P.O. Box 1749
Halifax, Nova Scotia
B3J 3A5 Canada

Item No. 11.1.4
Halifax Regional Council
March 24, 2015

TO: Mayor Savage and Members of Halifax Regional Council

Original signed by

SUBMITTED BY:

Richard Butts, Chief Administrative Officer

Original Signed by

Mike Labrecque, Deputy Chief Administrative Officer

DATE: February 26, 2015

SUBJECT: Petition of Susan Sutherland (formerly Sheehan) for Private Right of Way

ORIGIN

Motions of Regional Council on March 1, 2011, Item No. 11.1.1 and Motion of Regional Council on June 7, 2011, Item No. 10.1.3.

On March 1, 2011, Regional Council passed the following motions:

1) Council appoint a Commissioner pursuant to Section 17 of the *Private Ways Act*, to consider the petition of Susan Sheehan; and

2) Before the Commissioner is engaged, Council enter into an agreement with Susan Sheehan for reimbursement to HRM of any and all expenses incurred by HRM as the result of Ms. Sheehan's petition and which are recoverable by HRM under the *Private Ways Act*. Specifically, all expenses associated with the Arbitrators, and any compensation payable to Dr. and Mrs. Charles Cron.

On June 7, 2011, Regional Council passed the following motion:

1) Halifax Regional Council appoint Ms. Deborah Baker as commissioner pursuant to section 17 of the *Private Ways Act*, to consider the petition of Susan Sheehan for a private right of way across lands at 5 Milton Drive

LEGISLATIVE AUTHORITY

Private Ways Act, R.S.N.S. 1989, c.358, sections 17 and 26.

RECOMMENDATION

It is recommended that Halifax Regional Council:

1) Confirm the report of the Commissioner Deborah Baker, dated November 15, 2014, laying out a private way across the property at 5 Milton Drive for the benefit of 9 Milton Drive; and

2) Confirm the award of the Arbitrators as set out in the decision of the Arbitration Panel dated November 17, 2014.

BACKGROUND

Susan Sutherland (formerly Sheehan) is the owner of 9 Milton Drive. Dr. and Mrs. Cron are the owners of 5 Milton Drive. The properties are located near Sir Sandford Flemming Park and both are on the Northwest Arm. Ms. Sutherland has no vehicular access to her home and currently accesses her property by the way of the public path foot path that runs from the parking lot of Fleming Park, along the waters of the Northwest Arm, to Purcell's Cove. She filed a Petition to Regional Council under the *Private Ways Act (PWA)* on November 15, 2010, for the laying out of a private way across the property of Dr. and Mrs. Cron at 5 Milton Drive.

Ms. Sutherland's Petition was considered by Halifax Regional Council on March 1, 2011. A copy of the report to Council dated March 1, 2011 is attached as Attachment "A" and includes a copy of Ms. Sutherland's Petition. Council passed the following Motions on March 1, 2011:

1. Appoint a Commissioner pursuant to Section 17 of the *Private Ways Act*, to consider the petition of Susan Sheehan; and

2. Before the Commissioner is engaged, Council enter into an agreement with Susan Sheehan for reimbursement to HRM of any and all expense incurred by HRM as the result of Ms. Sheehan's petition and which are recoverable by HRM under the *Private Ways Act*. Specifically, all expenses associated with the Arbitrators, and any compensation payable to Dr. and Mrs. Charles Cron.

On May 19, 2011 the Province amended the *PWA* to allow Council to make a by-law respecting the recovery of the compensation paid from either the polling district in which a private way or road is made, or against the applicant. The by-law may provide for: methods for payment, when the charges are payable, that the charges are first liens on the property, that they may be collected in the same manner as taxes, a means of determining when the lien becomes effective or when the charges become due and payable, and to allow for the payment of the charges by installments.

As per the March 1, 2011 Motion of Council, an agreement was entered between HRM and Ms. Sutherland on June 15, 2011, setting out the terms by which Ms. Sutherland would pay back to HRM all expenses associated with the Arbitrators, and all compensation to be paid to Dr. and Mrs. Cron as the owners of the land over which the right of way will be located

By motion of Council on June 7, 2011, Deborah Baker was appointed as the Commissioner. Correspondence went to Ms. Baker from the Clerk's office on June 21, 2011, outlining her duties and permitting her to commence work. The Commissioner's duties under the *PWA* are to:

1. Examine whether the proposed private way or road is the most practicable and reasonable means of access for Ms. Sutherland to her land, and whether it is requisite for her purposes;

2. If satisfied that the proposed way or road is the most practicable, reasonable and requisite, the Commissioner is to lay out the private way or road in the manner most advantageous to Ms. Sutherland and least detrimental to Dr. and Mrs. Cron; and

3. If an agreement can be reached between Ms. Sutherland and Dr. And Mrs. Cron with respect to the compensation payable to the Crons, the Commissioner is to put the agreement in writing.

Ms. Baker determined that the proposed way was the most practicable and reasonable means of access for Ms. Sutherland, and that it was required, as Ms. Sutherland's property was landlocked without it. On November 27, 2013 Ms. Baker provided the parties with a sketch, prepared by a surveyor with Servant Dunbrack (SDMM), laying out the private way in a manner that she determined was the most advantageous to Ms. Sutherland and the least detrimental to the Crons. Ms. Baker then prepared a report outlining the basis for her determination, as required under the *PWA.* The report is dated November 15, 2014, and a copy is provided as Attachment "B".

Under the *PWA,* if Council confirms the report of the Commissioner, a copy of the plan laying out the location of the private way is to be registered at the Land Registry Office for HRM. In accordance with the *PWA*, the effect of this registration is to vest the title as an easement to the land. The sketch prepared by SDMM would not be sufficient for this purpose. Staff requested an official plan of the easement from SDMM in December. A copy is attached as Attachment "C".

DISCUSSION

Council's authority with respect to the report of the Commissioner and the compensation payable to the Crons is set out in section 26 of the *PWA*, which states:

> **Decision of council**
>
> 26 (1) The council may confirm or disallow the report and, if it is satisfied that the amount of the compensation is either insufficient or excessive, it may disallow and set aside the agreement or award and direct a new appraisement of the compensation to be made, unless an agreement is entered into in respect thereto, and may delay action on the precept until a new agreement or award is made and transmitted.
>
> (2) The council may also either confirm or disallow the new agreement or award. *R.S., c. 358, s. 26.*

Staff recommends that Council confirm the report of the Commissioner. This will have the effect of granting Ms. Sutherland a private way over the land of Dr. and Mrs. Cron, as laid out on the plan at Attachment "C".

In making her determination, Ms. Baker received submissions from both Ms. Sutherland and Dr. and Mrs. Cron. In their submissions, the Crons suggested another location for the private way around the back of their property. Ms. Baker considered this alternate location but determined that it was not a more practicable and reasonable means of access. The alternate location proposed by the Crons was considerably longer, would possibly impact on other property owners behind 5 Milton Drive, would involve rock breaking or blasting, and a retaining wall would have to be constructed. Ms. Baker was also concerned that snow clearing would be difficult and that a fire truck would not be able to navigate the entrance into the driveway.

Ms. Sutherland, in her original petition of November 15, 2010, petitioned for a private way that followed the course of the public footpath that runs from Fleming Park to Purcell's Cove, and crosses the front of the property of Dr. and Mrs. Cron. This is not the exact location of the private way that has been laid out by Commissioner Baker on the plan at Attachment "C". The private way as laid out by Commissioner Baker runs parallel to the location in Ms. Sutherland's petition, but is further up the Crons property and sits below a berm. Staff takes the view that the *PWA* is not to be interpreted so narrowly as to limit the authority of the Commissioner to lay out the private way to the specific location of the private way

petitioned for by Susan Sutherland. Although the *PWA* states that the Commissioner is directed to examine whether the proposed private way or road is the most practicable and reasonable means of access, if satisfied that it is, the Commissioner must then lay out the private way in the manner most advantageous to the person applying for the way or road and least detrimental to the owners of the land through which the same should pass. It is staff's opinion that the Commissioner therefore has some discretion with respect to the physical location of the private way.

In laying out the private way as shown on Attachment "C", Ms. Baker considered, among other things, the following (pages 60-61 of her Report):

1. It maintains all the attributes of the prior driveway Ms. Sutherland had for 10 years under the lease agreement with the Port Authority;
2. It will have its own entrance which will clearly be distinguished from the foot path;
3. It will lay many metres from the sea wall and will hopefully withstand any wall degradation, flooding and subsistence over time;
4. At its closest point it will lay 35 feet from Dr. and Mrs. Crons' boat slip;
5. It will be wide enough to accommodate a fire truck;
6. It will lay under the berm on the Crons' property and will be less visible than the prior driveway Ms. Sutherland had under her 10 year lease;
7. The disturbance to the Crons' property should be minimal at that location compared to other locations;
8. Trees and bushes on the berm should help muffle any noise from the driveway; and
9. There will be minimal impediments to the slipway which will be open for use and access to the Cron's boathouse.

The private way laid out by Commissioner Baker will go across part of a service easement belonging to Halifax Water for water and wastewater infrastructure. Staff have confirmed with Halifax Water that it consents to the private way being constructed over the existing service easement and that the private way will not interfere with the service easement. Ms. Sutherland and Dr. and Mrs. Cron have been advised that access to the driveway may be required by Halifax Water from time to time to clean the system and that the manhole must remain at grade or brought to grade in order to allow easy access to the system for that purpose.

Under the *PWA*, if the parties cannot reach an agreement with respect to the compensation that it is to be paid by the petitioner to the property owner over whose land the private way will run, the matter is to be determined by 3 arbitrators. Unfortunately, the Crons and Ms. Sutherland were unable to reach an agreement on compensation. As such, 3 arbitrators were appointed: one by the Mayor, one by the Commissioner and one by Dr. and Mrs. Cron, as required by the *PWA*. The matter proceeded to arbitration on September 23, 2014, and a decision was issued by the Arbitration panel on November 17, 2014, which is attached as Attachment "D". The Arbitration panel granted Dr. and Mrs. Cron compensation in the amount of $140,800.00 plus a contribution towards the Crons' legal fees of $16,800, their expert fees and their disbursements. The total amount of compensation is $168,477.15.

Staff reviewed the decision of the Arbitrators and recommends that Council confirm the Arbitration Award. The panel was comprised of two lawyers and one appraiser who heard expert evidence from an appraiser retained by Dr. and Mrs. Cron, and an appraiser retained by Ms. Sutherland. Staff is not in a position to question the value attributed to the land by the arbitrators.

When the matter proceeded to arbitration, the parties and the arbitrators had only the sketch prepared by SDMM and the correspondence of Ms. Baker of November 27, 2013. The sketch did not include the total square footage of the private way. The parties' respective appraisers determined the square footage based on the sketch and provided an agreed upon amount to the arbitration panel of 3570 sq. ft. When SDMM prepared the December, 2014 plan, the square footage of the private way was determined to be 3160 sq. ft. Based on the per square foot values attributed to the private way by the arbitration panel,

this difference in square footage results in a compensation award that is $6,862.50 less than what was awarded by the arbitrators.

This was raised with both parties by staff, but an agreement could not be reached with respect to how to best deal with this issue. Staff is recommending that Council accept the arbitrators' award of $168,477.15, even though there may have been an error in the square footage calculation. Should Council feel that the amount of the award is too high or too low, Council does not have the authority to substitute its own award for that of the Arbitration Panel. Council's only recourse is to send the matter back for a new arbitration. This will only serve to increase costs. The total cost of the arbitration was $61,583.52 (includes HST), comprised of invoices from the three separate arbitrators. If this matter is sent back to a new arbitration panel, the costs will likely be similar and certainly will be higher than the $6,862.50 difference.

As with the compensation, the arbitration costs of $61,583.52 (includes HST) must first be paid by Council, but will be recovered from Ms. Sutherland pursuant to the terms of the agreement between HRM and Ms. Sutherland of July 15, 2011.

If Council confirms the Report of the Commissioner and the award of the Arbitration panel, one of the plans and a copy of the arbitration award are to be registered in the Land Registry Office. The registration of the documents will vest the title in the private way as an easement to the land.

FINANCIAL IMPLICATIONS

Pursuant to section 29 of the *PWA* Council must pay the amount of compensation determined by the Arbitrators, as well as all expenses incurred with respect to the Arbitration. These amounts total $230,060.67 (includes HST). These amounts can then be recovered from Susan Sutherland. Section 29 of the *PWA* states:

> **Payment of compensation and expenses**
>
> 29 The compensation ascertained by the agreement or by the appraisement of the arbitrators, and the expenses incurred in respect thereto, shall be paid by the council, and may be charged against and recovered from any polling district in which such private way or road is made, or in whole or in part from the applicant or applicants therefor, as the council may direct. *R.S., c. 358, s. 29.*

As per Council's motion on March 1, 2011, an agreement has been entered into with Ms. Sutherland to recover all expenses incurred by HRM as a result of her petition, including the compensation payable to the Crons and the cost of the arbitration. In addition, Council has the ability under section 29A of the *PWA* to make a by-law respecting the payment of compensation and charging the amount, in whole or in part, against Ms. Sutherland's property.

Funds have been set aside in a suspense account for the payment of the arbitration costs and the compensation.

COMMUNITY ENGAGEMENT

N/A

ENVIRONMENTAL IMPLICATIONS

N/A

ALTERNATIVES

The alternatives are:

1. Council could disallow the Report of the Commissioner. This would conclude Ms. Sutherland's application and she would not receive a private way over 5 Milton Drive.

2. Council could confirm the report of the Commissioner but disallow and set aside the award of the Arbitrators and direct a new appraisement of the compensation to be made. This would require the appointment of a new arbitration panel, would increase costs and may not result in a different outcome. Council has no authority to determine its own amount of compensation.

ATTACHMENTS

Attachment "A" – March 1, 2011 Report to Regional Council
Attachment "B" – Report of Commissioner Baker
Attachment "C" – Plan of Private Way
Attachment "D" – Arbitration Decision

A copy of this report can be obtained online at http://www.halifax.ca/council/agendasc/cagenda.php then choose the appropriate meeting date, or by contacting the Office of the Municipal Clerk at 902.490.4210, or Fax 902.490.4208.

Report Prepared by: Karen E. MacDonald, Senior Solicitor, HRM Legal Services 902.490.3570

Report Approved by: Original Signed
John Traves, Q.C., Director of Legal, Insurance and Risk Management, 902.490.4219

Financial Approval by:
Greg Keefe, Director of Finance & ICT/CFO, 902.490.6308

HALIFAX
REGIONAL MUNICIPALITY

P.O. Box 1749
Halifax, Nova Scotia
B3J 3A5 Canada

Item No. 11.1.1
Halifax Regional Council
March 1, 2011

TO: Mayor Kelly and Members of Halifax Regional Council

SUBMITTED BY: Original Signed by

Wayne Anstey, Acting Chief Administrative Officer

Original Signed by

Mike Labrecque, Deputy Chief Administrative Officer

DATE: February 17, 2011

SUBJECT: **Petition for Private Right-of-Way**

ORIGIN

This report arises out of a petition received from Susan Sheehan to Council to lay out a private right-of-way across lands at 5 Milton Drive, for the benefit of her property located at 9 Milton Drive. The petition has been made pursuant to the *Private Ways Act*, R.S.N.S. 1989, c. 358.

RECOMMENDATION

It is recommended that:

1. Council appoint a Commissioner pursuant to Section 17 of the *Private Ways Act*, to consider the petition of Susan Sheehan; and

2. Before the Commissioner is engaged, Council enter into an agreement with Susan Sheehan for reimbursement to HRM of any and all expenses incurred by HRM as the result of Ms. Sheehan's petition and which are recoverable by HRM under the *Private Ways Act*. Specifically, all expenses associated with the Arbitrators, and any compensation payable to Dr. and Mrs. Charles Cron.

BACKGROUND

Susan Sheehan is the owner of property located at 9 Milton Drive in the Halifax Regional Municipality. To the north of her property are the waters of the Northwest Arm, to the east are lands owned by Marterra Inc., and to the south and west are the lands of Dr. and Mrs. Charles Cron (5 Milton Drive). Ms. Sheehan has access to her property by way of a public footpath that runs from the parking lot of Fleming Park, along the waters of Northwest Arm to Purcells Cove. The public footpath crosses the property of Dr. and Mrs. Charles Cron. Ms. Sheehan does not have any vehicular access to her home. Ms. Sheehan inherited the home from her father, Harold Sutherland, when he passed away in December, 1997.

Ms. Sheehan has filed a petition pursuant to the *Private Ways Act* (*PWA*) to Council for the laying out of a private way across the property of Dr. and Mrs. Cron, located at 5 Milton Drive. A copy of Ms. Sheehan's petition is attached as Appendix "A".

A copy of the *PWA* is attached as Appendix "B". Part 2 of the Act provides a means whereby landlocked property owners can acquire a right-of-way across neighboring lands. Under the Act, a property owner may apply to Council asking for the laying out of a private way or road. Council must hear the application, but has the discretion as to whether or not to grant it. If Council is not satisfied that the application should be granted, that is the end of Council's involvement.

If Council decides to grant the application, then the next step is for Council to appoint a Commissioner. The Commissioner is to:

1. Examine whether the proposed private way or road is the most practicable and reasonable means of access for the person petitioning for the way or road to his or her land;

2. If satisfied that the proposed private way or road is the most practicable and reasonable means of access, the Commissioner is to lay out the private way or road in the manner most advantageous to the person applying for the private way or road and least detrimental to the owner of the land through which the private way or road shall pass; and

3. Work with the owners of the property over which the right of way will pass and the petitioner under the Act, to attempt to reach an agreement as to the compensation to be paid for the land.

Council is required to pay for the services of the Commissioner, who shall receive such remuneration as Council allows. If Council chooses to grant the application, a further report will be submitted to Council recommending who should be appointed as Commissioner. These costs cannot be recovered from the Applicant.

If the Commissioner cannot get the parties to agree to compensation, there is a procedure under the Act for determining the amount to be paid. This procedure involves the appointment of three arbitrators. One is appointed by the Commissioner, one is appointed by the owner of the land over which the right of way will go, and a third is to be appointed by the Mayor.

The compensation ascertained by either agreement or by appraisement, and the expenses occurred in respect thereto, shall be paid by Council under the Act. However, these expenses may be charged against and recovered from any polling district in which the private way or road is made or may be recovered in whole or in part from the applicant, as Council may direct.

Once the Commissioner has fulfilled his or her duties and either an agreement is reached or an award for compensation is made, the Commissioner will prepare a report to Council, setting out his or her findings and recommendations. Council may accept or reject any recommendations contained in the report, including recommendations made with respect to compensation. If a private way is ultimately granted to the petitioner by Council, a copy of the plan setting out the private way shall be registered in the Registry of Deeds.

Ms. Sheehan's father, Harold Sutherland, petitioned Council in 1997 for a private way pursuant to the *PWA*. Unfortunately Mr. Sutherland passed away before the matter could be heard by Council, but Ms. Sheehan, as beneficiary and Executrix of his Estate, continued with his petition. The matter went before Council in January 1998. Council granted the application and a Commissioner, Ms. Deborah Baker, was appointed. Ms. Baker determined that the land over which the private way would be located was Crown land and therefore under Federal jurisdiction. The *PWA* does not apply to Crown land and as such the Commissioner could not make a decision affecting these lands under the Act. This brought the petition to an end.

In 2000, the Halifax Port Authority entered into an agreement with Ms. Sheehan to cross the Crown land in order to access her home. The agreement was for a ten year period, but was not subject to renewal. Ms. Sheehan was permitted to construct a driveway across the Crown land that ran along the frontage of the property of Dr. and Mrs. Cron at 5 Milton Drive. The Crons disputed the Crown's assertion that the property was Crown land. The dispute was ultimately settled as between the Federal Crown and the Crons, with the Crown deeding any interest it had in the land in front of 5 Milton Drive to the Crons by way of Deed dated January 14, 2010. The Crons respected the lease between the Crown and Ms. Sheehan, and permitted Ms. Sheehan to continue to use the driveway until such time as the lease expired on April 30, 2010. The driveway has since been removed. Ms. Sheehan has not had vehicular access to her home since that time. Attached as Appendix "C" is an aerial photo of 5 and 9 Milton Drive, taken from HRM's GISS. The photo appears to have been taken before the driveway installed by Ms. Sheehan under the Port Authority lease was removed.

In anticipation of Ms. Sheehan's petition, on October 1, 2010 the Crons filed an application in the Supreme Court of Nova Scotia for an order declaring that Ms. Sheehan's proposed petition for a private way under the *PWA* is beyond the jurisdiction of Halifax Regional Municipal Council. Ms. Sheehan filed her petition on November 15, 2010, but it was agreed that her petition would not proceed until such time as the Crons' application was heard and a decision rendered. The Crons' application was heard on December 8, 2010, and was dismissed by the Court on December 15, 2010. Justice Rosinski of the Supreme Court of Nova Scotia declared that as a matter of law, Part 2 of the *PWA* is operative legislation and any municipal Council petitioned for the obtaining and laying out of a private way or road may properly consider the petition as per the provisions of the *PWA*.

On January 13, 2011 the Crons filed a Notice of Appeal appealing the decision of Justice Rosinski. The appeal will be heard on September 20, 2011.

DISCUSSION

In accordance with the decision of Justice Rosinski of the Supreme Court of Nova Scotia, Council may consider the petition of Susan Sheehan under the *PWA*. The *PWA* is silent with respect to the procedure to be followed by Council when considering the application. It is staff's opinion that both Ms. Sheehan and the Crons should have an opportunity to present their position to Council on March 1, 2011. Both Ms. Sheehan and the Crons were advised on February 1, 2011 that this matter would be on the March 1st Council Agenda. This is in keeping with the rules of procedural fairness.

It is recommended that Council appoint a Commissioner pursuant to the *PWA* to consider the application of Susan Sheehan. Ms. Sheehan has no means of vehicular access to her home. As indicated in her petition, this raises concerns over access to 9 Milton Drive for emergency services, as well as access for basic necessities such as heating oil delivery. Further, other possible remedies have been considered and denied. For example, the Supreme Court of Nova Scotia determined in 1968 that Ms. Sheehan's father did not meet the requirements necessary to establish a right-of-way of necessity under the common law.

Council will have to consider, however, whether to hear the petition at this time or wait until the appeal of Justice Rosinski's decision has been heard and determined by the Court of Appeal. If Council chooses to proceed at this stage, there is a risk that the matter will be determined by the Court of Appeal prior to the Commissioner submitting his or her report. If the Court of Appeal determines that a petition for a private way under the *PWA* is beyond the jurisdiction of Halifax Regional Municipal Council, then all proceedings under the *PWA* must come to an end. Council will be responsible to compensate the Commissioner for any work done up to that point.

BUDGET IMPLICATIONS

The budget implications are as follows:

1. As indicated, Council is required to pay for the remuneration of the Commissioner, in an amount as allowed by Council. When Deborah Baker was appointed as Commissioner in 1998, Council had approved remuneration to Ms. Baker in the amount of $1,500.00. However, the actual time spent by Ms. Baker resulted in fees of just over $7,000.00, inclusive of HST. Ms. Baker did not request additional payment from Council, as she had agreed to undertake the task for the agreed upon fee of $1,500.00. However, it is unlikely that a Commissioner today would agree to undertake this project for a payment of $1,500.00. It is anticipated that the Commissioner's fees would likely be in the range of $7,500.00 to $10,000.00. These costs are not recoverable from Ms. Sheehan.

2. Under the *PWA*, if an agreement for compensation cannot be reached, arbitrators must be appointed to enter the land and appraise the compensation payable to the owner. The expenses associated with the arbitrators, including compensation for their time, are to be

paid by Council. However, it may be charged against and recovered from any polling district in which such private way or road is made, or may be recovered in whole or in part from the applicant, as Council may direct.

3. Should a right-of-way be granted to Ms. Sheehan over the property of Dr. and Mrs. Cron, the compensation payable to the Crons is to be paid by Council. However, it may be charged against and recovered from any polling district in which such private way or road is made, or may be recovered in whole or in part from the applicant, as Council may direct.

Staff recommends that any expenses associated with the arbitrators and the compensation payable to the Crons be recovered from Ms. Sheehan, as she is the one who will benefit from the creation of the private right-of-way. If Ms. Sheehan's application is granted, staff further recommends entering into an agreement with Ms. Sheehan that outlines how she will reimburse HRM. This agreement should be signed before the Commissioner begins his or her work.

Funds for payment of the Commissioner's fees will be paid out of Account Number M351-6999. There are sufficient funds available in this account to pay the Commissioner's fees.

FINANCIAL MANAGEMENT POLICIES/BUSINESS PLAN

This report complies with the Municipality's Multi-Year Financial Strategy, the approved Operating, Project and Reserve budgets, policies and procedures regarding withdrawals from the utilization of Project and Operating reserves, as well as any relevant legislation.

COMMUNITY ENGAGEMENT

Not applicable.

ALTERNATIVES

The alternatives are:

1. Council could postpone hearing Ms. Sheehan's application until the appeal of Justice Rosinski's decision has been heard and determined by the Court of Appeal.

2. Council could hear Ms. Sheehan's application and, if granted, postpone appointing a Commissioner until the appeal of Justice Rosinski's decision has been heard and determined by the Court of Appeal.

3. Council could hear Ms. Sheehan's application and refuse to grant it. This would conclude Council's involvement in the matter.

ATTACHMENTS

Appendix "A" Petition of Susan Sheehan

Appendices available online:
http://www.halifax.ca/council/agendasc/documents/110301ca1111.pdf

Appendix "B" *Private Ways Act*

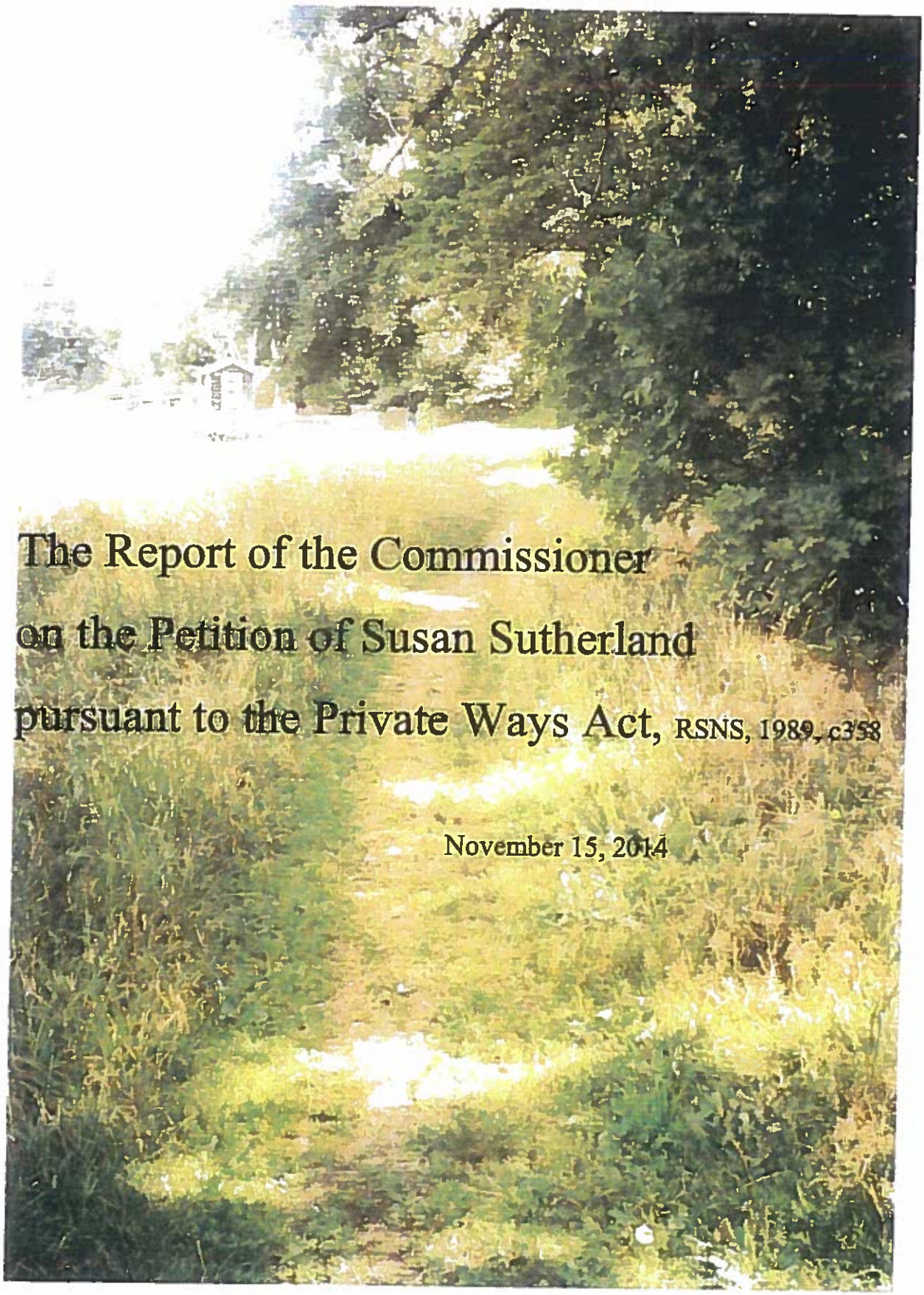
Appendix "C" Aerial photo of 5 and 9 Milton Drive, taken from HRM's GISS

A copy of this report can be obtained online at http://www.halifax.ca/council/agendasc/cagenda.html then choose the appropriate meeting date, or by contacting the Office of the Municipal Clerk at 490-4210, or Fax 490-4208.

Report Prepared by: Karen E. MacDonald, Solicitor, 490-4226

Report Approved by: _____
M. E. Donovan, Director, Legal Services & Risk Management, 490-4226

Financial Approval by: _____
Cathie O'Toole, CGA, Director of Finance, 490-6308



The Report of the Commissioner on the Petition of Susan Sutherland pursuant to the Private Ways Act, RSNS, 1989, c358

November 15, 2014

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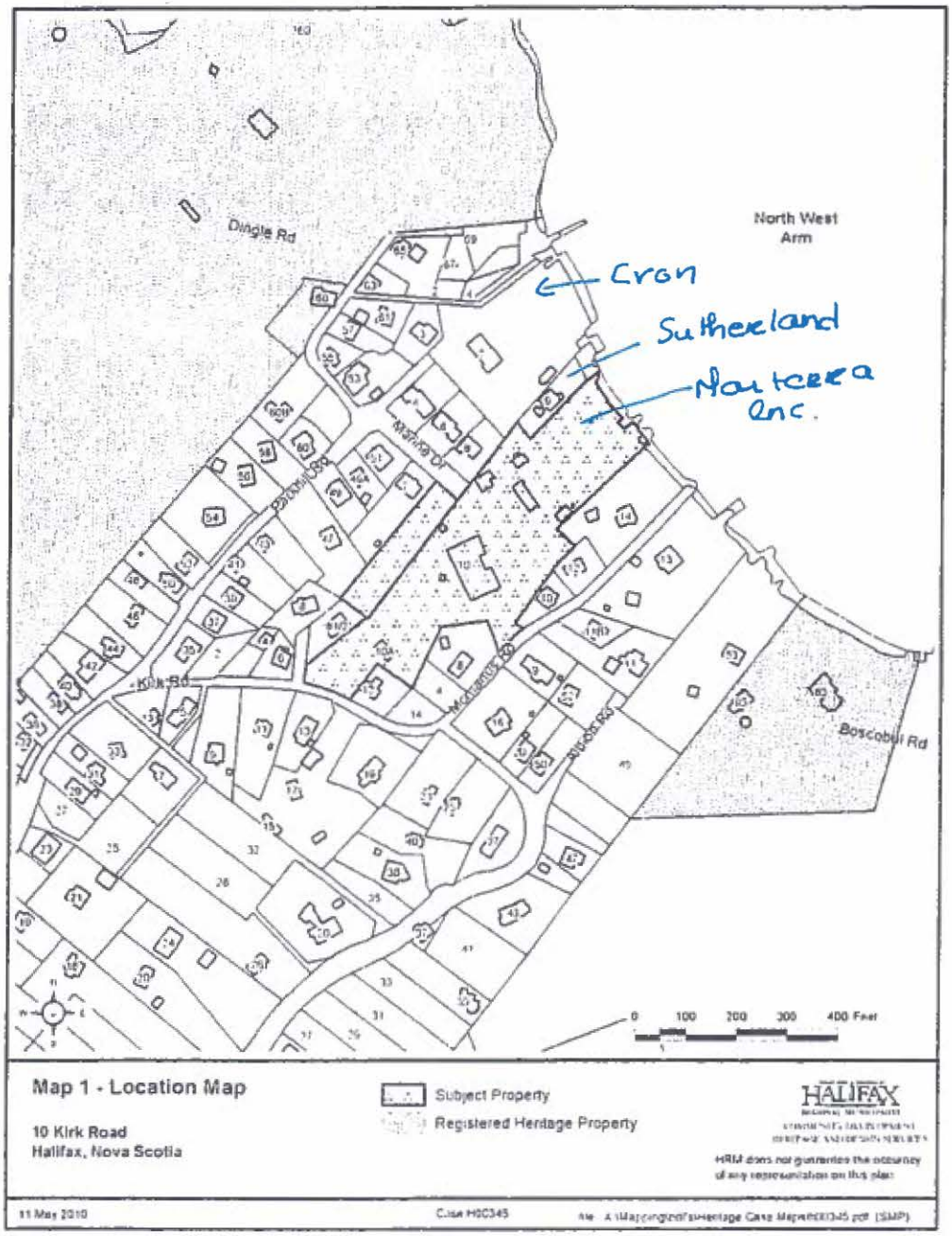
Map # 1


Dingle Rd
North West Arm
Cron
Sutherland
Manteera Enc.
Kirk Rd
Boscobel Rd
0 100 200 300 400 Feet
Map 1 - Location Map
10 Kirk Road
Halifax, Nova Scotia
Subject Property
Registered Heritage Property
HALIFAX
HRM does not guarantee the accuracy of any representation on this plan
11 May 2010
Case H00345

BACKGROUND

Historical Background of Susan Sutherland's Petitions for a Private Way:

While Ms. Sutherland's landlocked situation is familiar to City Council, the Commissioner would like to briefly review the historical background leading up to her second petition for a private way and the present proceedings under the *Private Ways Act* (R.S.N.S.1989,c.235) which hereinafter will be referred to as the *PWA*.

Referring to Map 1 (opposite) , one can see that the subject lands are in Jollimore on the western slopes of the Northwest Arm in the county of Halifax. Ms. Sutherland's land is bordered to east/northeast by the shores of the Northwest Arm , to the south/southwest by the lands of a development corporation, Marterra Inc., and to the north/ northwest and by the lands of Dr. and Mrs. Charles Cron . The Cron's property is bordered on the north/northwest by Milton Drive which terminates in a parking lot by the Arm in Flemming Park , also known as the "Dingle" .

Ms. Sutherland's civic address is 9 Milton Drive and the Cron's civic address is 5 Milton Drive. Marterra's address is 10 Kirk Road.

When Mr. Harold Sutherland, Ms. Sutherland's Father, purchased their property and homestead in 1963 he assumed he was acquiring two access easements. One was over the lands to the south, which at the time belonged to the predecessor in title to Marterra , Russell Allen Finley, and the other , an easement over the public footpath, which runs along the shore from the Sutherland home to the Dingle Parking lot on Milton Drive . The words to the latter easement may be found in the last paragraph of his deed, as cited by Justice Coffin of the Nova Scotia Supreme Court Trial Division, 1966 (Exhibit 1 , attached)

> **"AND for consideration aforesaid the Grantors grant, quit, release and quit claim unto the Grantee, his heirs and assigns all their right, title and interest in that easement appurtenant to the said lands for persons animals and vehicles over that existing foot path easement or public right-of way from the northern boundary of Milton Drive(so called)**

PLAN

and over it to Dingle Road (so called) for the use of the Grantee, his heirs and assigns for all purposes at all times of the day or night."

Without at least one of these easements Mr. Sutherland's lands would be landlocked.

In 1966 Russell Finley brought an action against Mr. Sutherland in trespass and sought a declaration in the Supreme Court of Nova Scotia against him, for allegedly "trespassing " on Finley's land, and destroying a fence that Finley had erected in the so-called "right-of way". Finley further sought to prohibit the Sutherland's access to the easement running through his lands and up the hill to the public road. Justice Coffin, of the Supreme Court Trial division found that an easement had been properly granted but that it had been extinguished by lack of use. The reason for its lack of use was outlined in obiter by Justice Coffin who referred extensively to testimony from J.D. MacKenzie, provincial land surveyor. At p.307 , Mr. MacKenzie , who had surveyed the lands where the easement lay explained that they were " of a very steep grade, they were " rough " and there were " good size boulders " . With regards to an existing path or right –of way Justice Coffin cited Mackenzie's testimony that : " It was very difficult to travel on foot due to an existing wall, rough ground and trees. "

The court did not address or determine the validity or legality of the Sutherland's easement which was granted over the public footpath along the shore, it did however conclude that the decision regarding the Finley easement, the subject of the litigation , would render the lands of Mr. Sutherland landlocked and that he would have rights under the PWA . An appeal made by Mr. Sutherland to the Appeal Court of Nova Scotia, was denied *(Finley v. Sutherland* ,(1969) NSSCA 2. N.S.R. 1965-69, p.197)

The result of these court decisions was that the Sutherland's only way of access to their property, by land, was the public footpath which runs from the Dingle parking lot , crosses the lands of the Cron's and the Sutherland 's and then carries on down the shore in front of several more properties . (See Map 2 opposite) The distance from the Dingle parking lot, over the foot path to the Sutherland's has historically been about 250 feet, more or less.

The foot path is a trodden way through the grass and is as wide " as a flour barrel" according to historical documents . At the time of Mr. Sutherland's first petition to City Council by the Petitioner in 1997, the entrance to the footpath was through a gap in a wire fence by the

parking lot, not wide enough for a vehicle (see photo below). At that time the Petitioner and her family had lived 34 years without vehicular access to their property. The challenges of such a situation have been extensively documented in the petitions of Susan Sutherland and of her Father Harold, which were submitted to City Council on November 5, 1997 and November 15, 2010.

Harold Sutherland passed away before the first petition could be heard by Council . Ms. Susan Sutherland, as beneficiary of the estate and of the lands, carried on with the petition which was heard by Council in January 1998. Council granted the application and appointed a Commissioner, Deborah Baker, MA. Econ., LLB. To carry out the prescribed tasks under the *PWA*.

Ms. Baker found through extensive research and in consultation with experts, that the lands east of the foot path ,(on the left in this photo) , and on which the Petitioner requested a private way, were in-filled lands which previously lay on a location below the " ordinary high water mark" + of the North West Arm. As such these lands , being and belonging in the Public

Harbour as delineated by the Constitution Act of 1867, were under the jurisdiction of the federal government and thus under the direct control of the Halifax Port Authority. The *PWA* does not apply to federal Crown lands and therefore the Commissioner had no authority to make a decision or to complete her job under the *PWA* . This brought the first of Ms. Sutherland's *PWA* processes to an end.

In 2000 the Halifax Port Authority entered into an agreement with Ms. Sutherland to permit her to cross the Crown l ands, those in-filled lands that ran in front of the Cron's property. This agreement culminated in the issuance of a licence to Ms. Sutherland on May 1, 200 (Exhibit 2). This license granted Ms. Sutherland a 10 foot wide right of way over the lands adjacent to the footpath , lying between the footpath and the sea wall, for a period of ten years, commencing on the first day of May 2000 and ending on the last day of April 2010. This license allowed for " reasonable ingress and egress" to the Sutherland home. The license prohibited parking on the lands and, vehicular access included : delivery vehicles (oil trucks, service trucks, power trucks, couriers etc.), emergency vehicles, and invited guests and it was subject to the Licensee paying $ 1.00 per year and complying with any government acts and regulations that were in force at the time of the grant. Other conditions related to prohibitions regarding toxic and hazardous waste, maintaining the sea wall between the shore and her licensed property , maintaining the private way, indemnifying the Port Authority for damage to the property and to third parties , as well as maintaining the Port Authority's right to enter onto the lands to effect repairs. The license expired on April 30th. 2010.

On April 13, 2010, just prior to the license expiring, Ms. Sutherland received a notice from the Crons disputing the Port Authority's ownership of the land and asserting that the lands , where the license had been granted, were now their lands . This dispute over the title to these lands was not brought before the courts . The Crons had, without notice to Ms. Sutherland, secured a grant of the in-filled lands from the Minister of Transport on behalf of, the Federal government and Her Majesty the Queen, on January 14, 2010 , (Exhibit 3) which quit claimed the in-filled lands to the Crons, whereupon the Crons covered the ten year old gravel road the Sutherlands had laid down, with dirt and planted rose bushes along where the road had been. The swinging gate that had been installed was removed and, the opening in the fence narrowed once again to prevent vehicular traffic.

Ms. Sutherland prepared another petition to City Council to be submitted before Council on October 1, 2010. This submission was delayed . In anticipation of this, the Crons filed an application in the Supreme Court of Nova Scotia requesting that an order be issued that Ms. Sutherland's petition was outside of HRM's jurisdiction. (*Cron v. Halifax (Regional Municipality, 2010 NSSC 460, CanLII)* Ms. Sutherland filed her petition on November 15, 2010 pending the outcome of the Cron's court application which was heard and subsequently dismissed on December 15, 2010.

Justice Rosinski, of the Supreme Court declared, that as a matter of law, Part II of the PWA, RSNS 189, c.358 : Exhibit 4) which is the part of the Act under which this present petition falls, is operative legislation and that any municipal council in Nova Scotia ,who might be petitioned to lay out a private way, has the jurisdiction to do so. On January 13, 2011, the Crons filed a Notice of Appeal, the Commissioner, Deborah Baker was appointed by Council on March 1, 2011 and the Cron's appeal was withdrawn on September 10, 2011 because the Nova Scotia Law Amendments committee amended the PWA and explicitly stated that the private way allowed for under the Act is not an "expropriation" :

Expropriation Act does not apply

36 For greater certainty,

(a) an order, award or decision made or any other action taken pursuant to this Act is **not an expropriation for the purpose of the Expropriation Act or at common law or otherwise; and**

(b) **the Expropriation Act does not apply to this Act or to any order, award, decision or any other action made or taken pursuant to this Act. 2011, c. 25, s. 2.**

The process under the *PWA* proceeded thence.

The Historical Development of the Commissioner's Task:

Legislation providing for the laying out of Private Roads has been in existence in Nova Scotia since the late 1800's. Like many statutory enactments , it was designed to fill in the gaps that Common Law did not address. It is to be viewed as remedial in nature whereas ," every enactment in Nova Scotia shall be deemed to be remedial and interpreted to insure the attainment of its objects" (The *Interpretation Act*, RSNS, 1989, c.235, Section 9 (5)) . According to to the *Interpretation Act* of Nova Scotia , legislation is designed to rectify some " mischief" or injustice, that does not have another remedy, (op cit. Section 9 (5) (c)). In the case of the *Private Ways Act,* the legislation is set out to remedy a person who is landlocked, and who has no other remedy available at law.

The 1900 version of the Act there were three requirements of a Commissioner in laying out a road. He was to ascertain whether the road petitioned for : (1) was the most reasonable and practicable means of access for the person petitioning for the road; (2)was necessary, and (3) was in the interest of the public:

> Provided however that no private way shall be laid out over another person's land unless it is shown to the satisfaction of council that the way or road as laid out by the commissioner **is the most practicable and reasonable means of access for the person or persons petitioning for the said way to his or their lands or property or rights and that the said way is necessary, and that it is the interest of the public that the said way be laid out.** (Emphasis added) , (R.S.1900, ch.24) An Act to Amend Chapter 45 , Revised Statutes, " Of Laying out of Roads and Other Great Roads"

In the 1923 consolidation of the legislation , the private ways section of the act got its own chapter, (c.7) entitled "Of Laying Out of Private Ways" , and the same paragraph as cited above in the 1900 revisions was now set out in Section 2 (2) of c. 73.

In 1926 the legislation respecting Private Ways repealed the 1923 act and was renamed : An Act Respecting the Laying Out of Private Ways (S.N.S. 1926, c 8. am S.N.S.1928, c.58, 1930, c.52) . In this revision significant changes occurred. The requirements that the way be "

necessary" and that it's creation be" **in the public interest"** was removed. The new section 2 stated as follows:

> (2). If the council is satisfied that an applications should be granted, it shall order a precept to be issued to a competent person as a commissioner, directing him within a convenient time to examine whether **the proposed way or road is the most practicable and reasonable means of access for the person or persons petitioning for the said way or road to his or their lands or property rights, and if satisfied in respect thereto, to lay out the same in the manner most advantageous to the person or persons applying for the said way or road and least detrimental to the owner or owners of the land** through which the same shall pass , and to mark out the same on the land.

The index to the 1954 revision for the act indicates that R.S. 1923, c.145 (" Of Necessary Private Ways" (which was parallel legislation for commercial interests) and S.N.S.926, c.8 ("The Laying Out of Private Ways") were consolidated into R.S. 1954, c.223 : Private Ways Act, which , with respect to this paragraph is the same that we have today except for paragraph 36, mentioned aforesaid.

The legislative criteria and task , set out for the Commissioner, has been the entrenched in our legislative history for almost ninety years but even with such a long history , there is no case law to assist in interpreting the Act . While there does not appear to be any significant ambiguity , the legislation, seems to be short on elaboration and process , perhaps because it lacks a regulatory instrument.

The Commissioner's Task

To effectively carry out one's job under any statute it may be prudent to examine any subsequent regulations or policy documents which elaborate and expand one's tasks under the Act. As mentioned above there are none. One might also seek out past legal interpretations of the Act. Legal interpretation and application is a complex area of law and is often derived from a rich contextual history of the law's past application to various circumstances through court determinations and tribunal decisions ; the historical context of a statutes' form and substance

; the intent of the legislators; and legal jurisprudence. Prior to this situation between the Crons and Ms. Sutherland, the *PWA* has not been an a statute submitted to the courts for interpretation, nor has it been the subject of legal jurisprudence in Nova Scotia .

It is also of interest to note that because the *PWA* legislation is primarily set out as an administrative process , cases under it would not necessarily appear in Nova Scotia's judicial history unless the parties appealed a municipal council's decision, requested a statutory interpretation , or sought an equitable remedy in the courts . Research by the Commissioner did find one instance in the last 20 years when the *PWA* was invoked by one other petitioner in Annapolis County . This was in 1993 , by Evelyn MacMaster. In that case an agreement was reached and a right-of way granted , but the Commissioner provided only a verbal report to Council, not a written one. (Exhibit 5)

The legislative task for the Commissioner is prescribed in Sec. 17 (2) and Sec. 18 (1) of the *PWA* as follows:.

> Sec. 17 (2) Where council is satisfied that the (petitioner's) application should be granted, it shall order a precept to be issued to a competent person as a commissioner, directing him , within a convenient time , to
>
> **(a) Examine whether the proposed private way or road is the most reasonable and practicable means of access for the person or persons petitioning for the way or road to his or her lands property or rights**
>
> **(b) If satisfied with respect thereto , lay out the same in a manner most advantageous to the person or person's applying for the way or road and least detrimental to the owners or owners of the land through which the same shall pass; and**
>
> Sec. 18 (1) **If the commissioner considers that the proposed way or road is reasonable and practicable and requisite for the purposes of the person or persons applying therefor, he may lay out and mark the same and make**

plans thereof, in duplicate, and if he considers otherwise he shall report to council.

Other sections describe the Commissioner's duties regarding compensation for the private way.

Definitions of reasonable, practicable and requisite are not given in the *PWA* so the Commissioner turned to Black's Law Dictionary and case law for guidance:

practicable: Practicable is that which may be done, practised and accomplished; that which is performed, feasible, possible: and the adverb practicably means in a practicable manner. (Black's Law Dictionary 5th. Edition) [Note: there is not much case law using this word but within a liability policy providing that when an accident had occurred, written notice should be given by or on behalf of an insured or any of its authorized agents as soon as practicable, " practicable" was held to mean " **feasible in the circumstances**". Frey v. Security Insurance .Co.of Hartford, D.C.Pa.,331 Supp.140,143]

Practicable: expedient, advisable, recommendable, appropriate, workable, doable, viable, practical, achievable (synonyms from Roget's Thesaurus)

reasonable: Fair, proper, just moderate, suitable under the circumstances. Fit and appropriate to the end in view. Having the faculty of reason; rational; governed by reason; under the influence of reason; agreeable to reason. Thinking , speaking or acting according to the dictates of reason. Not immoderate or excessive, being synonymous with rational honest equitable fair, suitable moderate, tolerable.(Black's Law Dictionary 5th. Edition)

requisite (adj): required by circumstances; necessary to success (The Oxford Dictionary)

City Council's Task :

For purposes of clarifying the exact nature and scope of the Commissioner's task it is of interest to outline what functions the Commissioner is **not** authorized to undertake:

1. The Commissioner has no authority to decide if the Petitioner is to get a road. The decision to allow an applicants' petition is vested in City Council. The decision to accept the road that the Commissioner recommends is also vested in City Council.

2. The Commissioner does not have the authority to choose a road location. The road location is proposed by the Petitioner. The Commissioner may accept that this proposed location is the most reasonable and practicable available to the Petitioner , or she may reject it.

   If the property owner of the lands, over which the private way is requested , proposes their own road, which they think more reasonable and practicable, the Commissioner may look at that road for the purposes of comparison , but she may not choose that road, she may not even recommend it .

   If the road prayed for by the Petitioner is not the most reasonable and practicable road , the Commissioner must report this to Council and her job is then completed and the process terminated.

The only control the Commissioner has over the road location is in laying the Petitioner's proposed road on the land in such a manner as to balance the interests of the parties , such that it the location and road which is "most advantageous to the Petitioner and least detrimental to the land owners."

It is of interest to note that unlike the Expropriation Act, the *PWA* provides for some flexibility and discretion in the location of the road. The Expropriation Act, assumes that an expropriating authority has the right to take whatever land it wants , even a person's home , and the expropriating authority's only duties under the Act and Regulations are to provide fair compensation and a fair process. The *PWA* , on the other hand , provides that if the road

requested by the Petitioner is not " the most reasonable and practicable " for the petitioner, the application process ceases and there is no private way. Also, in laying the road, the Commissioner has the duty to take into account the interests of the property owners and to minimize the detriment (opportunity costs, and other damages to the property owners) while , at the same time maximizing the benefits to the Petitioner . This balancing of interests is not even contemplated under the *Expropriation Act* . The *PWA*, is like the *Expropriation Act* , only in that it provides for monetary compensation for the land value and for injurious affection.

3. The Commissioner does not have the ability to set the value for the land on which the road is to be placed. This is to be decided by the parties or, by an independent tribunal of arbitrators/appraisers .

4. The Commissioner is not required to refer to any law or any past decisions of any municipality , board , tribunal, or court, in undertaking the process by which he will make his decision, although to do so, regarding the scope and nature of his task may be helpful and indeed prudent. With regard to assessing the reasonableness and practicality of the proposed road she/he must consider the specific circumstances of the case and make a determination on the facts before her.

5. The *PWA* does not require the Commissioner to set out, before the petitioner and property owners his/her criteria for determining the most reasonable and practicable road for the Petitioner. The Act does not require that the Commissioner set out a process for the receipt or response to documents from the parties in determining which location is the least detrimental to the land owner and most beneficial to the petitioner. The Act does not refer to any process at all, judicial or semi-judicial or administrative. Whether the Commissioner is an independent contractor or an employee of the City/Municipality is also not clear.

What is clear, is that the Municipal Council is the Decision Maker. They decide whether to accept the Petitioner's petition. They decide who to hire as the Commissioner. They decide whether the recommendation of the Commissioner will be accepted or rejected. They decide whether the compensation awarded to the property owner is fair. It is the Council's final decision on the road location and its value that is appealable to the courts, not the

Commissioner's recommendations. The relevant sections of the Council's duties are set out in the *PWA* as follows:

Decision of council (Section 26)PWA:

(1) The council may confirm or disallow the report and, if it is satisfied that the amount of the compensation is either insufficient or excessive, it may disallow and set aside the agreement or award and direct a new appraisement of the compensation to be made, unless an agreement is entered into in respect thereto, and may delay action on the precept until a new agreement or award is made and transmitted.

(2) The council may also either confirm or disallow the new agreement or award. R.S., c. 358, s. 26.

Appeal to Court (Section 32)PWA

(1) Any person petitioning for a private way or road, and any person who is interested in the lands through or over which such way or road is to be laid out, may, within ten days after the decision of the council, appeal from the decision of the council to the county court in the county wherein it is proposed to lay out such way or road, by giving notice thereof to the warden or municipal clerk, in writing, stating the grounds of appeal. R.S.,c.358,s.32

(4) After hearing the appellant, the other parties interested and the municipal council, and any witnesses produced, the court shall finally determine the questions raised, and either allow the appeal and quash, set aside or reverse the decision of the council, or confirm the same, either with or without costs, in the discretion of the court. R.S., c. 358, s. 32

Principles of Fairness Regarding the Process:

It goes without saying that whether it is provided for in the legislation or not , in any administrative process there is a presumed standard of fairness to be adhered to. This will be discussed briefly below.

In addition to this standard, which is the foundation of administrative law , the Commissioner had two things to consider in the matters of fairness. The first , was that the Petitioner was not represented by legal counsel, while the property owners were. The second is that the decision whether the Petitioner gets the road she petitioned for , is made by Council. This decision may be based on the Commissioner's recommendation or disapproval , but it is not dependent on it.

Having no particular guidelines about the standard of fairness to be applied to the task of the Commissioner , and no judicial determination of whether her/his task is judicial, semi-judicial , in the nature of an administrative tribunal , or whether her task is merely consultatory and advisory (where procedural fairness may not be required at all) , the Commissioner undertook to take the high road , to ensure that various fairness principals and standards were applied and adhered to. These included:

(1) ***audi alteram partem/* the right to be heard** : The Commissioner tried to ensure that the concerns of both parties be heard and known and considered through the exchange of documents, letters, meetings and conference calls, and in the decision making process);

(2) **adequate time to prepare** : The Commissioner tried to ensure that each party had sufficient time to prepare evidence and responses in a fair and equitable manner (If the Commissioner initially erred in this regard, on notice from the parties, she quickly readjusted schedules to accommodate their needs) ;

(3) **evidentiary fairness**: The Commissioner tried to ensure that all evidence from the parties was accepted and reviewed and given weight according to its probative value if it was submitted to prove a fact, and also given consideration if it was merely a concem or speculation regarding an event, or eventuality . Many of the concerns of the parties were about possible future events that have yet to become facts. These are distinguished throughout and addressed where possible;

(5) **interpretation fairness** : The Commissioner tried to stick to the exact words of the Private Ways Act so that they parties knew exactly what evidence was relevant and what would be considered . The reason for this was to minimize the cost of gathering extraneous expert evidence and other opinions on irrelevant issues and subjects , and because the Commissioner did not feel that this rarely invoked statute , which sets out to remedy to a rarely encountered problem, was one which should be broadly interpreted or expanded on by her. Statutory interpretation lies in the exclusive purview of the courts and the judiciary and, is based on well accepted rules of interpretation and hundreds of years of judicial decision and a Commissioner would not presume to take on an interpretative role, unless there was ambiguity in the legislation. The *PWA* it is submitted is very clear in setting out the Commissioner's task.

(6) **input from the parties:** the Commissioner invited both the Crons and the Petitioner to make suggestions regarding the proposed criteria that the Commissioner would use in assessing the reasonableness and practicality of the road . She asked them to make suggestions about reasonable time frames and she sought their input on contentious matters as they arose.

THE LAYOUT OF THE LANDS

The Petitioner's Land:

The lands of the Petitioner are relatively modest in size compared to that of her neighbors , the Crons and Marterra Inc. The lot is narrow and extends from the footpath that runs along the Northwest Arm then up a hill where it abuts the Marterra lands to the west and south and the Cron Lands to the north and east (See Map opposite).

In front of the Sutherland house (Sheehan was Ms. Sutherland's married name) is a small terraced front yard (See Photo below) To the north and right of the house is the Cron's boat house, and between the trees is a path adjoining the public footpath , leading north to Flemming Park , and the Dingle parking lot, which attaches to Milton Drive, a public road. Also notice , in front of the Sutherland property is a slipway with a stone wall approximately 4 to 5 feet high and 14 feet wide.

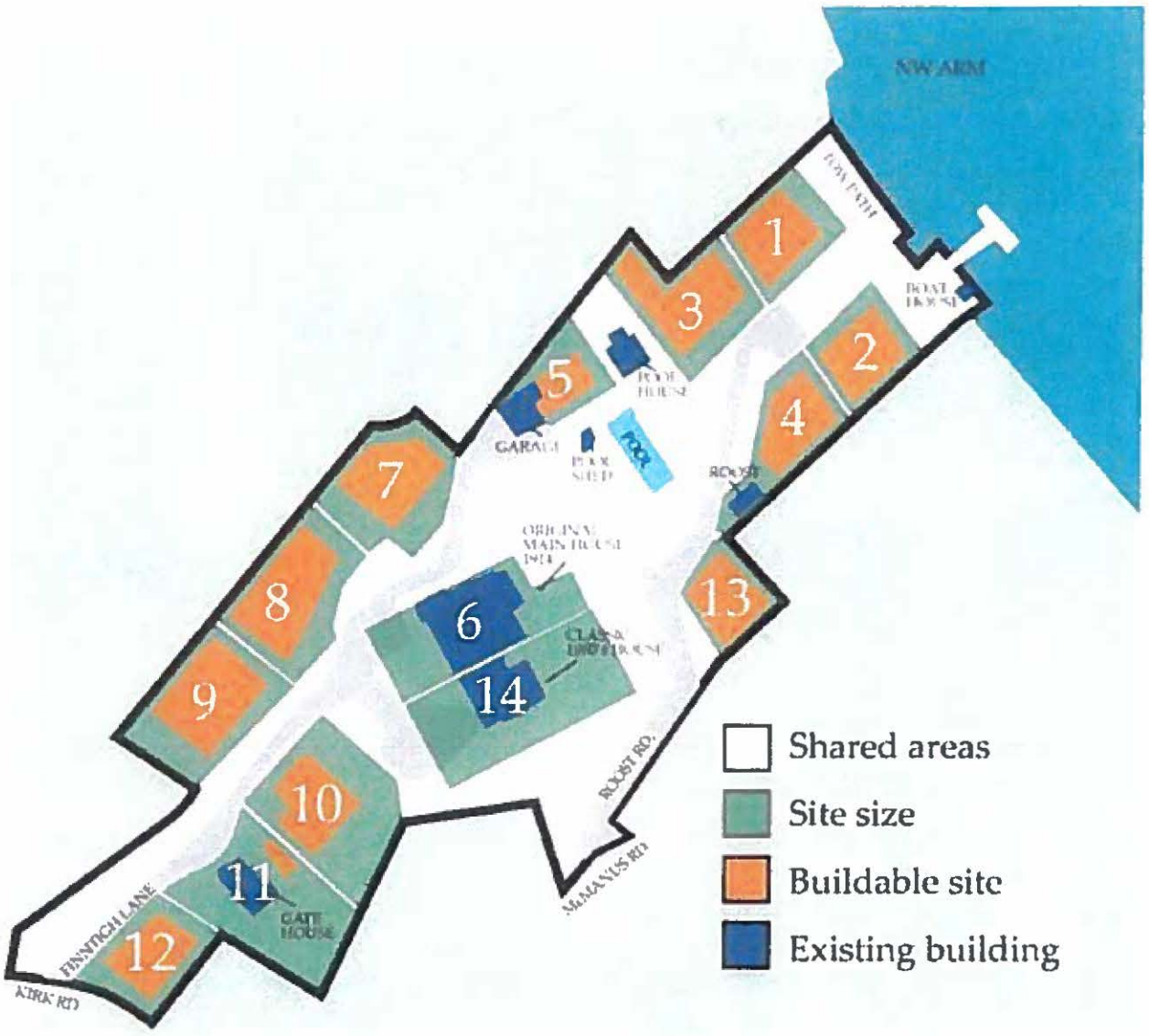
6. SLIPWAY, BOATHOUSE & SHEEHAN RESIDENCE

Behind the Sutherland house is a storage shed perched on a treed hill. The hill continues upwardly behind the house for several feet , and belongs to the Marterra Inc., (formerly the

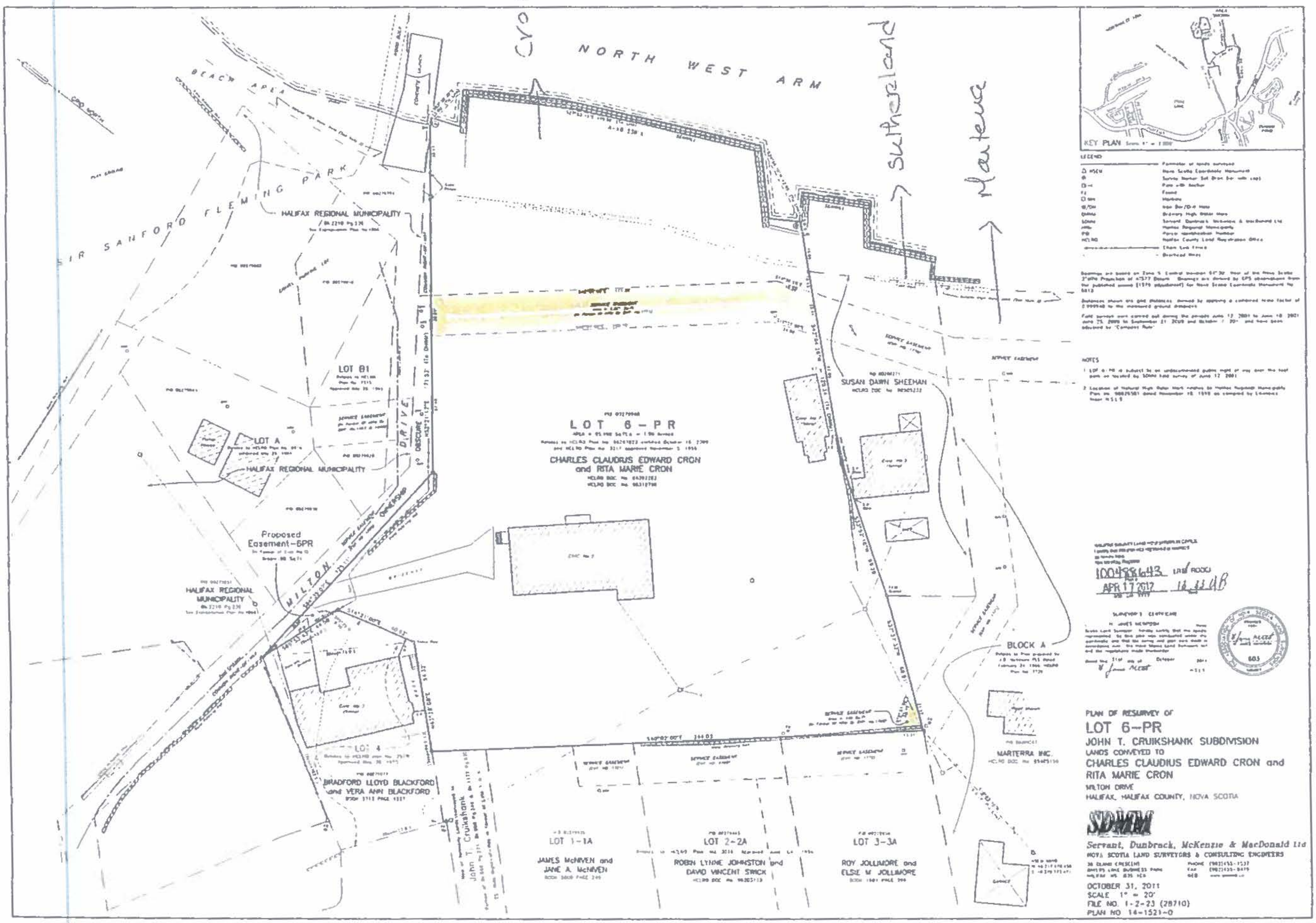
Finley lands) and the Cron's, The terrain as described by one land surveyor MacKenzie is " very steep, with many trees and boulders, and is rough walking" (*Finley v. Sutherland (1966))*

The Marterra Lands

The Marterra Inc. Lands are the lands formerly owned by the Finleys who sued Harold Sutherland in trespass aforesaid. Marterra Inc. is a proposed Bare land Condominium Development and the outline of its development plan ,as found on website, is inserted below.



Building site # 1 and 3 are the closest to Ms. Sutherland's house . To access "Roost Road" , Ms. Sutherland would have to travel between Building lot #1 and #3. The distance between these two proposed building lots, according to Jennifer Corsten , owner of Marterra, is 8 feet, which is

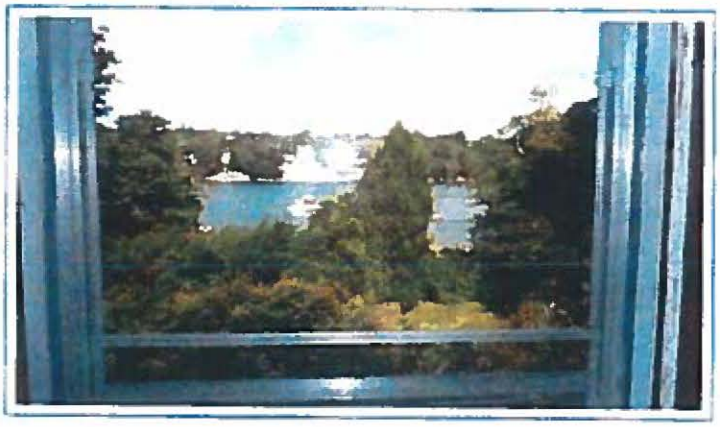

NORTH WEST ARM
Cron
Sutherland
Marterra
BEACH AREA
SIR SANFORD FLEMING PARK
HALIFAX REGIONAL MUNICIPALITY
KEY PLAN
LOT B1
LOT A
HALIFAX REGIONAL MUNICIPALITY
DRIVE
LOT 6-PR
CHARLES CLAUDIUS EDWARD CRON
and RITA MARIE CRON
SUSAN DAWN SHEEHAN
Proposed
Easement-6PR
HALIFAX REGIONAL MUNICIPALITY
MILTON
LOT 4
BRADFORD LLOYD BLACKFORD
and VERA ANN BLACKFORD
John T. Cruikshank
LOT 1-1A
JAMES McNIVEN and
JANE A. McNIVEN
LOT 2-2A
ROBIN LYNNE JOHNSTON and
DAVID VINCENT SWICK
LOT 3-3A
ROY JOLLIMORE and
ELSIE M. JOLLIMORE
MARTERRA INC.
BLOCK A
100488643
APR 17 2012
PLAN OF RESURVEY OF
LOT 6-PR
JOHN T. CRUIKSHANK SUBDIVISION
LANDS CONVEYED TO
CHARLES CLAUDIUS EDWARD CRON and
RITA MARIE CRON
MILTON DRIVE
HALIFAX, HALIFAX COUNTY, NOVA SCOTIA
Servant, Dunbrack, McKenzie & MacDonald Ltd
NOVA SCOTIA LAND SURVEYORS & CONSULTING ENGINEERS
OCTOBER 31, 2011
SCALE 1" = 20'
FILE NO. 1-2-23 (28710)
PLAN NO 14-1521-0

not wide enough for a road . If this space were wide enough , Ms. Sutherland , in addition to getting access between these two building lots, would also have to secure rights to traverse the " Roost Road" through a Bare Land condominium corporation. The Roost Road does not exist at present, neither is there a Board of Directors for the Condominium Assoc.

As of the date of this report, there have been no building lots sold in this development and the entire development area is up for sale as a single property.

The Cron Property

The Cron Property is bordered on the west and up the hill by three homes situated on Marine Drive which is a higher elevation than the Cron's house. (See Map opposite) The Cron's home is situated about a quarter of the way between these houses and the waters of the Arm . The property slopes towards the water . The view of the Northwest Arm as seen from the house is shown below, as is the front tiered lawn and gardens which lay above the water and sewage easement in the lower terrace.



Water view

Front tiered lawn

Behind the house is a retaining wall (see photo below) which four or five feet high and which borders the a stone walkway which leads from the Cron's driveway to the rear porch entry.

Rear walkway and entry - retaining wall

In this area (on the left side of the picture is also a wood pile, a pond and extensive gardens.

View of driveway looking at end view

When looking at the driveway from the other direction (above photo), the water is down to the left and the retaining wall and upward sloping hill is to the right .

Looking up at the Cron's house from the water there is a line of trees stretching across the property. These trees, when leafed out, pretty well obscure the view of the house from the

waterside, or lower terrace , of the property . They also obscure the view of the footpath and water/ sewage easement area from the house, (see the "water view " photo above). These trees lie on, and border a berm under which a 20 foot wide city water and sewer easement lies.

Below this berm the land flattens out and is quite level between the service easement and the rock wall bordering the Arm. It is this flat area where a public footpath meanders along the shore .

The Public Footpath (Tow path)

The next four pictures, and the one above are pictures were taken of the public footpath(, aka. The " tow path ") before Ms. Sutherland had a license to use the land next to it for a driveway.

Although it is supposed to be as wide as a " flour barrel" the actual travelled way is only about a foot or two wide . The first four photos were taken on a typical winter day when the area has ice and slush and when the footpath tends to be a bit slippery.

The first photo is a view of the footpath from the Dingle parking lot looking towards the Sutherland home. The entrance was not gated and was two feet wide. Just past the Sutherland property is the small boat house you can see near the water's edge. To the right you can see the Cron's boat house above the treed berm.

The second photo (above) is taken looking from the Sutherland land , in the opposite direction, and faces towards the Dingle parking lot. To the right is the wall of the boat slipway just in front of the Sutherland property and the Cron's boathouse , to the left above is the berm,

which houses the city water/sewer easement and the row of trees. The slipway used to have wooden skids and is located approximately 40 feet downhill from the boathouse. This photo shows that the public footpath and the slipway are quite close to each other, which they are, (just a few feet apart).The two large trees to the left are reported to be more than 100 years old.

The third photo (below) and fourth photos are views of the Dingle parking area at the end of the footpath and located to the north of the Cron and Sutherland properties .

Almost immediately adjacent to the entrance of the footpath is a public concrete boat launch which is part of Flemming Park/ Dingle . Inside the fence on the Cron's side is a wooden boat slip. There are some pieces of machinery which would have been used for hauling boats in times past, and there is much evidence of current use of the concrete boat launch just outside the fence in the parking lot, to the right.

The final view of the footpath is on a summer's day facing towards the Sutherland's home.

The Private Way Lands Requested by the Petitioner

The Petitioner 's present request for a road is as follows:

> **following the public footpath over the land of Dr. and Mrs. Charles Cron, sufficiently wide enough for vehicular access to my property"**

In a rebuttal submission by the Petitioner , this requested location was further clarified :

> **The word 'follow' was intended to suggest: to go in the general direction of or to move in the direction of**

The Commissioner was tasked therefore to assess whether a road " going in the general direction , or moving in the direction of the footpath was the most reasonable and practicable and requisite for the Petitioner's purposes.

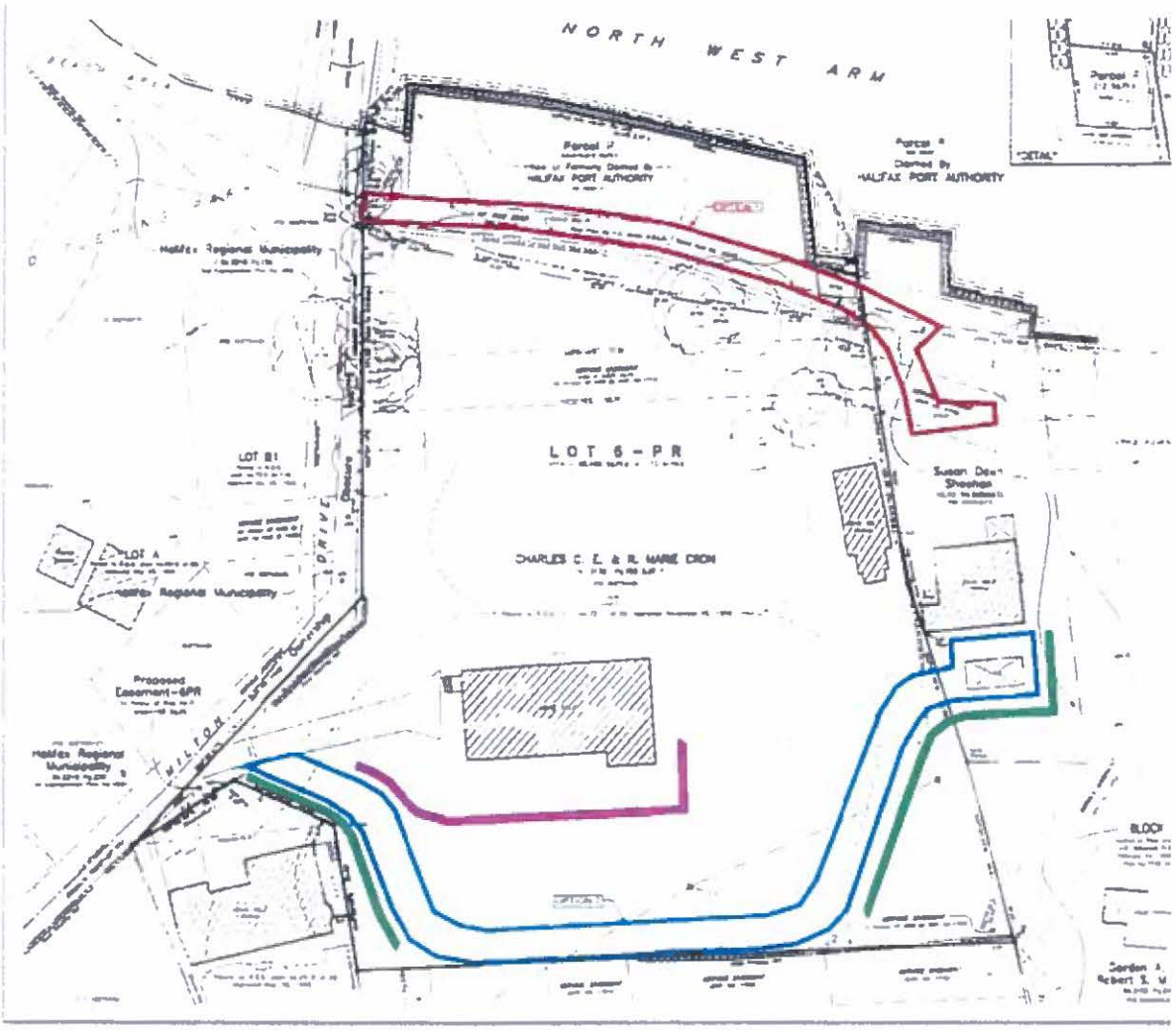
The word "most" implies a comparison to other possible road locations, not that other road locations are options for the Petitioner, but they must be analysed to assess whether the one she chose is the most " reasonable and practicable " and " requisite for her purposes.

THE MOST REASONABLE AND PRACTICABLE ROAD

Referring to the definitions on p. 10 herein , "practicable and reasonable" and "requisite" for the Petitioner's purposes may also be interpreted to mean " fair, proper, just, moderate, suitable under the circumstances; required under the circumstances , fit and appropriate to the end in view; governed by reason. The synonyms for practicable are also helpful: expedient, advisable, recommendable, appropriate, workable, doable, viable, practical, achievable.

Theoretically Ms. Sutherland could gain access to a public road by crossing the lands of Marterra or the lands of the Crons. The practical aspects of crossing over Marterra's lands to a

Figure 1 – Option 1 and 2



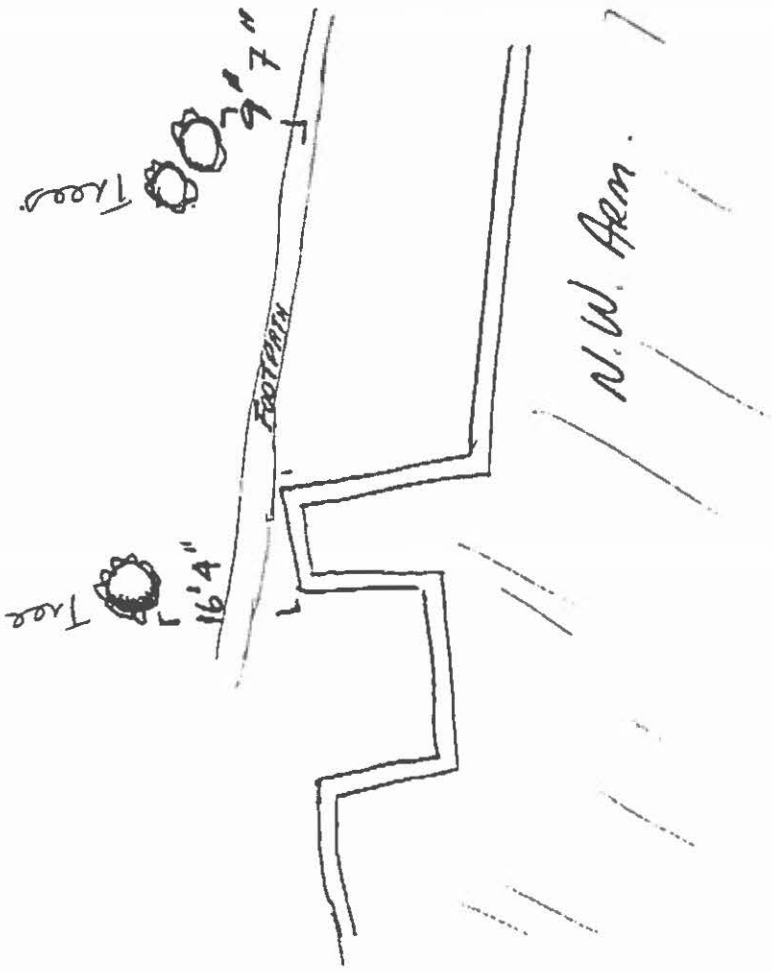
road that is not constructed, in a condominium corporation in which nothing has been built and over lands which are for sale is far too uncertain to be reasonable or practical. The parties agreed to this.

The focus of these proceedings were on private way access across the Cron property. The Cron's submitted an alternative route to the one proposed by the Commissioner. While the Commissioner is not at liberty to choose an alternate route which "does not follow the footpath", or "go in the general direction of it" , all information regarding other ways is very valuable in doing the comparative analysis required by the *PWA*.

The First Private Way : the "Way- That- Was" :

On May 1st., 2000 the Petitioner received a license from the Halifax Port Authority permitting her to lay a road on their lands, or the lands which had been in-filled below the high water mark of the North West Arm , but not on the footpath.(see map opposite outlined in red)

The footpath has existed in the same general area for over 200 years and it is thought to have laid above the high water mark in front of the Cron property. (See Map opposite). The distance between the center of the footpath and the sea wall in November 10, 1998 was approximately (scale: 1:250) 47feet or 14.3 meters at the narrowest point to 52 feet or 15.8 meters at it's widest point , except where it meets the boat slip (which makes an indentation in the sea wall in front of the Cron's boat house). The area between the footpath and the boat slip is no more than about a foot (.3 metres) or so on this drawing. While the footpath's exact location changes with the vagrancies of the people who walk on it, suffice it to say that where it encounters the boat slip, in front to the Cron's boathouse and the edge of the Sutherland property, it is so close to the sea wall that it would not be possible to drive a car between the footpath and the wall (see sketch on next page) . There is , it seems , just enough room to drive



Distance - Tree to beginning of wall : 16'4"
(concrete is additional 12-16" wide)
- Tree to centre of path : 9'7"

a vehicle between the tree and the wall however, approximately 16.33 feet.

6. SLIPWAY, BOATHOUSE & SHEEHAN RESIDENCE

In 2000, Ms. Sutherland , following the grant of her license, laid down a 10 foot wide private way on the water side of the footpath. Where the footpath meets the sea wall (above) she in-filled the boat slip with boulders and fill which extended into the slip about 12 -14 feet. To do this she had to undergo environmental scrutiny and secure clearances from the Department of the Environment and the federal Department of Fisheries and Oceans.

She also installed a swing gate at the entrance to the Dingle Parking lot. Most of the rest of the driveway lay at least 30 feet (10 metres) from the sea wall except in the area of the slipway . The next picture shows the last of the boulders being removed by the Crons after Ms. Sutherland's license expired. The picture following shows the swing gate at the parking lot and the relevant signage.


350

It is of note that in the ten years the Sutherland's traversed this road there was not a single complaint from the Crons regarding the use of the road or any record of adverse occurrences on the road .

On one occasion Ms. Sutherland had to report to the authorities a parked car on the Cron property. On one other occasion the City By-law officers notified her that the gate had been left open and was swung out into the parking lot creating a potential impediment to traffic. These were the only two incidents reported to the Commissioner by the Petitioner . No incidents were reported by the Crons. The road also survived inclement weather, including the following hurricanes, and in particular Hurricane Juan, and Hurricane Noel. Regarding the former, there was some gravel washed from the road, but other than that the road stayed intact. The road also

was not substantially affected by occasional flooding of the area as the water seems to easily drain out through the sea wall.

October 15, 2001: Hurricane Karen brought beneficial rain after striking Liverpool, Nova Scotia. Winds there only gusted to about 64 mph (102 km/h), and little damage was reported.[20]

September 12, 2002: Hurricane Gustav struck Nova Scotia and Newfoundland, both as a category 1 hurricane. Gustav brought hurricane force winds to Nova Scotia and dropped at least two inches (50 mm) of rain across all Nova Scotian sites. The highest rainfall amount was 4 inches (100 mm) in Ashdale.[21]

September 29, 2003: **Hurricane Juan** is **sometimes considered Atlantic Canada's most widely destructive hurricane in over a century. Juan killed 8 and caused over $200 million in damage. Power outages in Nova Scotia and Prince Edward Island left over 300,000 Canadians without power for two weeks. Many marinas were destroyed and many small fish craft were damaged or sank. Hurricane force gusts were reported as far out as 100 miles (160 km) on either side of Juan at landfall with an astounding peak gust of 144 mph (229 km/h) (equivalent to a category 4 hurricane) recorded in Halifax Harbour, although it was a Category 2 at landfall with 100 mph (160 km/h) sustained winds.[22]**

Hurricane Alex, one of very few Category 3 Hurricanes to remain at Category strength just south of Nova Scotia.

September 17, 2005: Hurricane Ophelia, after stalling for several days off the coast of the southeastern states, raced up the Atlantic coast. On the 17th, Ophelia became extratropical and moved parallel to the Nova Scotian coast, never making landfall. Ophelia later struck Newfoundland. Although strong winds were forecast, they did not occur and overall damage was less than expected. One indirect death was reported from Ophelia in Canada.[23]

November 6–7, 2007: **Hurricane Noel,** after gaining hurricane force north of the Bahama Islands, Noel moved north toward the Cape Cod region of the Massachusetts U.S. coast. After swiping southeast Massachusetts with hurricane force winds,the offshore center transitioned to a sub-tropical and then extratropical stage at which time the storm slightly intensified and moved north-

northeast to the Nova Scotia coast near Yarmouth. **Full hurricane force conditions occurred over much of southeastern and eastern areas of Nova Scotia from Yarmouth north and eastward to the metropolitan Halifax area(84 mph recorded at McNabs/Halifax). This very same area reported large-scale power and utility line damage as well as widespread tree damage. In areas south of Halifax the tree damage was more severe than that which had occurred during Hurricane Juan in 2003.This was due to the longer transition over the southern peninsula of Nova Scotia than that of Juan.Though at category one status, Noel in its extratropical stage was responsible for coastal damage to some structures from waves and tides and wind damage to roofing and windows.Western areas of Nova Scotia, even well inland received strong gales, the strongest of which occurred in relation to a tropical system since hurricanes Gerda 1969 and Ginny of 1963.**

September 28, 2008: Hurricane Kyle, after forming as a tropical storm just east of the Bahamas, headed north, making landfall in Nova Scotia as a category 1 hurricane, causing power outages to 40,000 and $9 million in damage.[25]

August 23, 2009: Hurricane Bill, a Cape Verde hurricane, brushed by Cape Breton Island, Nova Scotia causing up to 2.3 in of rain. 32,000 residences were reported to have lost power in addition to winds recorded up to 50 mph. Bill then made landfall at Point Rosie, on the Burin Peninsula of Newfoundland.

September 3, 2010: Hurricane Earl made landfall at Westem Head, Nova Scotia as a minimal hurricane.[26] Earl produced 80–120 km/h (50-75 mph) sustained winds throughout Nova Scotia, which resulted in widespread power outages, fallen trees, and minor coastal flooding. After crossing Nova Scotia, Earl sped across Prince Edward Island before emerging into the Gulf of Saint Lawrence. As the storm tracked through the Gulf of Saint Lawrence, westem and northern Newfoundland experienced sustained tropical storm conditions. Earl finally transitioned into a non-tropical low approximately 120 kilometres (75 mi) northeast of Anticosti Island.(Source: Wikipedia list of Canadian Hurricanes http://en.wikipedia.org/wiki/List_of_Canada_hurricanes)

Concerns of the Cron's Regarding the location of the first Private Way(" the way that was")

The Cron's submitted a report from All North Consulting authored by Colin Fisher (Exhibit 6) to advance their concerns about "way-that -was" and to suggest an alternate road. These and other concerns are addressed below.

Safety of drivers and pedestrians :

Mr. Fisher suggested that (p. 4) , if the new private way reconstructed where the old road was it would :

(1)" present a hazard to users of the private way;

(2) attract more foot traffic than usual which would " result in liability and nuisance" to the Crons;

(3) the barrier at the southern boundary of the Cron property is " not sufficient to prevent someone from driving off the infill area if there is an errant vehicle

(4)with the development of the Marterra lands there is potential for increased foot traffic resulting in undesired vehicle/pedestrian interaction

(4) " due to the proximity of the water and the associated vegetation , an environmental impact assessment may be warranted to identify potential concerns such as contamination of the water, endangered species of plants or animals and construction techniques"

These concerns unfortunately were not substantiated by any factual evidence. As for the so called " hazard" to the public users of the way , there were no photos to illustrate how this might ensue , or evidence of this ever being a concem in the past. The private way was in existence for 10 years, it was not laid on the footpath .There were no reported incidents or complaints of any vehicle pedestrian interaction. Pedestrians have a right to walk on the footpath, they do not have a right to walk on a private way. This would be trespass, if enforced.

The Commissioner concedes that liability arising from pedestrians choosing to use the driveway , rather the footpath, could be an issue for Ms. Sutherland. Even though the road was not laid on the footpath, it seems pedestrians preferred to walk on it, and by year ten the original footpath had disappeared and pedestrians were using the driveway to walk on. It is important to note that this is not a public road , this was a gated private driveway with signs indicating as such. There is one car owned by the Sutherlands, which on most days traversed the road twice: to go to work and come home from work . Except for an occasional oil delivery in the winter, and guests, there was , in the absence of evidence to the contrary , negligible " traffic" on the driveway at any point in time during the ten years. No evidence was led to the contrary.

There were no facts to support the speculation that the gated gravelled private way might attract more foot traffic than the present un-gated un-gravelled footpath , thus increasing liability and nuisance exposure to the Crons. The Commissioner was not appraised about what liability issues the Crons actually face now regarding pedestrians on the footpath, (as the footpath is a public way) nor how that liability would change if there was a private driveway installed in the vicinity of it, with appropriate signage. The Commissioner was also not appraised of how more foot traffic on the foot path might create a nuisance to the Crons. The Crons have never been able to control the " traffic" and have heretofore accepted the traffic. Was it a nuisance then, is it a nuisance now? There was no evidence presented of present "traffic" flows , traffic on the " way that was", or projections of foot path traffic .It would be difficult , without evidence, to give this concern much weight .The Commissioner is also not convinced, in the absence of facts, that a gated way will attract more foot traffic than a footpath which is un-gated. If it is a matter of ensuring that pedestrians stay on the footpath and not the driveway , perhaps the footpath should be gravelled to entice pedestrians to use it and not the driveway , since empirical evidence of ten years use indicates they preferred a gravelled way to a path through the grass .

When Mr. Fisher outlines his concern regarding an errant vehicle going off into the water on the southern boundary of the Cron property , at the slipway , he does not indicate whether he is speaking of the slipway when it was filled with boulders, or after the boulders were removed. If it refers to a situation where there is no infill, near the slipway , it obvious from the photos that this area would be a concern for the safety of vehicular traffic, but this was addressed by the Petitioner, by filling the area with boulders and fill when she laid the first way. Also it is curious that when the Petitioner did fill the slipway with boulders it was safe enough to pass the Department of Environment's safety standards and the Department of Fisheries and Oceans safety standards .

The City By-Laws do not seem to be concerned about the proximity of driveways to the shore as Riparian buffer zones on the Northwest Arm do not apply to driveways along the shores of the Northwest Arm.

Halifax Regional Plan Policy

Section 2.2.3 of the Regional Plan indicates that the retention of riparian buffers around watercourses and along the coastline is important for the protection of water quality, wildlife, flood protection, erosion control, nutrient loading, aesthetic value and related attributes. To achieve these objectives, the riparian buffer should remain as a non-disturbance area to the greatest extent possible. The applicable policies of the Regional Plan are as follows, as adopted by Regional Council:

E-10 *HRM shall, through the applicable land use by-law, require the retention of a minimum 20 metre wide riparian buffer along all watercourses throughout HRM to protect the chemical, physical and biological functions of marine and freshwater resources. The bylaw shall generally prohibit all development within the riparian buffer* ***but provisions shall be made to permit board walks, walkways and trails of limited width, fences, public road crossings, driveway crossings, wastewater, storm and water infrastructure, marine dependent uses, fisheries uses, boat ramps, wharfs, small-scale accessory buildings or structures and attached decks, conservation uses, parks on public lands and historical sites and monuments within the buffer.*** *In addition, no alteration of land levels or the removal of vegetation in relation to development will be permitted.(Emphasis added)*

E-11 Policy E-10 shall not apply to lands designated Halifax Harbour on the Generalized Future Land Use Map (Map 2), industrial lands within the port of Sheet Harbour and lands within the Waterfront Residential (R-1C) Zone under the Shubenacadie Lakes Secondary Planning Strategy. These policies have been implemented through the respective Land Use By-Laws, through a regulation requiring, as a condition of a development permit application, and through a 20 metre setback from the ordinary high water mark of any watercourse. With some exceptions, this area is to remain a non-disturbance area (Emphasis added)

Of note is that Policy E-11 excludes the Halifax Harbour Designation from the riparian buffer requirements. The Harbour Designation includes North West Arm and extends seaward as far as Chebucto Head .

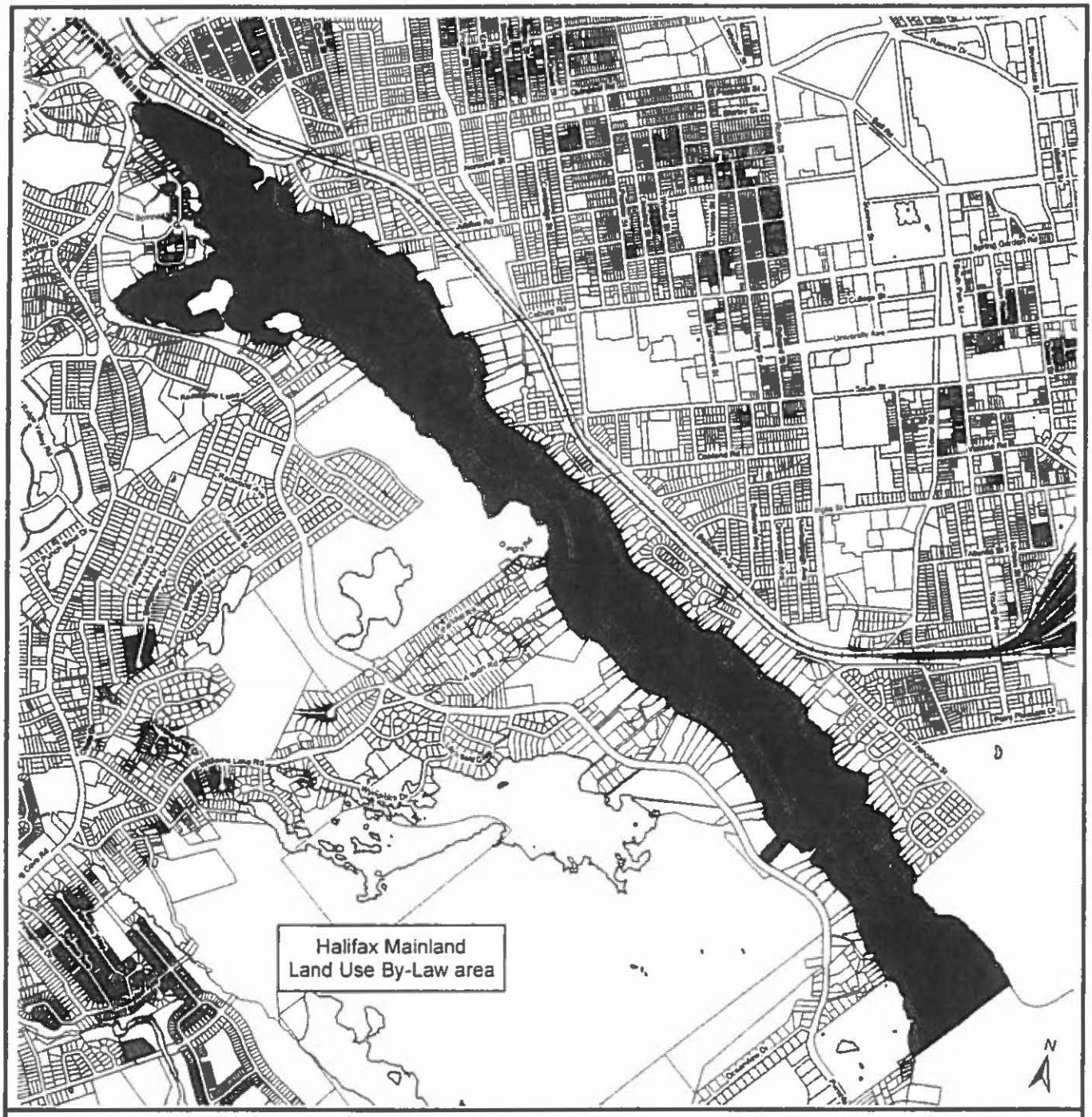
Further Concerns of the Cron's : Mr. Fisher

On page 3, of Mr. Fisher's report he suggests that a geo-technical assessment of the in-filled lands " may be warranted". The Commissioner notes that Mr. Fisher presented no evidence that the in-filled area where the driveway was, had any realized or actual technical issues regarding the private way , such as sink holes, or problems with drainage, or any construction issues over the ten year life span of the " way- that- was". There was no evidence led to indicate that a geo-technical assessment would be warranted, or that the integrity of the infill should be of a concern.

Fisher further suggests, without explanation , that the area may " require removal of topsoil" (grubbing) , grading to facilitate drainage and to prevent erosion and sediment control, and construction materials " in accordance with HRM and NSTIR specifications . None of these land alterations were necessary for the first road . This is not a subdivision road, or public highway. These HRM and NSTIR specifications , are not regulations and do not apply to private driveways except where a public road pairs with a driveway of a certain slope and configuration. There are no standards for private driveways in HRM.

Mr. Fisher suggested that the driveway attract more foot traffic and will present "visual and audible disturbances" to the Crons. There was no evidence of increased foot traffic on the gated "way-that- was" . It is also not clear , in the presence of the treed berm and the distance from the Cron house, that the Crons can see or hear anything that goes on , on the footpath , or that they even pay attention to it. They haven't articulated exactly what issues have arisen, in this regard, in their submissions, so it is difficult to address them.

Also Mr. Fisher suggests that complications might arise in subdividing the land to " produce a high-valued waterfront building lot". The following sections of the Halifax Regional Land Use By-laws: Halifax Mainland (with amendments to October 18 , 2014) preclude any development below the high water mark, which lies mostly below the centre of the footpath and these by-laws also preclude any building development within 9 metres, or 30 feet of the high water mark , placing any potential building lot up the hill, behind the sewer and water easement.



ZM-24

Northwest Arm
Halifax

HALIFAX
REGIONAL MUNICIPALITY
COMMUNITY DEVELOPMENT
PLANNING SERVICES

0 200 400 m

Water Access area

Halifax Mainland
Land Use By-Law

HRM does not guarantee the accuracy of any representation on this plan.

Effective 21 July 2007

ZM-24_WaterAccess.pdf (HEC)

HRM Land Use By-Laws Mainland :

DEVELOPMENT AND SUBDIVISION ON THE NORTHWEST ARM AND THE WESTERN SHORE OF THE BEDFORD BASIN (RC-Jan 11/11;E-Mar 12/11)

14U For any development or subdivision within the Northwest Arm Water Access Area (see map opposite) or the Bedford Basin Water Access Area, in addition to all other applicable requirements of this By-law, the following requirements shall apply:

(a) Definitions:

.....

(iii) **"Shoreline"** means the Ordinary High Water Mark as defined under the Nova Scotia Land Surveyors Regulations and as it existed on the effective date of this Section.

(b) In addition to all other applicable requirements of this by-law:

(i) No structure, with the exception of boathouses, public works and utilities, ferry terminal facilities, a multi-use trail system and associated facilities, parks on public lands, wharves, docks, gazebos, municipal, provincial and national historic sites and monuments, and existing structures may be located within 9 metres (30 feet) of the Shoreline within the Water Access Zone.

(c) Notwithstanding Subsection (b), the 9-metre (30-foot) Northwest Arm Shoreline setback shall not apply to the properties identified by the following P.I.D. numbers: 00251868 (leased to the Armdale Yacht Club), 00274548 and 00270942 (Royal Nova Scotia Yacht Squadron).

In summary, the " way-that-was" had approval from the environmental watchdogs and authorities for the infill that Ms. Sutherland lay in the slipway. HRM's Land –Use Bylaws and Regional Development Policies, regarding riparian buffer zones, explicitly exempt driveways on the Northwest Arm so the Commissioner did not understand , nor accept why Mr. Fisher indicates the need for an environmental assessment regarding the infill in the slipway. The way- that- was, was created by laying gravel on the flat lands , without grubbing and grading , and it stayed in tact for ten years even through hurricanes. There was no evidence submitted by the Crons of visible and audible disturbances emanating from the road . And there certainly is not a high- valued waterfront lot where the " way –that –was" lay.

While there was no evidence presented indicating that there might be a problem with the in – filled land upon which the way was laid , ie. the 30 foot area between the sea wall and the " way-that –was " it is of note that land is flat, in-filled below the ordinary high water mark , and is bordered by a tidal bay, and subject to occasional flooding. When the tides, the moon and the weather are right , flooding water can and occasionally does cover much of the area between the footpath. and the sea wall. What is, and has been of considerable public concern is the integrity of the seawall along the Northwest Arm. In July 2010 Coldwater Consulting submitted a report to HRM :

> The long natural fjord that forms the Northwest Arm is a unique part of the Halifax waterfront. One important element of the area's appeal is the walking paths and green space along the shorelines of Horseshoe Island, Regatta Point, and the Dingle. **(These) sea walls are in a generally poor state of repair. The storm waves and high water levels resulted in heavy wave overtopping that has eroded the fine gravel walking path behind the seawalls and has destabilized many sections of the wall. There is also considerable evidence of geotechnical instability of sections of the wall....(p.1)**
>
> **This report is an extensive engineering study regarding the sea walls at the Dingle, Regatta Point and Horseshoe Island.**

The findings of this report lend weight to the Commissioner's concern that in the future a private way running between the old footpath and the wall may be subject flooding, as well as potentially being subject to subsidence , erosion and structural issues as the wall degradation continues and the increased potential for sea levels to rise in the future in the face of global temperature shifts.

Liability Issues:

The Crons submitted a letter from their insurance company (Exhibit 7) which set out the potential liability issues that might arise for the Crons regarding the use of a driveway across their property. The potential events cited were not backed by any risk evaluation regarding probabilities or foreseeability, or any similar fact situations so it was difficult to know initially how much weight to give to the insurance companies hypothetical scenarios. . Regardless, insurance issues are very important to the Crons and they have raised them many other times through counsel and by voicing them to the Commissioner personally so an attempt has been made to address each type of legal concern that has been raised . In a review of all of their

submissions the Commissioner determined that the Cron's liability concerns are in a general sense related to two types of legal liability: occupiers liability and environmental incident liability ,which may or may not be mutually exclusive.

a) Dangers on a driveway , regardless of its placement on the property :

The issue of liability for harmful events occurring on a driveway , regardless of its location on the Cron's property could include many types of encounters: vehicle/pedestrian, pedestrian/ roadway, vehicle/ roadway. Vehicle/vehicle, motor carrier/ vehicle, motor carrier /roadway etc.

It is important to remember the driveway is not supposed to be co-incident with the footpath. The driveway and the footpath are two separate ways. One is " public" and one is " private " , these differences in ownership can significantly affect liability issues.

Incidents involving the operation of a motor vehicle with respect to pedestrians or other vehicles, the Commissioner submits, will be covered by an individual operators' motor vehicle insurance. In Nova Scotia the *Motor Vehicle Act* R.S.N.S, 1989, c.293 states (Section 230 (1)) " No person shall drive a motor vehicle unless there is in force in respect of the motor vehicle or in respect of the driver of a motor vehicle a motor vehicle liability policy. " It is thus mandatory that anyone driving a car, anywhere , even on a private driveway ,must have third party liability insurance. The Commissioner is satisfied that occurrences of harm to persons or property on the driveway, or off the driveway, caused by a motor vehicle, should be covered by motor vehicle insurance.

Other liability issues which may be germane to the Cron's , are incidents which could occur on the driveway that might somehow affect the lands around the driveway , or even incidents on the driveway which somehow could be attributed to them personally if they are found to be owners or occupiers of the driveway. Such incidents might arguably be caused by the condition of the driveway itself, obstacles placed upon it, potholes, etc. but not by the operator of a vehicle whose acts are covered by Motor Vehicle Insurance. The question is, just how much liability could the Cron's be exposed to for dangerous conditions of the driveway which could result in harm to persons and property? The relevant legislation in such cases are the provincial Occupier Liability Acts. Liability is found to exist if, under these acts , a person/ owner of the lands involved ,is found to be an " occupier".

The Crons submitted for the Commissioner's review an Ontario Superior Court case called *Davies v.Clarington* (Municipality , 266 D.L.R. (4th) 375.This case is helpful to the extent that it sets out the criteria necessary to be an " occupier" for purposes of liability under Ontario's Occupier's Liability legislation. *Davies* involved a crossing , used by the public and a private business (Blue Circle) over a railroad track owned by CN rail. The crossing joined a public road . The crossing was located on CN's busy train thoroughfare where trains raced past at speeds up to 100 km. per hour.

In the *Davies* case a passenger of a VIA rail train sued for damages when the train in which she was travelling hit a tractor trailer which had become immobilized on the railway track crossing. The train pushed the rig about 1,700 feet , or more than a quarter of a mile. The truck's destination was the nearby business, Blue Circle .

Blue Circle , whose right it was to cross the track, maintained it was not an "occupier "of the railway corridor and associated rail crossing and thus whatever conditions contributed to a truck being stuck in the crossing was not its fault. When the railway corridor was obtained by CN through two farm lots an obligation was imposed on it, the land owner , to construct and maintain a suitable farm crossing. Subsequent owners of the farm lands continued to have the right to cross the Railway tracks at this location, as did Blue Circle, but Blue Circle had no contractual obligation to maintain the crossing. The issue before the court was whether the Blue Circle , owner of the right to cross the tracks was an " occupier" for the purposes of the Ontario *Occupier's Liability Act* and if they were found to be an " occupier " , did they owe a common law duty of care to repair the crossing or to put up some appropriate signs that might have prevented the mishap.

Significant evidence was called with respect to CN's negligence conceming the maintenance of the railway corridor. That evidence included the following: that gates should have been placed at the crossing; the crossing should have been more clearly marked with appropriate signage; an emergency telephone number should have been posted at the corridor crossing ; and the physical structure of the railway corridor (i.e. the sloping and grading of the crossing and its approaches including its planking) was not constructed to appropriate standards.

For liability, under the Ontario occupier's legislation, to be found in the *Davies* case , the owner of the right to cross the railway corridor , would also have had to have been an "

occupier" under the Occupier's Liability Act. The judge noted at least two requirements to be found " occupier" under the Ontario Act and indicated that it was the plaintiffs task to establish on the balance of probabilities that the owner of the right-of way , not CN (owner of the land) was an " occupier" under the Act and thus responsible under the Act. The Ontario *Occupier's Liabilty Act* R.S.O. 1990 C.O .2 defines an " occupier" as follows:

> **Sec.1 (a) the person has " physical possession of the premises; or**
>
> **(b) the person has " responsibility for and control of the condition of the premises, or the activities there carried on, or " control over the persons allowed to enter the premises."**

The judge found that Blue Circle did not fulfill the these requirements : It was CN who owned the land and the track that went through the crossing, they were responsible for repairs and maintenance, they had the ability to control signage , the gates , and the workman who worked to repair and maintain the crossing . The judge also found that, with respect to whether the Blue Circle had control over the persons who entered the crossing , that it did not control who entered the premises for the crossing was used by the public and the company could not exercise control over access. In conclusion, the judge found that Blue Circle, one of the owners of the right-of way , was not liable for the damages caused to the plaintiff.

The Commissioner submits that there **is** case law , regarding **private ways** (*Davies* dispute was over a public way), which helps to establish who has the rights and responsibilities at law to keep a private road safe and in good repair . In a court of appeal case in New Brunswick *Gormley v. Hoyt* (1982) 43 N.B. R. (2^{nd}) 75 at para 14 (which has been cited by several judges since) the court explained what rights and obligations are attributed to person who is granted a right-of –way:

> **The owner of a right-of-way, in the absence of an agreement with the owner of the land over which it passes, has the burden of maintaining the right-of – way including the right to enter upon it for the purpose of making it effecting: see *Dalhousie Land Company v.Bearce* (1933) , 6 M.P.R. 399. The right of the owner of the right of way easement includes not only the right to keep the road in repair but also the right to make a road.**

Since the Nova Scotia Occupier's Liability Act reforms in the 1970's there have been no reported Nova Scotia cases relating to the Occupiers Liability Act and private driveways ,except *Langille v.Bernier* 2010 NSSC. 404 (Can LII) which was the case of an oil truck driver who overturned his truck on an icy private road owned by several homeowners. The driver sued the right-of-way owners for not keeping the road safe. He was not successful as the judge found the road was in reasonable condition and he found that the driver had not exercised reasonable care in traversing the road. This was not a case where the land owner who had granted the right-of-way was sued, it was the case where the right-of way owner was sued . Cases where the owner of the lands over which a right-of way crosses have just not appeared in the jurisprudence for a very long time, if at all.

The Nova Scotia *Occupier's Liabilty Act*, SNS 1996 c.27 (Exhibit 8) defines " occupier" in much the same way as the Ontario Act :

Section 2 (a)

(i) A person who is in physical possession of the premises

(ii) A person who has responsibility for, and control over the condition of the premises, the activities conducted on the premises, or the persons allowed to enter the premises, and for the purpose of this Act may be more than one occupier of the same premises.

Based on the N.S. Occupier's Act, and the *Davies* case, and review of the case law, the Commissioner does not find that the Crons concerns about being exposed to Occupier's Liability are warranted. However, to alay their fears they may want to enter into a contract with Ms. Sutherland , expressing that Ms. Sutherland is in care and control of the road and it is her duty to maintain it , bearing in mind however ,that at law , a positive burden can not run with the land.

b) Dangers because of the driveway location: (Oil Spills and Environmental Disasters)

Liability is apportioned by the degree of " negligence" that the tortfeasor has engaged in . Negligence in tort law focuses first on ascertaining whether the person who caused harm has any duty of care towards the person/s that are harmed. Once that is determined it focuses on

legal principals of foreseeability, probability, proximate cause and something called the "reasonable man" test. The area of law is complex with respect to environmental issues , it is overlaid and often subsumed with a large amount of statutory law .

The Crons expressed a concern regarding the probability of a harmful event such as an oil spill occurring because the " way-that-was " was so close to the water down by the boat-slip (14 or so feet from the water when the boat slip was filled with boulders and fill) . The issues which arise in such cases center around foreseeability and probability and also the contributory negligence of the driver. Foreseeability is related to probability and , in relation to harm , it is explained by Black's Law Dictionary as follows:

> A wrongdoer can not be responsible for a consequence which is merely possible , but is responsible only for the consequences which are probable according to ordinary and usual experience.

The Commissioner was unable to find statistics on oil trucks slipping off roads in Nova Scotia and was not given any data regarding this by the Crons. . The case of *Langille v. Bernier* , mentioned above, focused on the possible negligence of the right-of –way holders and the negligence of the truck driver , but the Commissioner received no other cases where an oil truck turned over due to dangerous driving conditions. The Commissioner , consequently had no information about whether such events are foreseeably likely to occur in this situation, or unlikely to occur. There are many roads in the province, which lie near water and shores and which can be very treacherous in bad weather. There are few , if any cases of oil trucks spilling their load in the water in Canada , or going off road into the water. Where the " way - that- was" met the boat slip on the southern border of the Cron property certainly there would have been a concern had infill not been initiated, but the Petitioner claims to have partially in-filled the area to prevent accidents , and to have gained environmental approvals. The Commissioner assumes this was sufficient.

It might be helpful to also outline some of the legal safeguards that are in place to protect the Crons .

a) Oil Deliveries

All trucks that carry commercial freight for business are governed by *The Carriage of Freight by Vehicle Regulations* (NS Reg 24/95) made pursuant to the *Motor Vehicle Act* of Nova

Scotia, R.S.N.S. 1989, c.293. Section 3 of the Act requires that such vehicles carry third party liability insurance to cover injury, death and bodily harm to persons or property damage in the amount $1 million dollars per vehicle for non dangerous goods and $ 2 million dollars per vehicle for dangerous goods . This insurance must cover all types of loss resulting from any number of enumerated events such as fire, collision, overturning of a vehicle, collapse of a bridge etc. Section 228(1) of the Nova Scotia Motor Vehicle Act makes a liability policy a condition precedent of any commercial permit or license to operate a vehicle. Other protective legislation includes the:

Dangerous Goods Transportation Act, RSNS 1989, c 119,

Commercial Carrier Safety Fitness Rating and Compliance Regulations, NS Reg 84/2005,

Carriage of Freight by Vehicle Regulations, NS Reg 24/95, (Motor Vehicle Act).

In addition to the protective legislation liability provisions for oil spills on the land are also covered under the Nova Scotia *Environmental Act* S.N.S. 1994-95 c.1 and the subsequent *Emergency Spill Regulations* (April11. 1995;N.S. Reg.59/95) and *the Petroleum Management Regulations* (O.I.C. 2002-139 N.S. Reg. 44/2002) and for spills in the Northwest Arm the federal *Fisheries Act* R.S.C 1985, c,F-14 and subsequent regulations are in place. The key for responsibility in all of the legislation is " the person responsible" which is defined under the *Environment Act,* Section3 (ak), as :

(i) The owner of a substance or thing

(ii) The owner occupier of the land on which the adverse effect has occurred or may occur

(iii) a previous owner of the substance or thing

(iv) a person who has or has had care , management, or control including care, management and control during the generation, manufacture, treatment, sale , handling, distribution, use, storage, disposal, transportation. Display or method of application of the substance or thing,

(v) a successor, assignee, executor, administrator, receiver, receiver manager or trustee of a person referred to in the sub-clauses (i) to (iv) or

(vi) a person who acts as a principal , or agent of a person referred to in sub-clauses (i) to (v);

The prohibition against pollution may be found in Section 67

> (1) No person shall knowingly release or permit the release into the environment of a substance in the amount, concentration or level or at a rate of release that causes , or may cause significant adverse effect, unless authorized by an approval or the regulation.
>
> (2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect, unless authorized by an approval or the regulations.

There can be no doubt that an oil spill from an overturned oil truck, if it were to leak, could cause an "adverse effect" within the meaning of the act :

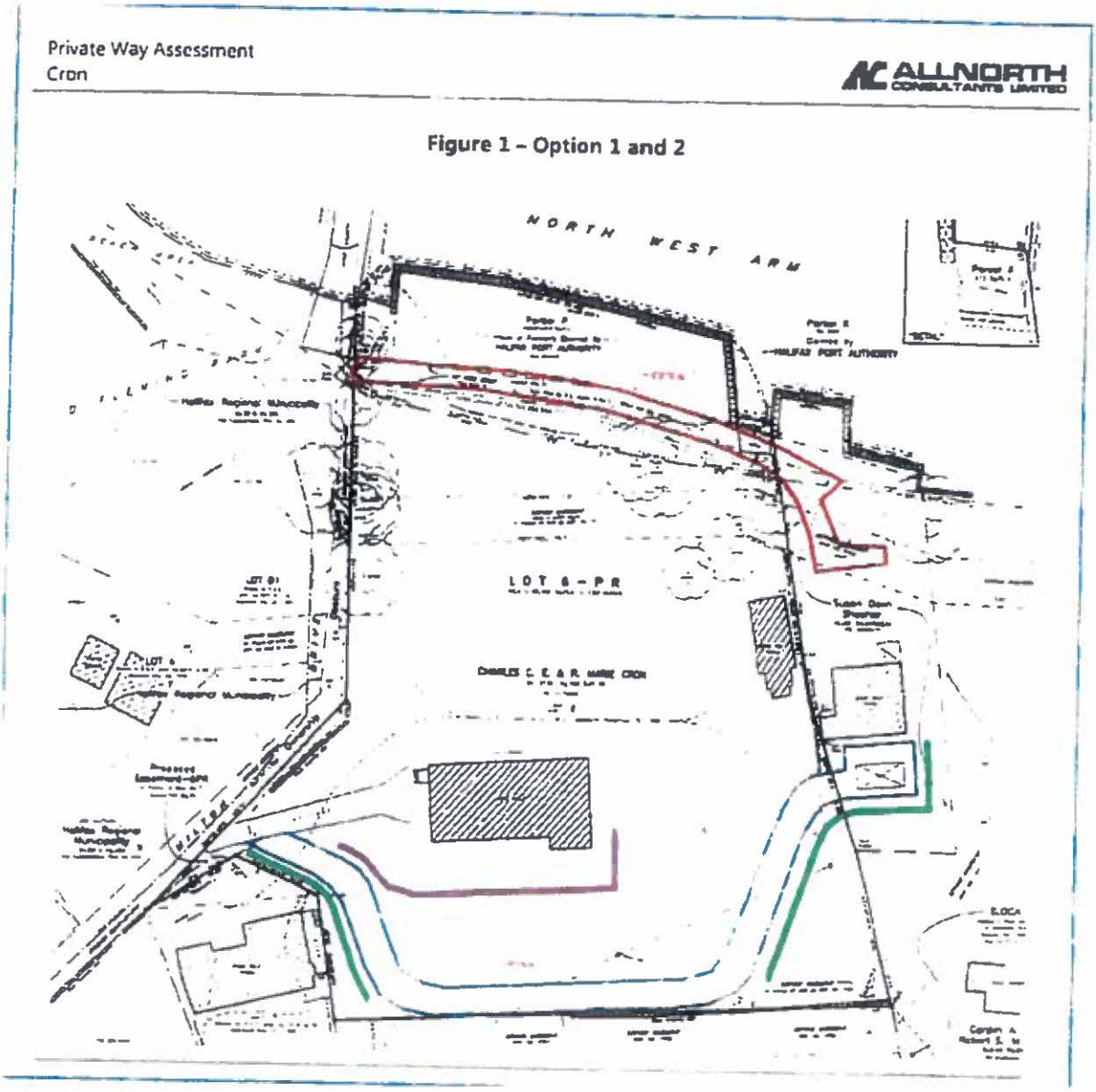
> Section 39 c) an effect that impairs or damages the environment, including an adverse effect respecting the health of humans or the reasonable enjoyment of life or property.

There is little in the *Environment Act* to cause one to anticipate any culpability on the part of the Crons for an oil delivery to the Sutherlands. It would be difficult to find them as " persons responsible" for a spill under the circumstances. Needless to say, liability law is complex and its consequences serious so the risks to the Crons have been earnestly considered by the Commissioner and their concerns have significantly affected how the past driveway was assessed and where the present recommended driveway is located.

The Crons Proposed Road

As mentioned previously , the Crons hired All North Consultants , and specifically Mr.Fisher, to undertake the Commissioner's task and to decide whether the road proposed by the Petitioner is

the most reasonable and practicable for her. The result of their investigation was to investigate three locations for a private way. (See map below)



The red road is the " way-that was" . Extensive review of Fisher's report of the overall concerns with this road has been outlined above. Regarding the technical issues Fisher suggested that as an option one could re- institute the " way-that- was", but to widen it to 3 metres/ 10 feet . Fisher apparently was not aware that the " way - that was ", had been 10 feet or 3 metres wide . He said the same way as the " way –that- was" would now need " tree trimming and removals ", as well as " removal of the top organic layer and grubbing, grading for drainage, materials to conform to HRM and NSTIR specifications (which do not apply to private driveways)" and

reinstatement of the damaged lands" . It is unclear which lands those might be or why grubbing and grading would be required in this location .He also suggested that the footpath be moved, which assumes that the " way-that –was" lay on the footpath, which it didn't. He also contemplated that parking might occur next to the seawall, which only happened once in ten years ,with one car, presumably this was discouraged because there was a swing-gate and proper signage to prevent such behaviour.

Fisher suggested that Ms. Sutherland could access a public road by going through the lands of Marterra (private way option #3). He felt this would be a cheap way with no environmental concerns but due to the unknown prospects of the development he did not promote this way as being the most reasonabale and practicable , at least for the time being. What Mr. Fisher did not realize are that Building lots 1 and 3, as drawn , are only 8 feet apart and inadequate for a private way, emergency vehicles such as fire trucks etc. which require 18 feet or 6m if there are any obstructions on each side of way such as the walls of buildings. Perhaps , more importantly, is impediment created by Section 7 of HRM Land- Use By-laws which requires as follows:

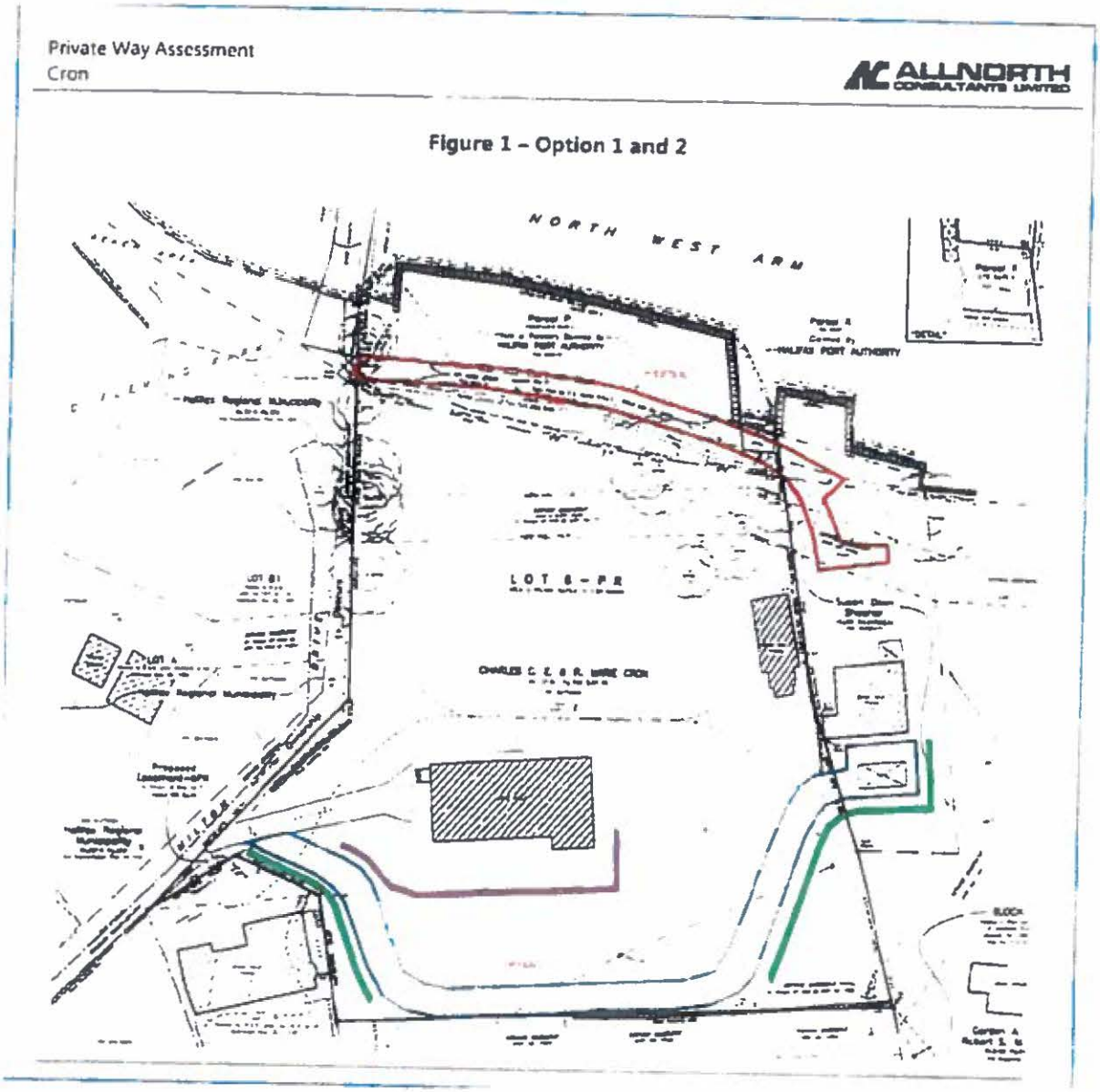
> LOT TO ABUT ON A STREET
>
> Sec. 7 Every lot, or some part of every lot, shall abut on a street and a building shall be deemed to abut on the street opposite to its principal entrance or, if such entrance is not opposite to a street, then upon the street from which it gains its principal access, provided that:
>
> > (a) Where such street is less than sixty feet in width, no portion of any building shall be located at a lesser distance from the center line of such street than thirty feet;
> >
> > **(b) No building shall be erected on lands abutting or fronting on a private thoroughfare unless such building is located at least twenty feet from the center line of such thoroughfare.**

If Ms. Sutherland were to obtain a private way between Building lots 1 and 3 , to conform with the by-laws , the buildings on these lots would have to be located 20 feet from the center line of

her private way, which would probably make these building lots too small to have building erected on them and thus make them unusable to Marterra. These, unlike the lands in front of the footpath ARE valuable and are approved development lots.

A Driveway to the back of the Crons House: (marked in green... map below)

Mr. Fisher suggested that the most reasonable and practicable road which is the least detrimental to the Crons and most advantageous to the Peititoner is the road outlined below in green . He claimed that such a road would "minimize the impact to the Crons but would



involve a relatively steep climb and decent at the beginning (where the Crons driveway is located) and at the end of the access road which would be at the back of the Sutherland property, ending on the sloped hill in back of, or in place of her garage".

The Commissioner took a serious look at this road as one to compare to the Petitioner's proposed way. There were not as many details given by Fisher as the Commissioner required to do a proper analysis so Ray Landry of Servant Dunbrack was contracted to assist her. She also extensively interviewed the fleet supervisor of the Mechanical Division of the Halifax Fire Department . Below is a comprehensive outline of Landry's findings and the Commissioner's conclusions. (Servant Dunbrack Report attached as Exhibit 12)

Safety and Access onto Milton Drive :

Mr. Fisher did not suggest a separate way for Ms. Sutherland, instead he suggested that the Cron's existing driveway be " widened to allow parking and access to the new private way". He did not specify in writing how wide this driveway would be but the drawing indicates it is approximately 4.5 metres wide. The *HRM By-Laws* (**S-300**) (respecting how driveways are to enter a public street state as follows:

> Two-Way Driveways
>
> 34. (1) Driveways permitted to allow vehicles to both enter and leave a street by means of the same driveway shall conform to the following requirements:
>
> (a) **two-way driveways shall not be permitted to join the roadway at an angle less than 70 degrees**;
>
> (b) Two-way driveways serving residentially used property with 4 or fewer units shall have a width not less than 10 feet (3m) and not greater than 16 feet (5m) at a point where the driveway meets the edge of the public right of way, except where the property frontage exceeds 60 feet (18 m), a driveway up to 20 feet (6m) in width may be permitted;.

(2) Notwithstanding subsection (1), where there are limiting or special circumstances, the Engineer may approve a driveway width subject to special conditions, where in the opinion of the Engineer the driveway will not affect the safe movement of traffic.

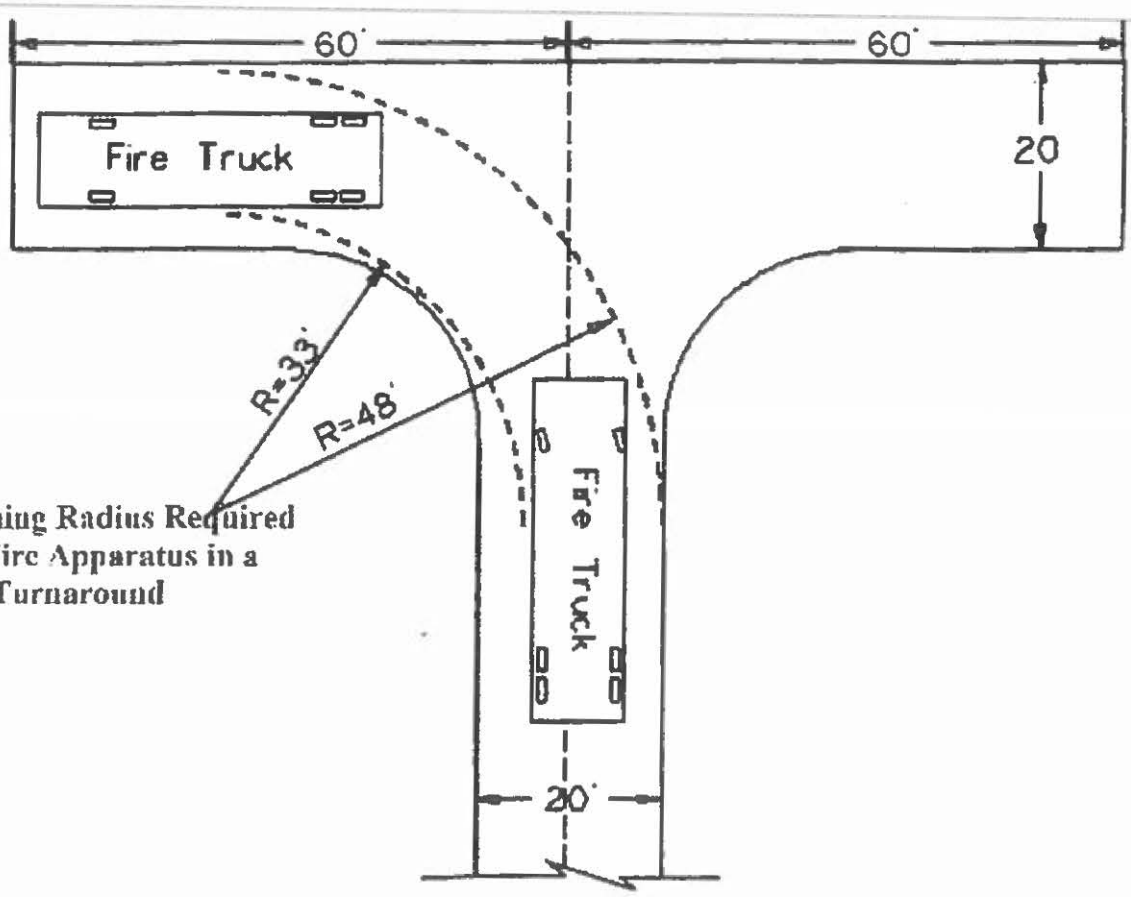
The Cron's existing driveway joins Milton drive at approximately 35 degrees, which is half the required angle if the driveway were widened at the road intersection to accommodate two driveways as Fisher suggests. Whether it would be possible to qualify under the special circumstances of Section 2 was not addressed.

Fire Truck Access to the Crons and Sutherlands:

The National Building Code for fire truck access is a minimum driveway width of not less than 6m (approx.. 20 ft) . A turnaround must be provided for routes/roads longer than 90 m. The grade or slope of the overall route cannot be more than 18% and change in the slope no more than 8% (1 in 12.5 over a minimum of 15m). It is important to note that on a completely flat open space a fire truck requires an absolute minimum road base of 12 feet to accommodate its 10 foot wheelbase. The rest of the 6m/20 ft. is to provide space for the large body of the truck which overhangs the wheelbase and the extended mirrors which stick out to the side by about another 2 feet. If trees and walls and other impediments line the road the minimum width of area for a fire truck must be 6m. This is very relevant for the proposed back- of- the- house road.

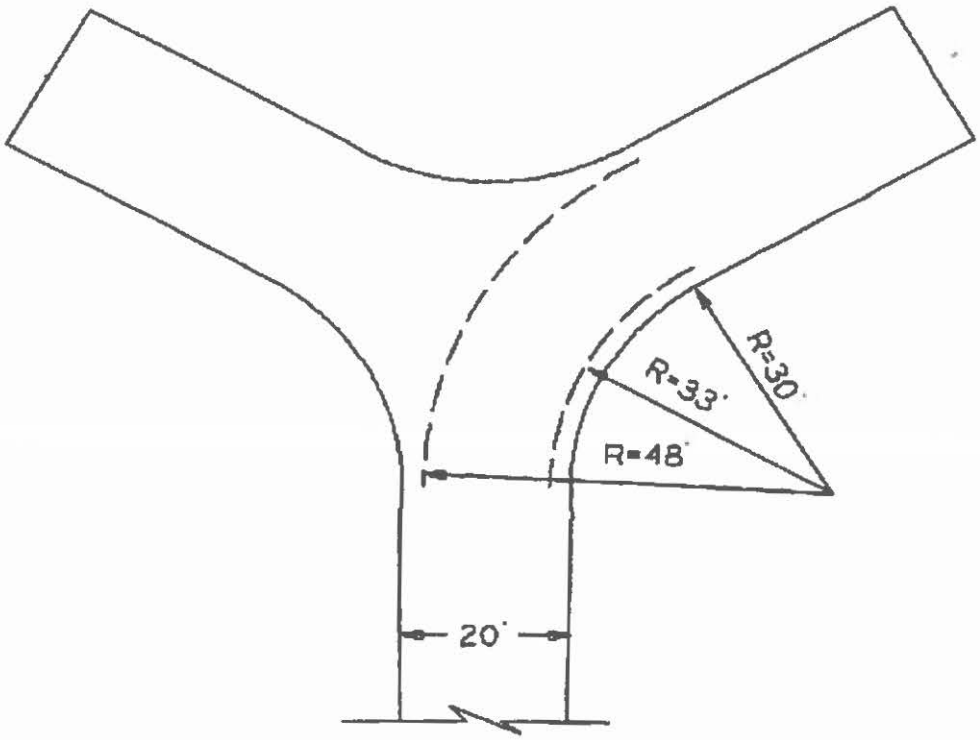
Fisher' s proposed road that travels up a wooded hill , is only about 4.5 m wide, not wide enough for fire trucks . The road he proposes is 120m . Roads longer than 90 m. require a turn-around. Also a turnaround for fire trucks must be relatively flat because the traction of a fire truck is in its front wheels making it very difficult and even impossible to back up a grade. Fisher did not consider either of these requirements.

When building roads there is a general rule to try to follow the existing ground contours to minimize site disturbance and cost. Residential driveway grades are usually between 10 and 15%, and for fire trucks , the change in grade not more than 1 to 12.5 over a minimum distance **of 15m. The maximum grade for a fire truck is 18% on a paved road like Duke Street Halifax.** If one tries to follow the ground on the hill behind the Cron's property on Fisher's proposed road the grades in some places are in excess of 60%. . To ameliorate this Fisher suggests retaining wall in 3or 4 areas that will " likely be 10-15 feet high in some places. To this Landry suggest as follows:



Turning Radius Required for Fire Apparatus in a Tee Turnaround

Alternative Tee Turnaround



Considering the maximum 15% grade for a residential driveway and a maximum change in gradient of 1 to 12.5 over a minimum distance of 15m for fire trucks the driveway will require **retaining walls on either side of the driveway for the majority of its length to a maximum of 5.7 m** (approx. 19 feet , high: the average height of a 2 storey flat roofed house) **near civic # 6 and 8 on Marine Drive. The overall retaining wall on the west side of the driveway would be, as a minimum, 105m long with a wall ranging from .5 m to 5.7 m in height** and on the east side of the driveway, the wall , at minimum would require " **115 m in length and a wall ranging from .5-2.6 m in height.** There are three properties that border the Cron's western boundary, Civic # 4, 6 and &. In front of these properties is a retaining wall that would have to be removed with their permission. Between the homes on these properties and the Crons boundary is a city water and sewer easement. The impact on this sewer easement of a wall 5.7 meters high and the required blasting, or rock breaking to etch a road into the bedrock of the hill was not addressed, except to mention that it would be an issue. There may also be a need to widen the road if the double retaining walls lining both sides of the driveway were to impede the movement of fire trucks. The installation of guardrails will also be required for safety purposes.

Other disturbances , besides blasting and wall building related to the back-of –the house road, would be significant tree removal on a steep slope possibly causing significant erosion, and the possible relocation of the power line and telephone lines which run behind the house , on the hill. The destruction of much of the Crons garden behind the house, significant visual disturbance of the neighbors on Civic # 3 Milton Drive , and 4, 6 , and 8 Marine Drive, and a significant alteration to the Cron property would also ensue. There was no detailed analysis of how a fire truck turnaround could be engineered behind the Sutherland property , whether there was room and what type of ground alteration would have to occur to provide a flat and wide enough space for this. Most t-shaped turnarounds have to be 60 feet long by 20ft. wide in the backing up lane (see sketch opposite) . Snow removal and build up , would be a significant factor.

The following is the summary and recommendation of Ray Landry at Servant Dunbrack regarding a driveway behind the Crons house as proposed by Mr. Fisher at All North Consulting. :

Review Summary

Based on our review of the proposed driveway route, west of the civic 5, significant tree removal, retaining wall construction and site disturbance

would be required on the property at 5 Milton Drive. A preliminary estimate for retaining wall construction would be approximately $350,000 (excluding rock excavation and probable blasting) based on the approximate lengths and heights. In addition, approval is required for; tree removal, existing retaining wall removal, construction access to install the required retaining walls would be required from; 3 Milton Drive, 4 Marine Drive, 6 Marine Drive, and 8 Marine Drive. Based on the local geology, rock breaking would more than likely be required to construct this driveway. There is an existing service easement along the shared boundary of civic 5 Milton and civic 4, 6, & 8 Marine Drive required from Halifax Water or other easement holder. The existing power poles would also likely be affected by the construction excavation and rock breaking may impact existing foundations and potable water wells in the area. In order to meet a maximum vertical grade of

not greater than 15% and a change in gradient of not more than 1 in 12.5 over 15m, the majority of this driveway will be a cut with retaining walls supporting the existing ground on both sides. In winter, snow clearing and storage will likely narrow the access with snow piling up along the sides of the retaining walls and the access will be prone to infill by drifting snow as the majority of the driveway will be below surrounding ground elevations (see section A-A on sketch 3). As the driveway will be for the most part below existing grade, both surface water runoff and groundwater drainage will also need to be addressed as part of the overall design. As per the proposed vertical grades, surface water will be directed to either end of the driveway from a high point at the approximate mid pint in its length.

Recommendation

Based on; the significant expected construction costs, large area of tree removal and disturbance, number of properties affected besides civic 5 Milton, potential rock breaking nuisance to neighbouring properties, potential for damage to existing properties, drainage issues, and winter maintenance issues this option should only be considered if no other access option was available.

The Commissioner , having visited the area behind the Cron's house, visually surveying the land and slopes, walking on the slopes , and interviewing the people from the HRM fire department, finds that the Landry report gives a reasonable and well researched summary of the situation.

This road behind the Cron's house, even if the best road under the PWA, could not be chosen by the Commissioner. It could only be used for comparison. The comparisons are set out below.

The Way –That-Was Compared to the Road Behind the House:

1. The " way-that-was" was approximately 250feet long (76m) and 3m wide compared to the " road behind the house" which would be 394 feet long and at least 6m wide(to allow fire equipment access) , making the road behind the house 57% longer and 100% wider than the " way –that-was".

2. The road- behind –the- house would probably involve the relocation of power and phone lines. No phone or power lines are in the vicinity of the "way-that was".

3. The road behind the house would involve other property owners such as 3 Milton Drive, and # 4,6, and 8 Marine Drive. The " way that was" would have no impact on other property owners.

4. The road behind the house would involve rock breaking or blasting with potential liability issues, noise issues, property disturbance issues to the neighbors and to the city water easement near Marine Drive. The "way-that-was" would involve none of these.

5. The road behind the house would entail the construction of large , up to 20 feet high , and long (a couple of hundred feet) retaining walls with guardrails and possibly lighting and extensive provision for drainage. The " way-that was " , lying on a flat grade near the water of the NW Arm requires no wall or guardrails or special drainage, or lighting.

6. The road behind the house will not, as proposed , have safe or permissible access to the public street (Milton Drive) . There is no problem with street access for the " way-that was" .

7. Snow removal on the " way-that-was" will require a plough pushing snow to either side of the road. Snow removal on the road behind the house will require physical removal by truck from the road due to guard rails and retaining walls. A significant amount of salt could also be required to keep the slopes of the road safe in winter while potentially damaging the soil and surrounding gardens if drainage into the city sewer is not provided.

8. With the road-behind the house, significant alterations to the land behind the Sutherland house will be required to provide for a fire truck turnaround. Fisher suggested that the

Sutherland shed be removed as well. The way-that –was did not require any alterations to the Sutherland property. A fire truck can turn round on Sutherlands front lawn and if necessary back up the 76m to the Dingle Parking lot (a distance of less than 90 m) which can't be done on the road behind the house.

9. A fire truck could not travel on the Fisher road-behind the house as it is too narrow and also a fire truck can not navigate a 35 degree access from the street, so fire protection on this route, as presented, is impossible. Fire protection would be possible on the " way-that was".

10. The hill behind the house is so steep that a tunnel may be required to properly grade a driveable driveway. The "way-that was" required a few loads of gravel.

11. The road behind the house would be relatively expensive to build and maintain compared to the " way-that-was" which cost $ 3,220 (three thousand two hundred twenty dollars) 14 years ago , (Exhibit 9).

12. The road behind the house would require significant tree removal , altering the look of the area and potentially creating significant erosion issues . The " way-that was " requires no tree removal.

There is no question , when reviewing the comparisons above, that the most reasonable and practicable way to access the Sutherland property was the " way-that was" , or for that matter , any "way " lying in the lower terrace of the Cron property, going in the direction of the footpath. There has not been shown any aspect of the road-behind the house that makes it more feasible , reasonable , practicable or requisite for the Petitioner's use than a road following the footpath. From the point of view of the degree of disturbance to the Cron property, a "way" on the lower terrace may change to look of the grasslands and natural setting in the lower terrace, but it will not impede a full view of the water, it will not impede development (which is not allowed) , and it will not alter the lay of the land. Whereas a road –behind the house will have a significant impact on the land, its contours, treed nature and its natural woodland setting will be permanently and significantly altered into high- tech walled 20 foot wide road which stretches from one end of the property to the other. Erosion and significant drainage problems could become issues for the Crons. They will not have safe or permissible access to the street and they may face liability and nuisance claims from neighbors resulting from blasting and rock breaking .The alteration in the views from these neighboring properties may or may not be appreciated. A road such as proposed in the back of the Cron property, it is submitted, will change the whole nature of the neighborhood, which presently nestles itself into the contours of the hills and melds with the land formations that exist.

Laying out the Road:

The Crons expressed many concerns about the "way-that was". These included safety issues regarding the proximity of the" way" to the footpath and interaction with pedestrian traffic ; safety issues regarding the infill of the slipway and possible accidents relating to its construction and proximity to the water; concerns about environmental impacts of oil spills and other accidents near the water. They are concerned about what risks they could be exposed to in the creation of a private driveway on their property which , in the area of the footpath , borders on a well-used public park and parking lot. They are concerned about the diminution of the value of their water front property and the diminution of their enjoyment of the property. If the slipway were in-filled , boats in the Cron's boat house would not have easy access to the water, they would have to be hauled to another slipway . The Crons also have a special interest in nature and plants. Dr. Cron is President of the Nova Scotia Wild Flora Society . He has planted many indigenous and rare trees and plant specimens on his property. In short, the Crons find the imposition of a private road very difficult, fraught with many concerns about possible future events . The road they proposed for the back of their property, which would be such a huge undertaking and which would create such a change to their property, physically and visually is testament to their aversion to the " way-that was".

Most Advantageous/ Least Detrimental

The Commissioner must lay out the road which is "most advantageous to the person or persons applying for the way or road and least detrimental to the owner or owners of the land through which the same shall pass" *PWA*

The Commissioner must base her recommendation on facts . Ten years, without incident on the "way-that was" weighs in favour of the " way-that was" location . The enormity and complexity of the road-behind the house weighs in favour of the' way-that-was" location. The permissible access to the street, the ease of fire truck access weighs in favour of " the way- that-was" location. There were no arguments, or facts presented by either the Crons or Ms. Sutherland that indicate that a road going in the direction of the footpath on the lower terrace , is not the most reasonable and practicable road for the Petitioner. In laying the road however ,the Commissioner realizes that placing a road on the Cron's property could have a considerable impact on them; their concerns are ever present and real to them. The public is also an interested party here in that they use the footpath and when the footpath was close to the road, they

preferred to use the road. The boat slips by the parking lot and the parking areas are also used by the public and there is a chance that a swinging gate in that area could impede the use of the slips or the parking area. The Commissioner is concerned about the degradation of the sea wall and its possible future effect on the area between the foot path and the North West Arm. The Cron's may also like to use this area for recreation, ie. to put chairs near the wall to look at the water, etc. although there is no evidence that they have ever done this, future owners might enjoy this as well.

Going in the same direction of the footpath is a city sewer and water easement. It lies under the berm which separates the lower terrace from the upper terraces. (See map opposite and the photo below)

This easement was expropriated (# 1711 Exhibit 11) in 1966 by the Municipality of the County of Halifax " for the purpose of maintaining sewer and water mains through portions of Jollimore".

The rights attached to this interest are as follows:

The right at any time to enter upon the said lands for the purpose of laying down and constructing sewers and drains and pipes for water and gas, and conduits for wires of all kinds in, under, and upon the said lands and of keeping and maintaining the same at all times in good condition and repair, and for every such purpose the municipality of the County of Halifax shall have access to the said lands at all times by its servants, employees, workmen and agents.

The City has rights under and over the ground on this area, to erect, pipelines, water mains and wires. The Crons can not build on this area, they technically can't plant things that interfere with the water and sewer pipes. They can however walk over the easement and enjoy the views over and around it. This easement lies many meters from the footpath and at the place of most concern, the slipway, the easement lies 35.28 feet from the sea wall . (See Exhibit 11)

The Commissioner proposes that a 12 foot way over or adjacent to this water easement would be the most beneficial for the Petitioner because it still maintains all the attributes of the " way-that –was" but has the advantage of additional benefits:

1. It will have its own entrance, which can and should be gated. The separate entrance and the gate will clearly distinguish the footpath from her driveway so wayward pedestrian encounters should be minimal;

2. The driveway will lie many meters from the sea wall and hopefully will withstand any wall degradation , flooding or subsistence over time;

3. The driveway will lie, at its closest point, 35 feet from the boat slip, which should minimize the risk of an oil truck incident;

4. The way will be wide enough to accommodate a fire truck and other vehicle access necessary for the enjoyment of the Sutherland's home;

The benefits the Commissioner sees for the Crons :

1. The way will lie under the berm and will be much less visible than the previous " way-that-was";

2. The Cron's liability concerns should be further minimized in this location;

3. The available area on the lower terrace between the "way" and the water will be maximized for the Crons use and enjoyment;

4. The disturbance to the Cron's property will be minimized here compared to other locations ;

5. The slipway will be open for use and access from the boat house will have minimal impediments;

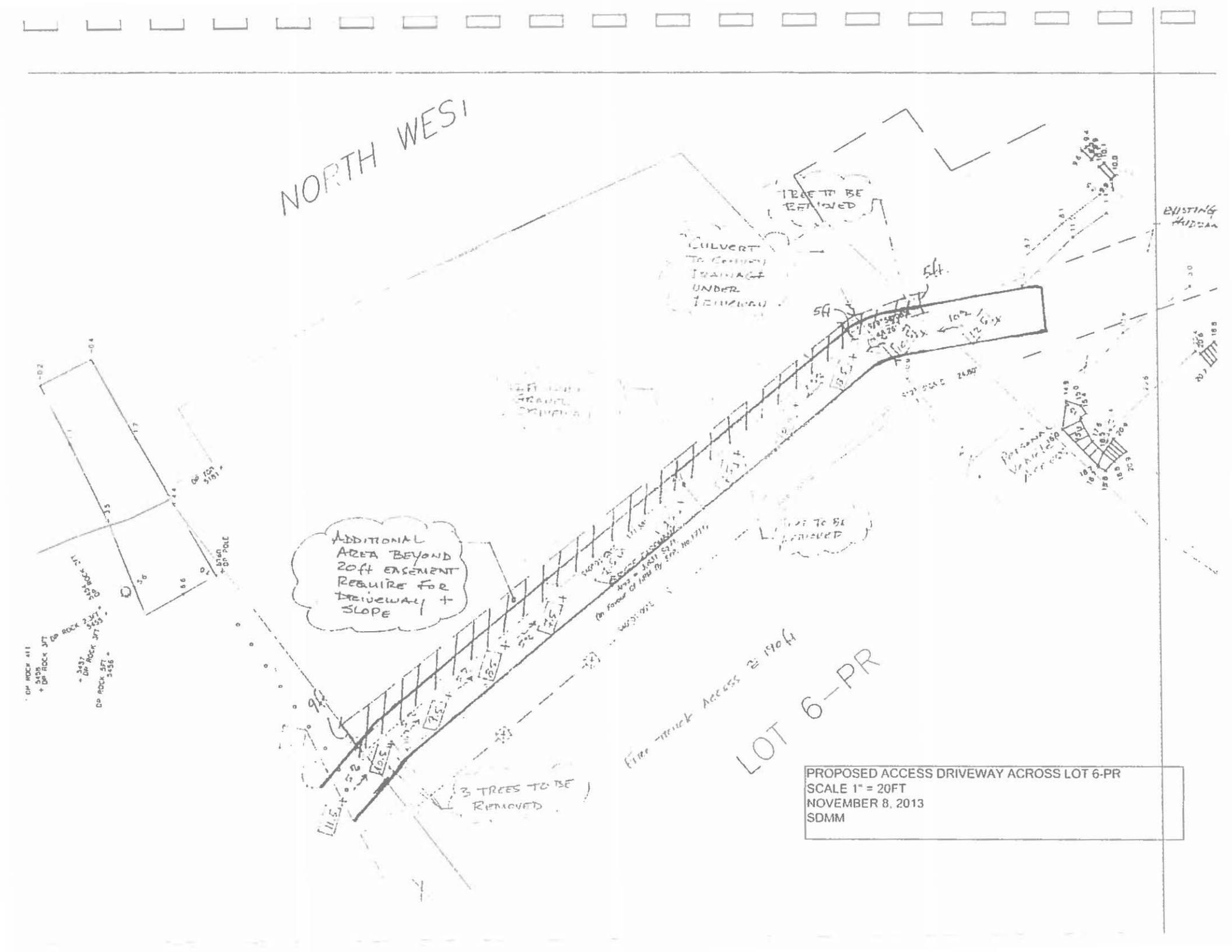
6. The trees and bushes on the berm should help muffle any noise from the driveway;

7. Nothing can be built on the water easement so in the event someday, somehow, a building could be built on the water front , the location of the Commissioner's road minimizes the area taken for the road, minimizes the loss in potential value to the Crons and leaves the maximum space available near the water for building;

8. The Crons, or their predecessors in title have already been compensated for the loss of rights of the land in the expropriation;

9. The Crons worries about people parking on their land, pedestrian accidents etc. should be allayed because the Petitioner will have a gate on her road and appropriate signage;

10. If Ms. Sutherland has a fire, the likelihood of the boathouse going down in flames because of no fire truck access should now be a non- issue.


NORTH WEST
TREE TO BE REMOVED
CULVERT TO CONVEY DRAINAGE UNDER DRIVEWAY
EXISTING HYDRANT
ADDITIONAL AREA BEYOND 20ft EASEMENT REQUIRE FOR DRIVEWAY + SLOPE
3 TREES TO BE REMOVED
Fire truck Access 20 ft
LOT 6-PR
PROPOSED ACCESS DRIVEWAY ACROSS LOT 6-PR
SCALE 1" = 20FT
NOVEMBER 8, 2013
SDMM

A Closer Look at the Commissioner's Road : (see sketch opposite)

If the driveway were laid entirely on the easement it would include some of the raised land in the berm and it would involve cutting quite a few trees and bushes and cutting into the berm with a bulldozer. Rather than do this the driveway was laid on the flat land under the berm which includes as much easement land as possible and some Cron land. . Where the Dingle parking lot is, and the entrance to the driveway is located , 9 feet of non-easement land is use. This distance narrows as we move closer to Ms. Sutherland's house. There are in total 1290 square feet of non-easement land included in the road.

The entrance to the driveway is from the Dingle Parking lot, or technically the end of Milton Drive. The easement is outlined in a solid dark line , the Commission's way is outlined in a broken slanted lines. The width of the way is 12 feet. At the parking lot one can see that the manhole cover lies outside of the driveway towards the water. The driveway will require a gate and a small ramp to access the Cron property. Three trees need to be removed at the entrance. The Commissioner believes one tree, if not two out of the three tree are dead . The driveway moves in the direction of the footpath towards the Sutherland's unimpeded until it comes upon a small fruit tree ,or ornamental tree, which needs to be removed. The two one-hundred year old trees lying on the waterside need not be removed. When the road nears the next old tree on the boathouse side of the property provision has been made for the driveway to narrow to 10 feet to save the tree. At this point the fire truck will have all the access it needs to reach the fire hydrant (located on the far right in the easement) in front of the Sutherlands, and to fight any fires that might occur on her property. Ten feet is also wide enough for Ms. Sutherland and her guests to drive to the front terrace in front of her house and park their car. Where the road narrows, there is still room for an oil truck to drive up to the front of the Sutherland house. The Weights and Dimensions Regulations under Section 191 of *The Motor Vehicle Act,R.S.N.S. 1989, c.293* prohibits vehicles on the highway which are wider than 2.6 metres (8.5 feet), so there is room also for the oil truck to traverse. The road is shorter than the " way-that was" , which was about 250 feet. This way is about 190 feet (58 metres) which is within limits for a fire truck to back up all the way to the Dingle if necessary. The map for this road is Exhibit 12.The Commissioner has verbal confirmation from the water authority that this plan is acceptable.

Further Duties of the Commissioner:

***PWA* : Agreement for compensation**

The Commissioner requested offers from the parties. The Petitioner put forth an offer. The Crons refused. It was therefore impossible for the Commissioner to commence negotiations to reach an agreement. An arbitration panel was appointed. The Commissioner appointed an arbitrator as required, but was asked not to participate in the pre arbitration processes.

All of which is Respectfully Submitted by the Commissioner, Deborah Baker M.A. Econ., LLB.

PART IV

JUDGMENTS

COFFIN. J.:

This is an action for trespass, for damages for destroying part of a fence and for perpetual injunction against injuring or interfering with the property alleged to be that of the plaintiff, or cutting down or interfering with any actual growth, vegetation, trees, etc. or interfering with or cutting down or destroying the fence.

The lands in question are at Jollimore on the western slopes of the North West Arm in the County of Halifax. The plaintiff is the owner of a large area of land; the defendant the owner of a smaller portion immediately north and east of the plaintiff's property.

The whole question revolves around an allegation of the defendant that he is entitled to a right-of-way coming from the western boundary line of his property in a generally westerly direction along the northern line of the plaintiff's property.

The plaintiff erected a fence on lines set out by her surveyor and the occasion from which the action has arisen occurred on the 19th November, 1966, and is described in the evidence of Mr. Russell Allen Finley, the husband of the plaintiff.

That day about two o'clock in the afternoon, as a result of a telephone call, he found the defendant, Mr. Sutherland, chopping down a fence that had been erected just north of the garage on his wife's property. The defendant advised him that he proposed to take down the fence of which he said there was about 90 feet knocked down. The posts had been set in concrete and were chopped off right at the concrete. There were about eight or nine which were dealt with in that fashion. In addition to taking down the fence, the defendant advised Mr. Finley that he had people engaged to take down three trees that were east of the garage. As to the trees, Mr. Finley said they were important for shade and for privacy and generally fitted into the landscape and they could not be planted and grow into maturity during his lifetime.

At the outset there was an admission that a right was in fact granted in 1891 to Mr. Henry Martin Bradford, who is a predecessor in title to the defendant. The deed in question is a deed from Amos Salughenwhite and his wife to Henry Martin Bradford, dated June 18, 1891, recorded in the Registry of Deeds at Halifax, on June 19, 1891, in Book 283, page 161. The wording of the right is as follows:

> "Also a free and uninterrupted right for the said Henry Martin Bradford, to construct and build a carriage road of the width of an ordinary carriage road, to lead from the northwest corner of the lot hereby conveyed to the said Henry Martin Bradford, through and over the property now owned by the said Amos Slaughenwhite, along the southern boundary of said Yeadon property until it meets the road leading from said property of Amos Slaughenwhite to the main road, together with a free and uninterrupted right-of-way and passage upon, along and over the carriage road hereby to be constructed with full power of ingress, regress and way to and for the said Henry Martin Bradford, his heirs and assigns and his agents, servants and tenants, and the occupiers for the time being of the land hereby conveyed and all other persons for the time being, with or by the leave of them or any of them over and upon and along the said carriage road hereby to be constructed, and also with full liberty for the said Henry Martin Bradford, his heirs and assigns, to pass and repass from time to time hereafter, through upon over and along the said carriage road hereby constructed, with or without horses, cattle, and other animals, carts, carriages, wagons, sleighs, sleds and other conveyances, goods and other things to and from the land and premises first above described from and to the said main road or public highway."

It is from this document that the defendant assumes that he has a right-of-way and that the fence constructed by the plaintiff was interrupting that right-of-way and thus the defendant takes the position that he was justified in taking the steps he did. The position of the plaintiff is that there has been non-use of the right-of-way, there

has been occupation over a great many years by the plaintiff and her predecessors in title, that the right-of-way was never in fact constructed and that no right-of-way now exists - certainly not in the position in which the defendant alleges it does exist. It was further suggested by the plaintiff in evidence that there may well be another right-of-way north of that now claimed by the defendant and that this is the right-of-way which should be asserted by the defendant and not the one which lies over the plaintiff's property on its northern side.

With regard to the costs of repairing the fence, I refer to the evidence of Mr. Earl Canfield, who described its construction by himself, saying that he followed the surveyor's stakes, that is, Mr. J.D. McKenzie, and that he constructed a fence along the line set by the stake markings. He was asked if the fence were torn down and had to be replaced along the area approximately 90 feet, whether he could give an estimate of what it would cost to repair and he presented a slip showing an estimate of $82.40.

Mr. Finley testified that his mother-in-law, Mrs. Dorothy Martin, purchased the property in 1944, that is, the main part of it; then in 1955, her husband, Mr. Gerald P. Martin, purchased from Mr. John T. Cruickshanks a lot to the north, which is referred to on the plan on file as Lot No. 24 which is on the western side of what is shown as Marine Drive and some distance west of the Sutherland property. Mrs. Finley, the plaintiff, purchased Mrs. Dorothy Martin's property, together with the interest of Mr. Gerald P. Martin in the other lot early in 1966. Mr. Finley was familiar with the property as far back as 1945. He had lived continuously in Halifax since 1945 and had occasion to visit the Martin property over the years very frequently. Actually he and his wife lived on the property for one summer in the early fifties. Since 1965 they have occupied the land and the dwelling thereon. He was shown the plan, which had been prepared by Mr. McKenzie, the surveyor, indicating the northern line of the property of the plaintiff. He said that the garage shown on that plan was in the same position in 1944 and 1945 as it is now, as was also a small shed shown on the plan. He described the stone wall north of the garage and shed. There was a high stone wall with a few trees growing along its top, but to the south of it, it had been landscaped and was part of the lawn of the plaintiff's property, and this wall existed in 1944 and 1945 and has not changed over the years. He also identified the gate

posts near the School Road on the western end of the property, as the two gate posts at the entrance. These also existed in 1944. The northern boundary of the turning area at the entrance just east of the gates follows the delineation of a wall, which is also shown on the plan. He denied that there was anything on the ground conforming with a green line, which is shown on the first exhibit tendered through Mr. J.D. McKenzie by the plaintiff. This green line runs directly west from the property of the defendant out to the School Road and purports to represent the right-of-way claimed by the defendant. Mr. Finley said that there was nothing on the ground conforming with that line, but he did suggest there was a path north of this line which seemed to go over what was referred to as Lot 24, that is the northern portion of Lot 24, running west from Marine Drive some distance. Lot 24 is the piece of land which was purchased in 1955 by Mr. Martin from John T. Cruickshank. Mr. Finley described it thus:

"A. Well, there is a path that seems to start at about the northeast corner of lot (24) and it is somewhat winding, it moves off in a westerly direction, and then appears to move northerly and becomes rather hard to follow from there, it's quite definitely defined for a fair, quite a distance in from the northeast corner.

Q. Yes. And in the vicinity of that path on lot (24), what, if anything, can you tell me about the location of a certain water tank?

A. There's a water tank - fairly high ground there - but it's, I think it's on the - oh, within 5 or 10 feet of it.

Q. Of the path?

A. Right.

Q. How long has that water tank been there, do you know?

A. Actually, it's as long as I remember."

I should say at this point that Mr. McKenzie tendered three plans. The first one is the one to which I have referred showing the green area marking the suggested position of the alleged right-of-way. The northern part of this area shown in red is what Mr. McKenzie considered the actual northern boundary of the Finley property, that is, the northern boundary for our purposes would include the southern boundary of the so-called Lot 24 which was purchased later. He also produced Exhibit P/2 in which he showed a blue area filled in in a position similar to that of the green. He said that the northern margin of the blue area was the most northerly position that he considered possible for that boundary line and the blue would represent a six foot strip to the south - a six foot right-of-way along that boundary line. In other respects Exhibit P/2 was the same as Exhibit P/1. He put in a third plan, P/3, which he said was basically the same and here there was an area coloured yellow, the northern line thereof being the most southerly location he could consider possible for this northern boundary line of the plaintiff's property. The yellow represented the six foot strip south of such boundary line.

Examination of these plans shows an encroachment on the southern portion of the green strip on P/1 by the shed, a slight encroachment, and a very substantial encroachment by the corner of the garage. It does not show an encroachment on the blue line by the shed or the garage, and, of course, P/3 shows a much greater encroachment by both shed and garage on the yellow one. On the blue, where shed and garage do not appear as encroaching, the wall definitely does.

Mr. Finley was asked whether during the course of his familiarity with the property since 1944, what, if anything, he could say about anyone other than a guest using the area marked green on the first Exhibit P/1 as a walkway or carriageway or road for motor vehicles? His answer was:

> "A. Well, no one possibly could because it involved going over, well, unless they were climbing up and down walls. It certainly couldn't be used as a pathway."

And he had seen no one use that area marked green since he had become familiar with the property. So, also, as to the yellow portion on P/3 and the blue portion on P/2.

Some photographs were admitted of the path which was evident, at least for some distance, across Lot 24, and also pictures of the stone walls in the area of the alleged right-of-way, and at least one photograph indicating the water tank to which he was referred. He described the terrain as being rough.

Mr. Finley did say that when crossing other portions of his property, permission was given some time ago to one of Mr. Sutherland's solicitors to bring in a furnace across the lot, that would be going from the south gate on the southern boundary of the main property right through the plaintiff's property over to that of the defendant.

The actual survey was described in evidence by Mr. J.D. McKenzie, the provincial land surveyor. He introduced the plan P/1 to which I have already referred. He had no difficulty finding the southern boundary line of the property from the monuments and the descriptions. He fixed the northern boundary line as shown on the plan P/1, but he did say that it was possible that the original boundary line by deed description might be slightly north of this, particularly out near its western portion, that is, at the southeast corner of the lot formerly of William Hartnett now Charles Stafford, because there was a shortage in width across the property from the northern boundary to the southern boundary of some seven or eight feet.

As to the variation of the northern line or the differential north or south, Mr. McKenzie referred to what Mr. Milgate found back in 1925 near the western area of the lot, which would be on the southern side of the William Hartnett property. There is a wall there, and Mr. McKenzie said he believed that the wall that Mr. Milgate found at that time was north probably as much as seven or eight feet of its present location, which he said would give the total width across the property approximately in agreement with the Amos Slaughenwhite deed description. Mr. McKenzie said it was now seven or eight feet short. Then this evidence appears at p. 15:

"Q. Then, if you move north 7 or 8 feet, then that's a maximum that you could go to find this right-of-way - the northern boundary, I am sorry

A. That's the furtherest north portion that I believe possible for that boundary line.

Q. Yes. Why

A. 7 or 8 feet north of the position that I have shown on the plan at that point.

Mr. Justice Coffin

Do you say you think the stone wall changes(d) positions, the wall itself?

A. Yes, I believe that it did."

At page 16, he was asked this question:

"Q. Mr. McKenzie, why did you choose on the plan in front of you, the location for that northern boundary that you did choose?

A. Well, partly because I was instructed by Mrs. Finley in case of any doubt that to decide anything that I had any doubt about as against herself, that is, to take the position of giving the abutting owner the benefit of any doubt, mostly for that reason."

He then described his Exhibits P/2 and P/3, which I have already mentioned. He came back to the fact that P/1 is where he put down the boundary where he believed it was the proper location.

He did describe a so-called tow-path running along the water that would pass along the eastern side of the property and continued as far as Mr. McKenzie knew, to the northern boundary of the Saraguay Club property. This right-of-way or tow-path was for walking purposes only and is used almost as a public right-of-way for walking.

Mr. McKenzie was then asked to describe the area which he had outlined in green, that is the area of alleged right-of-way on his first plan P/1. He said there were trees and boulders on part of it. The area between the red line on the plan and the stone wall was graded and occupied by the Finley property. The stone wall is approximately eight feet high and is north of the shed, then it runs in a westerly direction some distance beyond the shed shown on the property and then seems to fall away

to the south across the northern line of the Finley property, at the same time tapering down in height. Mr. McKenzie identified the shed and the garage on the property. He stated that there were trees along the area outlined in green. They were fairly large trees, some of them were, but not exceptionally large. He said the biggest would be 12, possibly 14 inches, hardwood trees. Two or three of them would be at least 40 or 50 years old and they were generally along the whole right-of-way. He said there would be trees definitely along the western end of the eight foot wall. There was a very steep grade from the Sutherland lot up to the garage and the area west of the wall to the southeast corner of the Hartnett property, which is generally in the western portion of the alleged right-of-way. He did not believe it had been cleared, the ground was very rough, there were good sized boulders in there. He could not be certain that any of the large older trees were as far south as that yellow area on P/3. With regard to P/2, the blue area, everything south of the wall had been landscaped and was level and immediately north are trees. On the western portion again there are trees and the ground is rough. Generally, whichever Exhibit you take, using the colour again, whether it is the blue, the green or the yellow, he said there was no clearly defined path at all. It was very difficult to travel on foot due to the wall and the rough ground and trees.

He then referred to the old road which he found north of the area on the so-called Lot 24. It was a narrow old road which has had some construction work done on it, and he showed it marked on his plan running from the northern portion of the Gerald Martin piece of property, the Lot 24, from Marine Drive in a westerly direction along the northern portion of Lot 24 almost to its western boundary and there to the southern boundary of the lot shown on the plan as Lot D. From that point it could not be followed because there was a foundation up there and there has been later some building, both on the Hartnett property and Lot D. It does not appear again until you get over to School Road. Mr. McKenzie further identified photographs of the area looking westerly, the area of this road.

Mr. McKenzie was also asked if he had been over the ground north of Lot 2, that is north of the Sutherland property, almost between Marine Drive and the Arm - Marine Drive on the west and the Arm on the east. He was asked if there was a possibility of taking a car, or a person

walking over that area. His reply was that there would be no difficulty about walking. There was another old house north of the dwelling shown on the Sutherland property and from that house the ground had been apparently graded and landscaped to some extent. The path could be built much more easily on the land to the north of this Lot 2 because of the contours of the road. It had been roughly graded and there was no steep grade proceeding northwardly. He said you could construct a road.

" There is another road coming down from the south boundary of the former Sir Sanford Fleming property, which is the Dingle property, coming down and running along the north boundary of the Lynch property, comes southwardly and then turns and runs eastwardly.

Q. Yes.

A. I believe the portion that turns and runs eastwardly is a private right-of-way. I am not certain about the portion coming southeastwardly.

Q. There is a possibility of travelling along that way?

A. Yes.

Q. would there be?

A. It's the way that, in part, that the road is, the road into the Lynch property."

On cross examination he was asked if he had satisfied himself as to the true location of the northern boundary between the property, and he said that as much property as Mrs. Finley could definitely hold without any question to his mind of somebody to the north claiming possessory title or claiming the boundary in a further south position or making any claim. He could not find any evidence of possession of lands south of the wall by persons north of the wall. Mr. McKenzie was asked this question:

"Q. Now, with respect to the road, which you say runs through block (24) and block (15)

towards Kirk Road, now would you tell us the condition of this at the present time?

A. It's unobstructed from, it's narrow to start with, I believe too narrow for a motor vehicle, a cart, could be used by a cart, and it's unobstructed and quite smooth from Marine Drive westerly for, I judge 300 feet or so or more, then it appears to turn to the right and go up to the north, and there are obstructions where it does that, there's an old foundation up there and I didn't attempt to follow it up through there; by standing where it turns north and looking, I could not see where it continued, I didn't go up and examine the ground any further."

The reason I mention this northerly road so often is that there is a suggestion running through the case made by the plaintiff, that although the defendant had no right-of-way in the area of the fence which he tore down which is the right-of-way he actually claimed, he may have some rights over this so-called northerly right-of-way which appears, at least partially appears, running through the northern portion of Lot 24 which was the Gerald Martin lot.

Following Mr. McKenzie's survey, Mr. Charles Dunn, provincial land surveyor, took the information provided by Mr. McKenzie and shown on P/1, referred to the monuments and he set the line, marked it with half a dozen stakes between the monument and towards the water and Marine Drive.

Mr. Clyde William North went to work for Dr. Mathers at the end of the first world war. He identified the stone wall north of the shed, and said that when he was there many years ago that stone wall was there at that time. At that time Dr. Mathers gained access to his property from the south, going down the School Road and going in the position of the property just south of the garage, then drove across the driveway where the lawn now is, going on the southernmost part of the property and then across the front. In those days, he said, the wall came right around and ran right past the driveway that is there now. He said that was all stone wall across there.

You could not drive down through the gates to the west in those days because there was a wall across. The shed was built in 1918 or 1919 and it was as Mr. North saw it just before the trial in the same location as it was in 1919, when it was used as an icehouse. The garage itself was approximately in the same location although it has been turned. In those days the doors were facing southerly and now they are facing west.

He did not know of any other paths except the northerly one to which we have made reference, which he remembered, but he did not really know where it came out.

" ... it went down past the garage anyway, down there somewhere, I couldn't tell you."

There was another path but it ran north and south and was used by Mrs. Innes who lived north of the property and by no one else. That is the first path he mentioned. He reiterated there was a path and he had walked on it quite often himself and saw other people walking on it. It would be north of the stone wall about ten feet, but it varied. He said there was a tank on the path. He went past the tank quite often. The tank, Mr. North said, was approximately in the same location it was when he knew it.

Mr. Stanley Parsons became familiar with the plaintiff's property in 1945. He verified the position of both the garage and the shed as shown on the plan P/1. He also verified the gate posts as well as the wall just north of the gate posts, and the second wall, northerly again, to which we have already referred. He also verified the position of the wall which I have mentioned north of the shed. He further said that back of the wall near the water tank there was a path that led down toward the Arm. It went east and west and was used by pedestrians walking down to the Arm. The area shaded in green on P/3, he said, had never been used as a path. The terrain was partially through rock. He was referred to the area in blue on P/2. He had no knowledge of anyone ever using the blue strip on P/2, nor the yellow strip on P/3. He only knew of one other path to the north, in the northern area. Mr. Parsons said that there would be difficulty in getting around the northwestern tip of the garage. He could recall between the corner of the garage and the wall there were trees and one could hardly get a wheelbarrow through with any ease. It was difficult. In between, he said, right in the back of the garage, there was a lot of rubbish and debris, and there was never a path there other than

that which they used to wheel a wheelbarrow to carry out the dead foliage and so on to make a compost heap.

"A. Well, there were rocks, there was rock, plus trees, plus wild bush. This was the reason for the difficulty."

Mr. Ernest Jollimore grew up as a boy north of the Lynch property. It was just north of the lands in question. He felt he had been familiar with the Finley property from 1926. He verified the position of the shed and the garage, and he was referred to the path that had been mentioned in Mr. Parson's evidence. He said that it was directly opposite his lot. His lot is shown as Lot 3 marked "Roy Jollimore" and is just north of the garage. From the northwesterly corner of his lot the path ran westerly. He was asked where it went. His answer was:

"A. It would come out near the - well, formerly, it was the Slaugherwhite property and now it belongs to Hartnett, I believe.

Q. Yes.

A. And then it extends beyond the Hartnett home to Murrant.

Q. To Murrant.

A. On Kirk Road.

Q. Can you designate

....."

He then went on to say the Murrant home was formerly the Puttner property, and that is shown on the plan at the most northwesterly angle on the eastern side of School Road. The path came out that way. The eastern end now ends at Marine Drive, but he believed it formerly carried on beyond his property towards the Lynch home down the hill. It had only been used by the gardener of what is now the Lynch property, and is not used at the present time. Nor had it been used since 1955. He reiterated that the areas shown on the various plans marked in colour were not used as a pathway or a way for motor vehicles. The shore path along the shore of the Arm ran from the Ferry to the Saraguay. He admitted on cross examination

by Mr. Bryson that his house was immediately north of the alleged right-of-way. He was questioned as follows:

"Q. How do you feel about that, make any difference whether there is a right-of-way there or not?

A. Oh, well

Q. Do you want one?

A. Not particularly."

Mr. Walter Galton, a brother-in-law of Mr. Parsons, living on the property since 1950 as caretaker, described the position of the water tank and said that it had been moved last Fall a little just to put a foundation in, but it was not in the road by any means. Neither the shed nor the garage nor the gate posts had changed since he had been there. He said there was a path north of the water tank. He had not seen anyone using it. He saw no one using the coloured areas on the various plans P/1, P/2 and P/3. He did refer to certain oil deliveries made from the south side of the property and he said that they used to come to see him every time. Mr. Martin made that agreement for them to deliver oil through his property and they used to come to see him to give them the orders to go and do so.

Mrs. Finley, the plaintiff, became familiar with the property in 1944. Between 1944 and 1966 she lived there for an entire summer and parts of others. To her knowledge there had not been any change in the location of the garage or the shed or any of the walls for that period. She did think that Mr. Jollimore had built a wall on his property adjacent but no walls had been changed on her property nor had the gate posts. She was referred to the green area on Exhibit P/1 and asked if she had ever observed anyone walk along that area and she replied that it would be impossible to travel over the area because it would be necessary to carry a ladder to scale the wall. The same thing applied to the area shaded in blue on P/2 and in yellow on P/3, particularly on P/3 which would be more difficult because the building goes completely across. She was referring there to the garage.

On cross examination she stated that she had no knowledge of any discussion of the right-of-way within her family prior to 1960. She was asked if any obstruction to

the right-of-way in a general sense had been made by members of her family since 1944. Her answer:

"A. made by members of my family. Well, I feel that I couldn't answer that, Mr. Bryson, because I never realized that anyone considered there was a right-of-way on any particular spot, until Mr. Sutherland became interested in his property. And I doubt if anyone would obstruct something they didn't think was there, that was woodland.

Q. I see. So there was (not) any effort to block it, then, by any members of your family?

A. I doubt it. I feel I can't say for certain what previous owners did, but not to my knowledge. It wasn't discussed with me.

Q. Do you know if there had ever been any discussions with Mr. Sutherland by members of your family concerning the right-of-way?

A. I know that Mr. Sutherland, after he bought the property, I believe in 1963 although he could verify that, came to see my father to discuss the building of a road across the edge of the property at 10 Kirk Road. My father left the country in 1964 and at that time was most distressed, I believe, to find that Mr. Sutherland assumed that he could go ahead with this idea of his, and told me under no circumstances had he agreed to such a thing. The property at that time was, of course, part of my mother's estate anyway, dad at no time, I believe, owned the property."

The defendant, Mr. Harold J. Sutherland, said that he had lived on the property since 1963 and he purchased from Mr. Marshall a lot of land, the house, plus a right-of-way out through the Finley property, together

with the right-of-way along the shore. He had no other means of access to his property. He usually reaches it by the footpath and he described the difficulties he encountered in doing so, particularly in the winter weather when it was icy. In the summer he had to use a wheelbarrow for his groceries, all of which makes living in the house very uncomfortable. He was referred to his Deed and asked to read the last paragraph, as follows:

> "A. AND for the consideration aforesaid the Grantors grant, quit, release and quit claim unto the Grantee, his heirs and assigns all their right, title and interest in that easement appurtenant to the said lands for persons animals and vehicles over that existing foot path easement or public right-of-way from the northern boundary of the said lands to the southern boundary of Milton Drive (so-called) and over it to the Dingle Road (so-called) for the use of the Grantee, his heirs and assigns for all purposes at all times of the day or night."

He first thought this referred to the right-of-way over the Finley property. He was questioned on this again and indicated his conclusion that it was a footpath. He identified the shaded areas on the plans in evidence as his right-of-way. He stated that he had already taken out raspberry bushes and trees therefrom in the area between the Finley garage and his own dwelling. He further said that he had walked over the right-of-way sometimes with Mr. Gerald Martin over the length of it, and sometimes only partially over it. His opinion was that it could be developed by the use of a tractor or bulldozer. He did not think the elevation would be as steep as Park Hill Drive which, he said, was used as a county road. To walk the full length of it he would walk right from his house up to the School Road. There was some evidence that after consultation with Mr. Martin he had employed a surveyor, Mr. Servant, to draw a plan to be approved by the County Planning Board showing a lot of land on Marine Drive approximately 20 x 60. The plan was approved by the County Planning Board but not executed.

On cross examination he was again referred to the right-of-way which he described as the tow-path and it was suggested to him that the further easement had

with the right-of-way along the shore. He had no other means of access to his property. He usually reaches it by the footpath and he described the difficulties he encountered in doing so, particularly in the winter weather when it was icy. In the summer he had to use a wheelbarrow for his groceries, all of which makes living in the house very uncomfortable. He was referred to his Deed and asked to read the last paragraph, as follows:

> "A. AND for the consideration aforesaid the Grantors grant, quit, release and quit claim unto the Grantee, his heirs and assigns all their right, title and interest in that easement appurtenant to the said lands for persons animals and vehicles over that existing foot path easement or public right-of-way from the northern boundary of the said lands to the southern boundary of Milton Drive (so-called) and over it to the Dingle Road (so-called) for the use of the Grantee, his heirs and assigns for all purposes at all times of the day or night."

He first thought this referred to the right-of-way over the Finley property. He was questioned on this again and indicated his conclusion that it was a footpath. He identified the shaded areas on the plans in evidence as his right-of-way. He stated that he had already taken out raspberry bushes and trees therefrom in the area between the Finley garage and his own dwelling. He further said that he had walked over the right-of-way sometimes with Mr. Gerald Martin over the length of it, and sometimes only partially over it. His opinion was that it could be developed by the use of a tractor or bulldozer. He did not think the elevation would be as steep as Park Hill Drive which, he said, was used as a county road. To walk the full length of it he would walk right from his house up to the School Road. There was some evidence that after consultation with Mr. Martin he had employed a surveyor, Mr. Servant, to draw a plan to be approved by the County Planning Board showing a lot of land on Marine Drive approximately 20 x 60. The plan was approved by the County Planning Board but not executed.

On cross examination he was again referred to the right-of-way which he described as the tow-path and it was suggested to him that the further easement had

nothing to do with the tow-path but really was an easement over the Lynch property permitting him to drive a vehicle over the Lynch property out to Milton Drive and out to the Dingle Road. This, he said, had never been brought to his attention.

"Q. Yes. But wouldn't - I take it it would be fairly easy to construct a roadway for motor vehicles leading from the Lynch driveway, first leading easterly towards the Arm and then southerly towards your property, there wouldn't be much difficulty from the physical point of view of doing that?

A. I have never explored the property in there so I wouldn't have any idea of how much.

Q. I see. But you have looked at the Lynch property, you know what it's like?

.....

Q. Would it not be possible to put in a road leading from the driveway into the Lynch house, extend it about 20 feet to the east, that is, towards the Arm, and then extend that road southerly towards your property about 50 feet, and you would be on your property 50 or 100 feet?

A. Well, all things are possible, but

Q. All right. The Lynch property is on about the same level as your property is located, is it not?

A. Yes.

.....

Q. In fact it's really open ground between the Lynch property and your property, it's really, between their house and your house, it's just an open space, which is fairly level?

A. Yes.

Q. Yes. And how far would it be from your house to the Lynch house?

A. Oh, 150 feet."

He was further cross examined about the walks which he took and asked how he dealt with the wall. His reply was that he skirted the wall, he did not climb over it. There was a curve in the wall and he followed it and went around it. That would mean that he would go around it, I take it, to the north, which on the plan would appear to encroach on the Jollimore property and also on what has been referred to as the Gerald Martin property, that is, Lot 24.

This question of the reference to vehicles in what Mr. Sutherland felt was a tow-path was dealt with by Mr. Geoffrey James Marshall in his evidence. He was asked to explain it and he said:

"Yes. Inasmuch as we had on occasion followed that route by means of, with a vehicle, and inasmuch as if such use were continued for a sufficient length of time by occupiers or owners of what is now the Sutherland property, a right would then be acquired, and on advice of my solicitor, this paragraph was added for what little it might be worth."

He had already said that in using the tow-path he had on occasion followed it with the acquiescence of those who then owned the Lynch property with a motor vehicle, but the trespassers began to use it and park cars on Mr. Lynch's lawn so that Mr. Lynch blocked the access of vehicles by putting posts across the entrance to the tow-path. He stated that he knew as a fact that the description which had been previously put in evidence was really a description of the tow-path.

As to the right-of-way in dispute, he said the Deed gave the right to build a carriage road starting at a point three feet south to the northwest corner of the property and extending westerly and following the farm road of Amos Slaughenwhite to the main road. He himself, he said, gained access to the property across the lands formerly of Captain Cruickshanks and latterly Mr. Lynch's. He did say that he had gone through the so-called right-of-way in dispute, sometimes part way to try to get some idea

of the feasibility that might attend constructing a carriage road. He formed the opinion that it would be somewhat expensive but it could be done. He did see some evidence of rights-of-way leading from the Sutherland property and the rear portion, approximately 20 feet. To the westward of the house near the southern boundary there were some granite steps. The first and lowest step lay roughly north and south, parallel to the house. The steps curved to the southward toward the boundary and terminated a few feet from the boundary and almost directly opposite the end of the road.

> "..... which at that time ran across the Martin property to the eastward of the house and turned up on the - along the south side of the house."

He was asked if he saw any evidence of usage of this right-of-way. He said he saw no acts of obstruction through the so-called right-of-way, but it did appear that the Martin garage encroached on it. As to deliveries to his house, for the most part they were taken by himself in a packed basket or wheelbarrow or toboggan, and oil deliveries came through the Martin driveway, through the Martin property, and the truck would come down until it reached a point at the garage, that would be the Martin garage, and then there would be a long hose to the house. This was over the Martins' normal driveway. He agreed that these oil deliveries were with the expressed permission of the Martins. He further agreed that he was allowed occasionally to drive his car across the Lynch property to his house.

> "Q. Well, what were you giving to Mr. Sutherland, then, in P-20, what kind of rights were you giving to him?
>
> A. Only what I have already stated. I can't make it any clearer, I think. Very nebulous and hypothetical rights."

Despite the fact that the tow road had been used only, for many years, for foot passengers, he still insisted that that was the road referred to in the description in the Deed. He was asked about the other road which was mentioned in evidence over Lot 24, and said that he had walked through there and there was some evidence that there might, at some time in the past, have been some sort of a road there and since grown up. He was asked on

cross examination:

"Q. I take it that even on those other occasions when you did not follow this road that is outlined in pencil on lot (24), you didn't jump over the walls? or anything like that, did you?

A. Not that I remember of.

Q. You would recall something like that?

A. I think I should recall that and I don't remember doing it."

Mr. Ronald Wallace referred to a right-of-way which led from the back of his property to a road somewhere. He was vague about its direction and he could not locate it accurately. He did indicate that it went through the so-called green line on P/1. He did not have any occasion to use it and his provisions usually came across the public walkway. He could bring his car across with the permission of Captain Cruickshanks on the north. He did have an arrangement with Mr. Gerald Martin to bring oil through his property to his garage.

Mr. John Hussey remembered people walking from what he referred to as the Reynolds' house which is the Sutherland house, down to the Amos Slaughenwhite property. The two Slaughenwhite families lived there and they did work and visited the Reynolds. They came down through the woods, behind the garage, paralleling the stone wall to the south.

"A. To the south. To the south of one wall and north of the other wall. It would be north of the wall which is now the south boundary of the Sutherland property, and then when you came to the top of the hill, there was some stone walls up there, and from the garage on, there was always confusion in my mind where the right-of-way went, whether it went straight up the Mathers' property or whether it meandered through the woods out to the School Road."

Mr. Reynolds had, he said, indicated a right-of-way "up the hill towards the Martin garage". On cross

examination he was referred to the other right-of-way through Lot 24, mentioned by Mr. McKenzie. He said that when they were coming down from the Slaughenwhite houses they would follow, as he expressed it, "they came down, I would assume, in this line down here in green, down into here". He was pressed as to whether it was in fact using the more northerly right-of-way, because the other right-of-way was covered with trees and bushes, and he said:

"A. Actually, the right-of-way on the Finley property was terminated, I had no idea where it went from the garage, I had an opinion that the garage encroached on the right-of-way; and from here on I wasn't clear how you got from here to School Road.

Q. Yes. No, but what I am asking you about is what you say. And all I am suggesting to you is that there was a path, which is north of the area you are indicating, that people can easily pass back and forth.

A. Oh, yes.

Q. And that what you say these people walking on was, I suggest to you, this well defined path.

A. Well, actually, the houses were here and handier this wall they had to go that way to get to that path, they came this way and down here, sir.

Q. Where do you say the houses were, sir?

A. The houses were up under (24) area and they come this way rather than go up that way to the path.

Q. Well, with respect, sir, there are no houses on 24 area.

A. They are not now, but there were two old shacks in there, Tiny and Will Slaughenwhite.

Q. Oh, with respect, I don't think so, sir. You're

A. This is where Stafford lives now.

Q. He is way out here, you see."

At p. 160 he defined the word "here". He said they came down from the area marked (15) on the plan, which was shown as "Hartnett", "they came down along this way and in behind the garage and came down to the Reynolds' house." He was indicating the area in the green strip. He summarized it by saying that in the period of years from 1926 on, there would be half a dozen occasions in which he would see people walking over the area, and he stated there were only the Slaughenwhite's he saw walking down, who were friends with the Reynolds'.

Mr. Servant was called and he generally agreed with the plans which were prepared by Mr. McKenzie.

Mr. Frederick James Bignell lived in Jollimore since 1913 and was familiar with both the Mathers' and Reynolds' properties. He used to work for Mrs. Reynolds. His method of getting to her property was through Dr. Mathers' property, through his southern entrance and diagonally across Dr. Mathers' road.

On one occasion Dr. Mathers stopped him and asked him where he was going. On being told he was going down to Mrs. Reynolds, Dr. Mathers replied -

"Well ..... that's o.k. but you are not going down to the ferry ..... Well, then, I suppose it's o.k., you go."

He was never stopped on any subsequent occasion from going that way.

He also described deliveries of coal which were brought in the same way to Mrs. Reynolds.

He could not give the date of the construction of the walls, but felt they were built by Gilbert or Cecil Slaughenwhite. He had no idea when they were built.

A view of the property was taken on the 7th of July and on the 14th of August, 1967, and there was some further evidence.

Mr. William Joseph Jessop first came to Jollimore in 1901 and was there permanently until 1907. He remembered the stone walls on the Mathers' property, which he said had been built between 1914 and 1919. He at no time saw anyone walk in the vicinity of the wall. He never knew of any path in that area. Even in 1902 and 1903 he knew there was a stone wall there somewhere, but he did not remember any road down through there. There were trees around the Mathers' garage. Referring to the high wall between Dr. Mathers and the fence, it now stops where the driveway is, but it used to go right across, he said.

Mr. William MacIlreith was asked whether there were any paths north of the garage and shed on Dr. Mathers' property. He referred to a path on his father's property to the north, running from School Road to the shore. He guessed it went right through Roy Jollimore's house. It continued in a westerly direction across Marine Drive. The water tank was quite near. Anyone, he said, could use it to get to the shore, but he said Dr. Mathers' own driveway was used more often. As to the path, Mr. McIlreith said that there is still part of the retaining wall to hold it.

Mr. Allan Umlah described the pathway as a Green Road. He travelled on it several times a day. There was no road or pathway to the south of it. None between this road and the garage.

There is not too much conflict in the evidence on the question of user. I have set out the statements of the various witnesses reasonably fully and it is clear that the use made of any right-of-way in the position of that alleged was spasmodic and only on foot, and the position of both the shed and the garage would indicate, if any walking was done in that direction, there was a swing around the outside of the stone walls. It was suggested in the evidence of one of the witnesses, it would take the person so walking well into Lot 24. On the other hand, there have been obstructions to the right-of-way, certainly the right-of-way shown in green on the first plan placed in evidence, by the walls and particularly, by the shed and by the garage. It seems then that the first important point to decide is whether under these facts a right-of-way can still be asserted.

The main authority on which the defendant bases his position is Baker v. Harris, (1903) 1 D.L.R., p. 354.

Examination of the facts in this case discloses the plaintiff was the owner of property in Toronto. The defendant was the owner of a lot immediately adjoining to the south. In 1907 the lands were owned by a common owner and the title came down in a series of conveyances. In each of the conveyances throughout the chain of title, there was a grant of a mutual right-of-way over the northerly five feet of the defendant's lands and the southerly two feet of the plaintiff's lands to a depth of 75 feet. There was also a gate across the right-of-way 60 feet from the street and running from the line of the gateway westerly to the rear limit of the property was a fence. The defendant used the gateway as access over this mutual right-of-way to the rear portion of these lands mainly for her own motor car. The plaintiff first used the right-of-way only as far as her side door, which was about half-way from the street line to the gate, and had no occasion to use any other part of the right-of-way as access to her house. In 1925 she made alterations by which she could enter her premises immediately to the east of the gateway directly opposite a side door in the extension of her house, which gave her direct access from the right-of-way to this side door, as well as into the premises to the rear of her dwelling house. At this time she had uninterruptedly used this as a means of access to her premises as well as the right-of-way itself as far as the gate, but still had no occasion, in order to enter her premises, to use the portion of the right-of-way west of the gate. She decided to acquire a motor car which would require the use of the right-of-way to its full depth of 75 feet.

In 1927 the division fence between the properties fell and although the plaintiff's husband proposed to the defendant the construction of a concrete way along the division line between the rear portion of the property for their mutual use, the defendant against the plaintiff's objections had the division fence rebuilt.

This action was commenced and the defendant set up that the plaintiff had lost by abandonment or otherwise her right to use as a right-of-way any portion of the mutual way lying west of the gate. Kelly, J., said at pp. 356 and 358:

> " There was, as I have pointed out, no occasion for the plaintiff to use the right-of-way to a greater extent than she did use it down to the time when the necessity arose

of further use for the motor car which was about to be acquired. Relationship between the plaintiff and defendant and their families had been friendly and familiar; the defendant was aware of the contemplated purchase by the plaintiff's husband of the motor car which would necessitate using the mutual right-of-way throughout its length if the car were to be kept as was intended, on the plaintiff's premises; but no objection was made until the trouble arose over the erection of the fence, in the spring of 1928.

.....

"There is here an additional factor which adds strength to the plaintiff's position as compared with that of the successful respondents in the James case. From the conveyance of the plaintiff's property by Case in June, 1907, in which this right-of-way was first created and defined in writing until and including the conveyance to the plaintiff in August, 1919, each of the several successive registered conveyances of the plaintiff's property contains a grant of this right-of-way; and similarly each of the registered conveyances of the defendant's property, beginning with Case's conveyance thereof in October, 1908, and down to and including the conveyance to the defendant's husband in 1914, similarly sets out the right-of-way. As a matter of law this is not without effect and should not be overlooked."

The "James" case referred to in the last paragraph is James v. Stevenson (1893), A.C. p. 162. In the Supreme Court of Ontario which dismissed the appeal in Baker v. Harris, Grant, J.A., on pp. 360 and 361, dealt with Swan v. Sinclair, (1925) A.C. 227, and stated that he felt that that case should be distinguished because there, in the opinion of the House of Lords, no right-of-way had actually been created, but at most, the right within a reasonable time to call for its creation, "and that acquiescence in the existing condition of the property for a period of 50 years, coupled with certain other acts and user of a portion of it, justified the Court in inferring

an intention by the parties to abandon such right."

In James v. Stevenson (supra), the respondents and appellants were the owners of adjacent pieces of land. The documents of 1893 conveyed to the predecessor in title to the plaintiffs a large area "with a right of road or way, 1 chain in breadth, in, through, and out of the same, and commencing at or about the northwestern point of the said portion of land hereby released, or intended so to be, and running in a southerly direction to the Yarra Yarra River." The action was begun in the year 1888. On a large portion of the right-of-way there was no visible track nor any use of the road shown, except on one occasion when the plaintiffs' predecessor was repairing the fence. There was a portion where there was a gate ordinarily left open, and over that portion there was a road which appeared to have been in existence as far back as the evidence goes, and it had been used as a private road by the plaintiffs and their predecessors. Then from the end of that private road on, the rest of the way of the original right-of-way as granted, no gates were shown to have been inserted in the fences, no user is shown and no track existed, and it is over these unused portions that the dispute arose. Sir Edward Fry, at pp. 167 and 168, stated:

> "There can be no question of the abandonment of the entire right-of-way granted in 1839, because an important part of it has been and is used by the plaintiffs without disturbance; the only question can be, whether the northern and southern continuations of that road have been abandoned. Now, the only facts which can be relied on by the defendant in the present case are, the absence of user of the northern part of the way; the sence of gates in the fences of that part of the land; the absence of user of the southern right-of-way by the plaintiffs and their predecessors, except on one occasion in 1872, when it appears that materials for the repair of the fence were carted under the direction of the agent of Stevenson, a predecessor of the plaintiffs, through the gate in the Lower Heidelberg Road, and down the west side of the fence; and the user by the defendant and his predecessors, for farm purposes, of the portions of the land over which the roads in question would pass. But these facts are, in their Lordships' judgment, insufficient to

show any intention to abandon the right-of-way. It does not appear that occupants of the plaintiffs' land have ever had any occasion to use the northern part of the way, or the southern part, except once, and then they did so use it; and to have required gates to be inserted in the wooden fence at Banksia Road and the road to Eltham, when the way was not wanted for use, would have been an unreasonable act, the omission of which cannot be construed as the expression of an intention to abandon the right-of-way. Nor is the occupation for agricultural purposes of the strips of land subject to the easement, when the easement was not wanted, in the opinion of their Lordships a conclusive circumstance. It is worthy of notice, in reference to this question of abandonment, that ever since the year 1875 the plaintiffs have distinctly asserted their right to the way which they now claim, and if in the earlier period there is no evidence of such assertion, it must not be forgotten that it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it."

On the other hand, in Bell v. Golding (1896), 23 O.A.R., p. 485, MacLennan, J.A. pointed out at p. 494 that the doctrine of abandonment may be presumed from acquiescence in acts done by the owner of the servient tenement. At p. 496:

"Now here were not only the fence and the ice house when the conveyance was made, but the ice house pulled down fifteen years ago and a stable erected on its site; and the Queen street entrance built upon eight or nine years ago, all evidently with the knowledge of the successive owners of lot 5, and all without any complaint, remonstrance, or objection. I think that is such obstruction and such acquiescence as, upon the authorities, amount to an abandonment of this right-of-way if it ever existed."

In Liscombe v. Maughan, (1928) 3 D.L.R. at p. 397, Kelly, J., said at p. 399, that he was not satisfied the onus of proving that the plaintiff and his predecessor in title had lost through abandonment or a lapse

of time, the right-of-way granted by the conveyance of October 31, 1883. Grant, J.A., said at 402:

> "Non-user may be explained by showing that the owner of an easement had for the time no occasion to use it, he having other and more convenient means of employing his land than when the easement was of use."

In Swan v. Sinclair, (1925) A.C. p. 227, a row of houses was sold and one of the conditions under which the lots were sold provided for setting aside on the eastern boundary of the land a strip 15 feet wide running north and south which would give the occupier of each lot a back way for carriages from and into the street called Church Road. A quote from one of the documents is as follows:

> "..... and it was amongst others a condition of the said sale that the part coloured brown on the plan drawn in the margin of these presents was intended to form a right-of-way from the back gardens of each house into the Church Road and that the lots would be sold subject to and with the benefit of such right-of-way and that the piece of ground marked brown on the said plan of the width of 15 feet at the rear or bottom of the back gardens of each lot 1 to 10 inclusive would be included in the purchase of each of those lots but subject to a right of carraige way to the owners of lot 11 and each of the other lots through and over the same into the Church Road but such right-of-way would only belong to the respective purchasers on the determination of the existing tenancies and for that purpose each purchaser (except the purchaser of lot 3 which was vacant) would have to determine at the earliest possible period the tenancy of the lot purchased by him and that the respective purchasers were on the completion of their respective purchases to forthwith at the earliest possible period consistent with the determination of the existing tenancies remove the 15 feet of end garden wall and form the before mentioned right-of-way ....."

Then the Deed had these words:

"together with such right of carriage way into and over the pieces of ground marked brown at the rear of the premises lot 1 on the said plan into Church Road as in the said conditions mentioned."

This was in a Deed of what was known as 320 Essex Road. No roadway was in fact either formed or used and Viscount Case, L.C., said at p. 234:

"..... nor is there any evidence that any person interested in any of the several lots ever desired or requested that it should be formed or made any attempt to use it as a means of access to his premises. The walls dividing the several lots, including those parts of them which ran across the 15 feet strip to the eastern boundary of the land, remained intact, and in places where they fell down were rebuilt or replaced by fences ..... the fact is, that from the year 1871 until the year 1922, that is to say, for a period exceeding fifty years, the road remained unformed and unused."

On p. 237, Viscount Cave gave the basis of his opinion:

"Even if the right-of-way claimed had been effectively granted to the appellant's predecessors in title in the year 1871, the non-user of the way for upwards of fifty years, coupled with the fact that throughout that time the appellant and his predecessors acquiesced in the continuance of the walls running right across the proposed roadway and (since 1883) in the additional obstruction caused by the filling up of the strip of land on lot 1, would, ... have been good ground for inferring a release or abandonment of the easement."

Then he went on at p. 237:

"But the present case is not of that simple character. The conveyances of lots 2 and 3 do not contain a clean grant of the right-of-way claimed, but only a grant of such right-of-way as was mentioned in the

> conditions of sale; and in the same way, lot 1 was granted subject, not to a right-of-way, but to the provisions of the conditions of sale. There was no covenant by the several purchasers with the vendors to pull down the walls and form a roadway, nor was there any deed of mutual covenants entered into between the several purchasers. The effect of the transactions was at the most to create a contractual relation between the several purchasers and the vendors, under which the purchasers might perhaps have been called upon within a reasonable time after the execution of the conveyances and the determination of the existing tenancies to clear the land and form the road; but until that had been done there could be no effectual creation of the easement of passage. In these circumstances it appears to me that the lapse of time is fatal to the appellant's claim. For the period of fifty years or thereabouts no person sought to enforce the contract, if contract there was, or to enter upon the enjoyment of the easement; and this being so, it appears to me that it must inevitably be inferred that the arrangement made in 1871 has by common consent been released or abandoned and cannot now be revived."

I have set out the evidence in this case in perhaps too much detail, for I felt that it was necessary to give a true picture of the facts as they were presented. From these facts I am satisfied on certain points:

(1) There was a conveyance to the defendant's predecessor of title to certain rights in the Deed of June 18, 1891, recorded in Book 283, page 161.

(2) No carriage road or, in fact, no road was ever constructed pursuant to this document along the area claimed as a right-of-way in this action by the defendant, although portions of said area have been used from time to time to a limited degree for pedestrian traffic.

(3) There is evidence of a pathway over the northern portion of Lot 24 to which I have frequently referred, running west from Marine Drive, and evidence that this has been used from time to time over the years

for pedestrian traffic.

(4) The evidence of other forms of access to the property such as that from the most southerly portion of the plaintiff's property and that over the tow-path is quite clear, but the access from the southerly portion of the plaintiff's property was always obtained by consent and the tow-path has never been used for anything but pedestrian traffic except the limited use referred to by Mr. Marshall which was finally terminated by Mr. Lynch.

(5) As to the problem that the defendant, if he should not succeed in this action, would be landlocked, I do accept the argument that he has rights under Private Ways Act, Chapter 237, Revised Statutes of Nova Scotia, 1967, section 16 and the following sections, although I do not consider this fact at all conclusive in determining whether the defendant has the right-of-way he claims.

(6) I accept the evidence of Mr. J.D. McKenzie as to the lines and I accept his conclusion as to the northern boundary of the property as I have set it out in detail in the preceding pages of this decision. I also find that there have been obstructions over the years on this right-of-way in the form of the garage, the shed, and the stone walls. The defendant and his predecessors have not performed any work over the years and have not constructed at any time a carriage road or any other road over the area in question.

In determining these facts, it is my opinion that the whole case depends on whether the principles to be applied in this solution are those set forth in Baker v. Harris, or those enunciated in Swan v. Sinclair.

There is no doubt that there was a grant of something in 1891 to Mr. Martin Henry Bradford. If I hold that this is an outright grant of a right-of-way, then I feel that I am forced to this conclusion that the mere non-user by the defendant over the years was not sufficient to result in an abandonment of the right-of-way, although, in the present case, there is much more detailed evidence of interference with the alleged right-of-way, at least in the past forty years, than there was in the Harris case.

On the other hand, if I come to the conclusion that what was once given was a right to construct a road within the terms of Swan v. Sinclair, then I must conclude

there were benefits Mr. Bradford may have obtained in the 1891 conveyance, but neither he nor his successors in title took any steps to carry out the terms of the document and confirm such a right-of-way as would now be in existence in favour of the defendant Harold Sutherland.

After careful consideration, it is my view that this is the case. What was given was a free and uninterrupted right to build a carriage road which, of course, would, if it had been completed, carry with it the right to build a road for motor vehicles. I think there is no doubt about that. But there is no evidence that anything was done pursuant to this conveyance. It appears to me that the facts in the present case, which I have set out in such detail, come within the statements of Viscount Cave, L.C., which I have quoted.

In the result, the plaintiff must succeed and I award the plaintiff the sum of $82.40 for the cost of repairing the fence and an injunction restraining the defendant, his agents or anyone acting on his instructions, from entering upon or interfering with the property of the plaintiff, including the area under discussion in this decision, restraining them from cutting down or interfering with any natural growth, vegetation, trees, etc. I do not think any other damages of consequence have been proved, but I do award the plaintiff the costs of this action.

(sgd.) T.H. Coffin

J.

Halifax, N.S.

April 22, 1968

BETWEEN:

HALIFAX PORT AUTHORITY

OF THE FIRST PART

- and -

SHAUN SHEEHAN AND SUSAN SHEEHAN

OF THE SECOND PART

LICENCE AGREEMENT

Lawrence A. Freeman
McInnes Cooper & Robertson
1601 Lower Water Street
P. O. Box 730
Halifax, Nova Scotia
B3J 2V1
LF-1588 (244928.2)

LIC-2000 -74

THIS LICENCE TO USE RIGHT OF WAY AGREEMENT made this 1st day of May, 2000

BETWEEN:

HALIFAX PORT AUTHORITY, a body corporate established pursuant to the Canada Marine Act and having an office at 1215 Marginal Road, P. O. Box 336, Halifax, Nova Scotia, B3J 2P6,

(hereinafter referred to as the "Licensor")

OF THE FIRST PART

- and -

SHAUN SHEEHAN AND SUSAN SHEEHAN, both of Halifax, in the Halifax Regional Municipality, Province of Nova Scotia

(hereinafter called the "Licensee")

OF THE SECOND PART

The Licensor, in consideration of the mutual covenants contained herein, hereby grants to the Licensee a licence in respect of a 10 foot wide right of way, which said location is shown on Schedule "A" attached hereto, (the "Lands"), for a term of ten (10) years commencing on the 1st day of May, 2000, to the 30th day of April, 2010, for reasonable ingress and egress (prohibiting any parking on the Lands or otherwise obstructing movement over the lands) to their property at 9 Milton Drive, in the City of Halifax, Halifax Regional Municipality, including delivery vehicles, emergency vehicles, utility vehicles and invited guests of the licensees herein referred, subject to the following terms and conditions:

1. The Licensee shall pay to the Licensor the sum of One Dollars ($1.00) per year on the 1st day of May in each and every year.

2. The Licensee shall comply with all laws and rules, regulations and by-laws of the Licensor and any other Government Acts or Regulations from time to time in force which in any way

bear upon the rights and obligations arising out of or in connection with this Agreement and, without limiting the generality of the foregoing, the *Navigable Waters Protection Act* (Canada). The Licensee shall comply with all applicable environmental laws, regulations, guidelines or standards and shall indemnify and hold harmless the Licensor from any claims that may be made against the Licensor arising from the failure of the Licensee to comply with such laws, regulations, guidelines or standards. This indemnity and hold harmless obligation shall survive the expiration or earlier termination of this Agreement.

3. The Licensee shall not produce on or bring onto the Lands any toxic or hazardous substances, including, without limitation, PCB's radioactive materials, noxious gases or other substances which may, in the opinion of the Licensor, be injurious to human life or health ("Hazardous Substances") and the Licensee shall indemnify and hold harmless the Licensor from all liability from whatever source, for pollution from any cause whatsoever to or escaping from the Lands, and this indemnity shall survive the expiration or earlier termination of this Agreement.

4. The Licensee shall be responsible for the maintenance of the right of way to the satisfaction of the Licensor and any necessary repairs to the seawall adjacent to the Lands that might need to be made in order to accommodate the license. All costs associated with the maintenance and repairs are to be the responsibility of the Licensee.

5. The Licensor may, at any time, inspect any works constructed or placed on the Lands and further require additional maintenance thereto. Failure to maintain the right of way to the satisfaction of the Licensor will result in immediate termination of the License at the sole discretion of the Licensor.

6. The Licensee shall indemnify and hold harmless the Licensor from all claims, losses, liabilities and expenses (including, but not limited to, legal fees and other professional assistance) of any kind in respect of damage to the Licensor's property or loss suffered by the Licensor including, but not limited to, liability of the Licensor to third parties arising out of or in any way connected with the exercise of any rights hereunder, except to the extent that the loss arises out of the gross negligence of the Licensor, its officers or servants.

7. The Licensee shall not have any claim or demand against the Licensor for loss, damage or injury of any nature whatsoever or howsoever caused, arising out of or in any way connected with the exercise of any rights hereunder, to the person or property of the Licensee and the Licensee assumes all risk incurred while using or maintaining the Lands.

8. The Licensor does not provide any express or implied warranty of title to the Lands.

9. The Licensee shall, if required by the Licensor, extend, alter, or relocate said right of way. If the Licensee fails to make the required changes as soon as reasonably possible upon notice from the Licensor, the Licensor may make the required changes at the Licensee's risk and expense or terminate the agreement

10. Upon the expiration or earlier termination of this Agreement, the Licensee shall, at its expense, if required by the Licensor, remove any work constructed or placed on the Lands so that the Lands are returned so far as practicable to the condition that existed immediately prior to the commencement of this Agreement. Where, in the opinion of the Licensor, the Licensee has failed to remove its works and restore the Lands within a reasonable time, the Licensor may carry out the removal and restoration of these works at the Licensee's expense.

11. No waiver of a breach of any term of this Agreement is a waiver of any subsequent breach. A waiver must be in writing and signed by the party waiving the breach to be effective.

12. The Licensor shall have the right to enter upon the Lands at any time to carry out work thereon whether or not such work will interfere with the Licensee's rights under the Agreement and in such an event the Licensee shall not be entitled to claim against the Licensor.

13. This Agreement may not be assigned without the prior written consent of the Licensor.

14. Any notice required or permitted to be given hereunder may be given by mailing the notice registered mail with postage prepaid to the party at the address for that party listed below:

(a) To the Licensor: Halifax Port Authority
P. O. Box 336
Halifax, NS B3J 2P6

(b) To the Licensee: Shaun and Susan Sheehan
9 Milton Drive
Halifax, Nova Scotia

Service of any notice by registered mail shall be deemed complete on the date of actual delivery as shown on the addressee's registry receipt. Any party may, by notice in writing, designate a different address for service.

15. This agreement shall enure to the benefit of and binding upon the parties hereto, their successors and assigns.

IN WITNESS WHEREOF the parties hereto have executed this Agreement as of the date first above written.

SIGNED, SEALED AND DELIVERED In the presence of:	)	**HALIFAX PORT AUTHORITY**
Original Signed	)	Original Signed
Witness	)	President & Chief Executive Officer May 23/14
	)	C/S
	)	Original Signed
Original Signed	)	
Witness	)	SHAUN SHEEHAN
Original Signed	)	Original Signed
Witness	)	SUSAN SHEEHAN

(244928.2)

CANADA

INSTRUMENT OF GRANT

THIS INSTRUMENT HAS THE SAME FORCE AND EFFECT
AS IF IT WERE LETTERS PATENT

(Subsection 5(7), *Federal Real Property and Federal Immovables Act*)

ELIZABETH THE SECOND, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories, QUEEN, Head of the Commonwealth, Defender of the Faith.

TO ALL TO WHOM these Presents shall come,

GREETING:

WHEREAS a portion of the lands hereinafter described are or may be vested in Us in right of Canada and are under the administration of Our Minister of Transport, Infrastructure and Communities;

AND WHEREAS the Minister of Transport, Infrastructure and Communities has agreed to execute this Quit Claim Deed in respect of lands located at 5 Milton Drive, Halifax, Province of Nova Scotia, bearing P.I.D. No. 00279968 with respect to an alleged encroachment on lands administered by the Minister and managed by the Halifax Port Authority under the Letters Patent for the Halifax Port Authority;

AND WHEREAS authority has been given for the grant of the portion of the lands hereinafter described or the interest therein that is or may be vested in Us in right of Canada to CHARLES C. E. CRON and R. MARIE CRON, both of Halifax Regional Municipality, of the Province of Nova Scotia, as Joint Tenants, hereinafter called the Grantees, at or for the price or sum of Ten ($10.00) Dollars in Canadian currency;

NOW KNOW YE that We have remised, released and quitted claim and do by these Presents remise, release and quit claim unto the Grantees and their heirs all the right, title, interest, claim, property, estate and demand both at law and in equity, as well in possession as in expectancy, which We or our Heirs or Successors have, or may have, for the use of or in the Right of Canada, of, in and to, ALL AND SINGULAR those lands described Schedule "A" attached;

TO HAVE AND TO HOLD the said lands unto the Grantees and their heirs, forever.

IN WITNESS WHEREOF these Presents have been signed and countersigned under the *Federal Real Property and Federal Immovables Act* of Canada.

DATED this _____ day of JAN 14 2010, 20__.

Original Signed

For the Minister of Justice
Clifford Soward
Counsel
Department of Justice

Original Signed

For the Minister of Transport, Infrastructure
And Communities

Original Signed
Clifford Soward

I hereby certify that:
The Deed Transfer Tax has been paid ☐
No Deed Transfer Tax is due and payable ☑
within described property transfer.
Dated this 9 day of July 20 10 AD

Original Signed
Halifax County Land Registration Office
for Registrar

Schedule "A"

LOT 6-PR

MILTON DRIVE

HALIFAX, HALIFAX COUNTY, NOVA SCOTIA

ALL that certain lot of land situated on the southeastern boundary of Milton Drive in Halifax, County of Halifax, Province of Nova Scotia shown as Lot 6-PR on a plan (Servant, Duntarch, McKenzie & MacDonald Plan No. 14-1434-0) of Survey of Lot 6-PR, John T. Cruikshank Subdivision, Consolidation of Lands Conveyed to Charles C. E. & R. Maria Crow and Lands Claimed by Halifax Port Authority, signed by Terrence R. Dooper, NSLS, dated October 16, 2009 and being more particularly described as follows:

BEGINNING at the eastern corner of Lot 3-1A, lands conveyed to Roy & Elsie M. Saltmarsh by Indenture recorded at the Registry of Deeds for the County of Halifax in Book 1481, Page 399 on the northwestern boundary of Block A, lands conveyed to Gordon A. & Robert S. M. Finley by Indenture recorded at the Registry of Deeds for the County of Halifax in Book 5100, Page 84; said place of beginning being distant 1,316.17 feet on a bearing of N 10 degrees 03 minutes 46 seconds E from Nova Scotia Coordinate Monument No. 6010;

THENCE N 46 degrees 02 minutes 00 seconds W, 244.03 feet along the northeastern boundary of Lot 3-1A, Lot 3-2A, lands conveyed to Anthony C & Chui-Chu Thompson by Indenture recorded at the Registry of Deeds for the County of Halifax in Book 2287, Page 1006; Lot 1-1A, Lands conveyed to James R Jane A. McNiven by Indenture recorded at the Registry of Deeds for the County of Halifax in Book 5008, Page 249 and lands now or formerly conveyed to John T. Cruikshank by Indentures recorded at the Registry of Deeds for the County of Halifax in a Portion of Book 868, Page 271; Book 908, Page 249 and Book 1177, Page 536 to the southeastern boundary of lands conveyed to Bradford L. & Vera A. Blackford by Indenture recorded at the Registry of Deeds for the County of Halifax in Book 3713, Page 1217 ;

THENCE N 43 degrees 28 minutes 08 seconds E, 54.32 feet along the southeastern boundary of lands conveyed to Bradford L. & Vera A. Blackford to a point;

THENCE N 14 degrees 31 minutes 00 seconds W, 40.62 feet along the eastern boundary of lands conveyed to Bradford L. & Vera A. Blackford to a point;

THENCE N 69 degrees 53 minutes 43 seconds W, 44.58 feet along the northern boundary of lands conveyed to Bradford L. & Vera A. Blackford to the southern boundary of Milton Drive;

THENCE S 84 degrees 35 minutes 07 seconds E, 125.11 feet along the southern boundary of Milton Drive to a point;

THENCE N 52 degrees 31 minutes 17 seconds E, 171.53 feet along the southeastern boundary of Milton Drive to the Ordinary High Water Mark of North West Arm;

THENCE easterly, southerly, easterly southeasterly, southwesterly and southeasterly following the various courses of the Ordinary High Water Mark of North West Arm for a distance of 238 feet more or less to the northwestern boundary of lands conveyed to Susan Dawn Sheehan recorded at the Halifax County Lands Registration Office in Document No. 90505372; said point being distant 23.80 feet on a bearing of S 83 degrees 39 minutes 30 seconds E; distant 149.59 feet on a bearing of S 27 degrees 03 minutes 15 seconds E and distant 42.05 feet on a bearing of S 24 degrees 56 minutes 10 seconds W from the last described point;

THENCE S 43 degrees 04 seconds 26 minutes W, 170.34 feet along the northwestern boundary of lands conveyed to Susan Dawn Sheehan to a point;

THENCE S 33 degrees 52 minutes 18 seconds W, 69.28 feet along the northwestern boundary of lands conveyed to Susan Dawn Sheehan to the northeastern boundary of Block A;

Lot 6-PR (continued)

THENCE S 37 degrees 37 minutes 33 seconds W, 68.81 feet along the northwestern boundary of Block A to the place of beginning.

CONTAINING 63,490 square feet more or less.

ALL bearing are Nova Scotia Coordinate Survey System Grid Bearings and are referred to Central Meridian 64 degrees, 30 minutes, West.

THE above described Lot 6-PR being a portion of Lot 6, lands conveyed to Charles C. E. & R. Macie Cron by indenture recorded at the Registry of Deed for the County of Halifax in Book 3135, Page 703 and a portion of lands claimed by Halifax Port Authority.

SUBJECT to Proposed Easement 6-PR as shown and mathematically delineated on the subject plan over the western corner of Lot 6-PR containing an area of 148 square feet in favour of Civic No. 3 (Dillon Drive).

SUBJECT also to a Service Easement as shown mathematically delineated on the subject plan over the southern corner of Lot 6-PR in favour of the Halifax Regional Municipality as acquired by Expropriation No. 1708.

SUBJECT also to a Service Easement as shown mathematically delineated on the subject plan over the northeastern portion of Lot 6-PR containing an area of 3,331 square feet in favour of Halifax Regional Municipality as acquired by Expropriation 1711.

SUBJECT also to the public right to travel over the Public Foot Path as shown graphically on the subject plan.

Terrance R. Deogue, NSLS
Halifax, Nova Scotia
November 9, 2009

Private Ways Act, RSNS 1989, c 358

Current version: in force since May 19, 2011

Link to the latest version:	http://canlii.ca/t/87c6
Stable link to this version:	http://canlii.ca/t/lflg
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Private Ways Act

CHAPTER 358

OF THE

REVISED STATUTES, 1989

amended 2011, c. 25

NOTE - This electronic version of this statute is provided by the Office of the Legislative Counsel for your convenience and personal use only and may not be copied for the purpose of resale in this or any other form. Formatting of this electronic version may differ from the official, printed version. Where accuracy is critical, please consult official sources.

An Act Relating to Necessary Private Ways

See Pt. II for the appropriate sections

Short title

1 This Act may be cited as the Private Ways Act. R.S., c. 358, s. 1.

PART I

AUTHORITY OF GOVERNOR IN COUNCIL

Petition for right of way

2 (1) Every owner or occupier of any mine, mill, quarry, farm or factory who is desirous of transporting the produce of such mine, mill, quarry, farm or factory to a railway or public way, or to tidal or other waters or elsewhere, and every owner or occupier of any timber lands who desires to enter upon such lands and cut the timber or wood thereon and remove the same to a mill, railway or public way, or tidal or other waters or elsewhere, and who is unable to agree for a right of way with the owner or owners of any lands which it is necessary to cross in order to effect such entry or transportation, may present a petition to the Governor in Council.

(2) Such petition shall set forth

(a) the nature of the business which such owner or occupier is desirous of carrying on;

(b) a description of the property over which it is sought to obtain a right of way;

(c) the width of such right of way;

(d) the nature and extent of the right required; and

(e) the amount which such owner or occupier has offered to pay the owner or owners of the lands sought to be crossed for a right of way across the same,

and shall pray that proceedings be taken under this Part to enable the petitioner to acquire a right of way across such land. *R.S., c. 358, s. 2.*

Commissioner and powers on inquiry

3 (1) Upon the presentation of the petition the Governor in Council may appoint a commissioner who, for the purposes of the inquiry herein provided, has power to summon before him any persons and to require them to give evidence on oath or affirmation and produce such documents and things as such commissioner deems requisite.

(2) Upon such presentation, the Attorney General shall forthwith, at the expense of the petitioner, cause the owner of the land over which it is sought to obtain a right of way to be served with a copy of the petition, together with a notice that a commissioner appointed by the Governor in Council will, at a time and place to be named in such notice, hear the application for such right of way and any objections thereto, and the petition and notice shall be so served not less than twenty days before the day so appointed.

(3) If such owner is absent from the Province, service on him of such petition and notice may be made by publishing the same in a newspaper published in the county in which such lands lie for at least four issues of such newspaper. *R.S., c. 358, s. 3.*

Hearing and orders

4 (1) At the time and place so named, such commissioner shall hear such application and all objections thereto and report the evidence taken by him to the Governor in Council.

(2) The Governor in Council, if satisfied that the right of way sought to be obtained is actually necessary for the purposes for which it is sought and that it is otherwise just and reasonable that the same should be obtained, shall thereupon by order in council declare that the petitioner is entitled to acquire under this Part a right of way over the lands mentioned in the petition or a part thereof.

(3) Such order shall define the boundaries of such right of way and shall specify the nature and extent of the right and whether the right is to be acquired in perpetuity or for a term of years. *R.S., c. 358, s. 4.*

No right of way through building or orchard

5 Where the commissioner finds on examination that the proposed right of way runs through any house, building, orchard or garden, he shall, without further inquiry, so report to the Governor in Council and no further proceeding shall take place on such petition. *R.S., c. 358, s. 5.*

Remuneration of commissioner

6 The petitioner shall pay such commissioner for his services such sum as is determined by the Governor in Council and the Governor in Council may make the payment of such sum a condition precedent to the making of the order in council declaring the petitioner entitled to acquire a right of way. *R.S., c. 358, s. 6.*

Costs

7 Where the application of the petitioner is refused, the Governor in Council may order such petitioner to pay to the owner of the land, to defray the expenses incurred by such owner in opposing the application, such sum as the Governor in Council determines. *R.S., c. 358, s. 7.*

Deposit

8 Before such commissioner is appointed, the petitioner shall deposit with the Attorney General the sum of one hundred dollars, towards the payment of the commissioner for his services, and of any expenses incurred by the Governor in Council in connection with

such petition, and of any sum ordered to be paid by the petitioner to the owner of the lands over which the right of Way is sought in case of the application being refused. *R.S., c. 358, s. 8.*

Notice to appoint arbitrator

9 Within thirty days after the making of such order in council, the petitioner shall serve a notice on the owner of the land over which it is sought to acquire a right of Way, stating the name of one arbitrator, and requiring such owner to name another arbitrator, for the purpose of assessing the compensation and damages to be paid to the owner of such lands on account of the right of Way sought to be acquired and, if such owner refuses or fails to notify the petitioner of the appointment of an arbitrator within ten days after service of such notice, a judge of the Trial Division of the Supreme Court or of a county court may appoint such arbitrator. *R.S., c. 358, s. 9.*

Appointment of third arbitrator

10 The two arbitrators so appointed shall be notified by the petitioner of their appointment and within twenty days after such notice choose a third arbitrator and, if they fail to choose such third arbitrator within twenty days after such notice to them, such third arbitrator shall be appointed by the Governor in Council. *R.S., c. 358, s. 10.*

Duty of arbitrators

11 Such arbitrators shall, without delay, proceed to assess the compensation to be paid with respect to the lands over which such right of Way is acquired, and for the damages, if any, occasioned by the acquisition of such right of Way, and shall file their award with the Attorney General. *R.S., c. 358, s. 11.*

Vesting of right of Way

12 On payment to such owner of the amount so awarded, a right of Way as in the said order in council defined shall vest in the petitioner. *R.S., c. 358, s. 12.*

Registration of copy of order and award

13 (1) A copy of the order in council and of the award, certified under the hand of the Attorney General, shall be registered in the registry of deeds for the registration district in which is situated the land over which the right of Way is acquired.

(2) The fees for such registration shall be those provided for the registration of deeds and shall be paid by the petitioner. *R.S., c. 358, s. 13.*

Insufficient deposit

14 If the amount deposited by the petitioner with the Attorney General is insufficient for the purposes for which the same is required to be deposited, he shall pay any deficiency before any award is made by the arbitrators. *R.S., c. 358, s. 14.*

Application of Part to sluice

15 This Part shall apply to a right of Way for and a right to build a sluice by which to convey, transport, or remove the produce, timber and wood mentioned in Section 2 by water or otherwise. *R.S., c. 358, s. 15.*

PART II

AUTHORITY OF MUNICIPAL COUNCIL

Interpretation

16 In this Part,

(a) "commissioner" means the person appointed by the council under this Part;

(b) "council" means the council for the municipality in which the road, alteration, landing or work is situated;

(c) "land" includes any easement or right in land;

(d) "owner" includes any person having an interest in land or in an easement or right in land;

(e) "road" includes a bridge or approach to a bridge, except in the provision prescribing the width of a road;

(f) "warden" means the warden for the municipality in which the road, alteration, landing or work is situated. *R.S., c. 358, s. 16.*

Petition for private way or road

17 (1) Any freeholder or freeholders of any municipality may present a petition to the council praying for the obtaining and laying out of a private way or road, either open or pent.

(2) Where the council is satisfied that the application should be granted, it shall order a precept to be issued to a competent person as a commissioner, directing him, within a convenient time, to

(a) examine whether the proposed private way or road is the most practicable and reasonable means of access for the person or persons petitioning for the way or road to his or their lands or property or rights;

(b) if satisfied with respect thereto, lay out the same in the manner most advantageous to the person or persons applying for the way or road and least detrimental to the owner or owners of the land through which the same shall pass; and

(c) mark out the same on the land. *R.S., c. 358, s. 17.*

Further duties of commissioner

18 (1) If the commissioner considers that the proposed way or road is reasonable and practicable and requisite for the purposes of the person or persons applying therefor, he may lay out and mark the same and make plans thereof, in duplicate, and if he considers otherwise he shall so report to the council.

(2) Such way or road shall be not more than twenty-five feet in width. *R.S., c. 358, s. 18.*

Agreement for compensation

19 (1) The commissioner may make an agreement in writing as to the compensation therefor with the owners of the land, the use of which is required for the purposes of the proposed private way or road.

(2) Such agreement shall contain a description of such land, a reference to the plan and the amount agreed upon for compensation.

(3) The commissioner shall transmit to the municipal clerk, to be laid before the council with his precept, such agreement and a full report of his proceedings thereon. *R.S., c. 358, s. 19.*

Appointment of arbitrators

20 Where no agreement for compensation is made, arbitrators to appraise the same shall be appointed in the following manner:

(a) one arbitrator shall be appointed by the commissioner, another by the owner of the land and a third by the warden;

(b) the county court judge for the district in which the dispute arises may appoint an arbitrator to act on behalf of any owner, who is under disability, or absent from the Province, or who fails to appoint an arbitrator in his own behalf, after three days notice to him when he is within the municipality and fifteen days notice when he is not within the municipality but is within the Province;

(c) such notice may be given by the commissioner and may be served by delivering the same to the owner or, if he is not within the municipality, by mailing the same to his last known address, postage prepaid;

(d) no notice shall be necessary in the case of the disability of the owner or of his absence from the Province. *R.S., c. 358, s. 20.*

Joint appointment of arbitrator and failure to appoint

21 (1) Where the land of more than one owner is required, the owners with whom no agreement has been made, instead of each appointing an arbitrator, may join in the appointment of one arbitrator to act with the two arbitrators appointed as hereinbefore provided in appraising the amount of the compensation to be paid to each of the owners represented by such arbitrator.

2) If any of the owners fails to join in making such appointment after seven days notice by the commissioner to do so, the county court judge for the district in which the dispute arises shall appoint an arbitrator to act on behalf of those who do not so join, and such appointment is as valid as if they had joined in making such appointment. *R.S., c. 358, s. 21.*

Oath

22 The three arbitrators, before entering upon their duties, shall take an oath before a justice of the peace that they will faithfully and impartially discharge the same. *R.S., c. 358, s. 22.*

Appraisal by arbitrators

23 (1) The arbitrators shall enter upon the land and appraise the compensation payable to the owner in respect thereto.

(2) The award of the majority of such arbitrators is valid and binding.

(3) The precept, with the report of the commissioner and the award, accompanied by a plan and containing or referring to a description of the land, shall be transmitted to the municipal clerk to be laid before the council. *R.S., c. 358, s. 23.*

Notice to interested person

24 After the report of the commissioner, with an agreement or award for compensation, is transmitted to the clerk, he shall, not less than thirty days previous to the next meeting of the council, serve a notice containing the substance of such report, agreement or award, upon each of the persons interested in the lands through which the way or road is proposed to be laid out, and service of such notice may be effected by mailing the same to the last known address of each of the persons, postage prepaid and registered. *R.S., c. 358, s. 24.*

Consideration of report

25 At the meeting of the council next after the receipt of the report, or at any subsequent meeting to which the consideration of the same is adjourned, the report, with the agreement or award for compensation, and any objections thereto shall be considered. *R.S., c. 358, s. 25.*

Decision of council

26 (1) The council may confirm or disallow the report and, if it is satisfied that the amount of the compensation is either insufficient or excessive, it may disallow and set aside the agreement or award and direct a new appraisement of the compensation to be made, unless an agreement is entered into in respect thereto, and may delay action on the precept until a new agreement or award is made and transmitted.

(2) The council may also either confirm or disallow the new agreement or award. *R.S., c. 358, s. 26.*

Filing of documents

27 If any agreement or award is confirmed, the municipal clerk shall file the same, and the papers in connection therewith, and shall enter the fact of such confirmation in a book to be kept by him for that purpose. *R.S., c. 358, s. 27.*

Calculation of compensation

28 The compensation to which an owner shall be entitled shall include the value of the use of the land so taken, if any, and the damages to the land of the owner directly caused by such private way or road. *R.S., c. 358, s. 28.*

Payment of compensation and expenses

29 The compensation ascertained by the agreement or by the appraisement of the arbitrators, and the expenses incurred in respect thereto, shall be paid by the council, and may be charged against and recovered from any polling district in which such private way or road is made, or in whole or in part from the applicant or applicants therefor, as the council may direct. *R.S., c. 358, s. 29.*

Council by-laws

29A (1) The council may make by-laws respecting the payment of compensation charged against the polling district in which a private way or road is made, or in whole or in part against the applicant or applicants therefor.

(2) A by-law passed pursuant to subsection (1) may provide

(a) that the charges may be chargeable according to a plan or method set out in the by-law;

(b) when the charges are payable;

(c) that the charges are first liens on the real property in the polling district or belonging to the applicant or applicants, and may be collected in the same manner as other taxes;

(d) that the charges be collectable in the same manner as taxes and, at the option of the Treasurer, be collectable at the same time, and by the same proceedings, as taxes;

(e) a means of determining when the lien becomes effective or when the charges become due and payable;

(f) that the amount payable may, at the option of the owner of the property, be paid in the number of annual instalments set out in the by-law and, upon default of payment of any instalment, the balance becomes due and payable; and

(g) that interest is payable annually on the entire amount outstanding and unpaid, regardless of whether the owner has elected to pay by instalments, at a rate and beginning on a date fixed by the by-law. *2011, c. 25, s. 1.*

Entry on land

30 (1) No ascertainment or tender of the amount of compensation is necessary before entering upon land required for a private way or road.

(2) When the amount is ascertained, the municipal clerk shall, under his hand, give such owner notice in writing that such amount is subject to his order in the hands of the municipal treasurer.

(3) Such notice may be mailed to his last known address, postage prepaid, and, if he resides out of the Province and his address is not known, no notice or tender shall be necessary. *R.S., c. 358, s. 30.*

Registration of documents and effect

31 One of the plans and the agreement or, if there is no agreement, a copy of the award shall be registered in the registry of deeds for the registration district in which the land lies, and such registration shall be held to vest the title as an easement to the land or rights of the person or persons applying for such private way or road. *R.S., c. 358, s. 31.*

Appeal

32 (1) Any person petitioning for a private way or road, and any person who is interested in the lands through or over which such way or road is to be laid out, may, within ten days after the decision of the council, appeal from the decision of the council to the county court in the county wherein it is proposed to lay out such way or road, by giving notice thereof to the warden or municipal clerk, in writing, stating the grounds of appeal.

(2) The municipal clerk shall thereupon transmit the proceedings to the clerk of such court.

(3) The appeal shall be heard at the next sittings of the court in the said county or, if it sits in more than one place in the county, then at the next sittings held at the place nearest by the usual route of travel to the proposed private way or road.

(4) After hearing the appellant, the other parties interested and the municipal council, and any witnesses produced, the court shall finally determine the questions raised, and

either allow the appeal and quash, set aside or reverse the decision of the council, or confirm the same, either with or without costs, in the discretion of the court. *R.S., c. 358, s. 32.*

Gate on private way or road

33 (1) The council may direct gates to be placed on private ways or roads, and make regulations respecting the placing and keeping thereof.

(2) Every person guilty of a breach of such regulations shall, for every offence, be liable to a penalty of not less than one dollar and not more than eight dollars. *R.S., c. 358, s. 33.*

Remuneration of commissioner

34 The commissioner shall, for his services, receive such remuneration as the council allows. *R.S., c. 358, s. 34.*

Petition to shut up altered or abandoned way or road

35 (1) Where a private way or road or any part thereof has been altered or abandoned, any person interested therein or any of the owners of land adjoining the same may, by petition stating the facts and the names of all persons interested in the way or road and in the lands on either side thereof, apply to the council to shut up or otherwise dispose of the same.

(2) At least thirty days previous notice in writing of the application shall be given to the persons interested and posted up on two conspicuous places near the way or road and the petition shall be accompanied by an affidavit proving that such notice has been so given and posted.

(3) The council shall hear the person or persons making the application, the persons who have been notified and any witnesses produced on behalf of any such persons and shall make an order either dismissing the application or granting the same in whole or in part. *R.S., c. 358, s. 35.*

PART III

GENERAL

Expropriation Act does not apply

36 For greater certainty,

(a) an order, award or decision made or any other action taken pursuant to this Act is not an expropriation for the purpose of the Expropriation Act or at common law or otherwise; and

(b) the Expropriation Act does not apply to this Act or to any order, award, decision or any other action made or taken pursuant to this Act. *2011, c. 25, s. 2.*

Durland, Gillis, Parker & Richter
Barristers, Solicitors, Notaries

W. BRUCE GILLIS, Q.C.
CHRIS K. PARKER, B.A., LL.B
RONALD D. RICHTER, B.A.(HON.) LL.B.

COUNSEL: CLARE H. DURLAND, Q.C.
(NON-PRACTISING)

76 COMMERCIAL STREET
P.O. BOX 700
MIDDLETON, NOVA SCOTIA
B0S 1P0
TELEPHONE (902) 825-3415

G-3729

26 May 1999

Livingstone & Company
Barristers & Solicitors
P.O. Box 664
Dartmouth, NS
B2Y 3Y9

Attention: Deborah M. Baker

Dear Deborah:

In reviewing my old file respecting an application under the *Private Ways Act*, I noted that there apparently was never a written report submitted by the Commissioner appointed under the Act. He met with the parties, discussed the matter and reported verbally to Council where upon the adjacent land owners reached an agreement under which my client purchased all of the adjacent lands at an agreeable price and was able to provide for a deeded right-of-way which allowed for a 66 foot roadway into the appropriate subdivision.

Accordingly, this probably is not much help to you, but I enclose herewith for your information a copy of the Petition and the accompanying Affidavit that were presented to Council.

Yours very truly,
DURLAND GILLIS PARKER & RICHTER

Original Signed

W. BRUCE GILLIS, Q.C.

WBG/hh
Encls 3

Via Fax 461-4911

IN THE MATTER OF the Private Ways Act

- and -

IN THE MATTER OF a Petition for private right-of-way by Evelyn MacMaster

TO: The Council of the
Municipality of the County of Annapolis
P.O. Box 100
Annapolis Royal, NS
B0S 1A0

The Petition of Evelyn MacMaster herewith, HUMBLY PRAYS that the County Council of the Municipality of the County of Annapolis shall order a precept to be issued to a competent person under the provisions of s. 17 of the Private Ways Act for the obtaining and laying out of a private way or road to lands of the Petitioner, located at Meadowvale, Annapolis County, Nova Scotia, to the rear of Jefferson Subdivision in accordance with the existing right-of-way established by the previous owners.

The circumstances and facts surrounding the request are as shown in the Affidavit of the Petitioner, attached hereto.

DATED at Middleton, Nova Scotia, this 15th day of January, A.D., 1993.

Original Signed

W. BRUCE GILLIS, Q.C.
Solicitor for the Petitioner

IN THE MATTER OF the Private Ways Act

- and -

IN THE MATTER OF a Petition for private right-of-way by Evelyn MacMaster

A F F I D A V I T

I, **Evelyn MacMaster**, of Meadowvale, Annapolis County, Nova Scotia, make oath and say as follows:

1. **THAT** I am the widow of Charles E. MacMaster, Sr., of Meadowvale, Annapolis County, Nova Scotia, who died intestate on the 28th day of December, 1988, possessed of certain lands described in the Schedule hereto.

2. **THAT** all of the said lands south of the Annapolis River and north of the Meadowvale Road have been conveyed since the death of my said husband.

3. **THAT** the balance of the lands lying north of the Annapolis River have no direct access to any public road.

4. **THAT** during the ownership of the lands by my late husband, the lands were adjoined by lands of one Milford Jefferson who subdivided his adjoining lands over a period of a number of years in the 1960s and 70s.

5. **THAT** in the course of creating his subdivision Mr. Jefferson cut off a right-of-way that allowed access directly to my husband's lands from the Ward Road, Highway No. 201, and had been used for many, many years for that purpose.

6. **THAT** by verbal agreement made between my late husband and the late Mr. Jefferson, an alternative right-of-way was created leading westward from Willow Avenue across lands of Mr. Jefferson, to the northeast corner of my husband's lands and they in fact built a gravel road to provide that access. In exchange for this, my husband abandoned the old access which led directly north to Highway 201.

7. **THAT** although Mr. Jefferson and my husband agreed to this access verbally, nothing was committed to paper, although there was substantial work performed on the ground to create a roadway providing for the new access road.

8. **THAT** since the death of my husband and the late Mr. Jefferson, the lot across which the new access road led was purchased by one Dean Saltzman, who now lives in the adjoining lot on Willow Avenue in the Jefferson Subdivision.

9. **THAT** the said Dean Saltzman has refused to acknowledge the existence of an agreed right-of-way and has attempted to block my access to the remaining lands which I inherited from my husband.

10. **THAT** as a result thereof, I have had difficulty asserting my access to my property and although I am advised by my solicitor and verily believe that there is an easement which has been created by operation of law, there is no paper documentation to establish this access and it would be extremely expensive and complex to apply to the Supreme Court to obtain confirmation of this access.

11. **THAT** as a result I am presenting a Petition to the municipal Council under the provisions of the Private Ways Act asking for the Council to obtain and lay out a private way or road leading to the remaining property which I inherited from my husband, and permitting undisputed access.

SWORN TO before me at Middleton in the County of Annapolis and Province of Nova Scotia, this 14th day of January, A.D., 1993.

Original Signed

A Commissioner of the Supreme Court of Nova Scotia

HOLLY HARRIS
A COMMISSIONER OF THE SUPREME COURT OF NOVA SCOTIA.

Original Signed

EVELYN MacMASTER

ALLNORTH CONSULTANTS LIMITED

229-1595 Bedford Highway, Bedford, NS, B4A 3YA Phone 902-835-7378 Fax 902-835-7385

September 25, 2011 Project No. 11-HF-0073

5 Milton Drive
Halifax, Nova Scotia

Attn: Dr. Charles and Mrs. Marie Cron

Re: Private Way Assessment, 5 Milton Way, Halifax NS

As requested by your solicitor, Mr. John Keith, Allnorth Consultants has reviewed the property noted above to assist in the determination of the most appropriate access for 9 Milton Way, which is currently land-locked, in accordance with the Private Ways Act. This act states:

- "Examine where the proposed private way or road is the most practicable and reasonable means of access for the person or persons petitioning for the way or road to his or her lands or rights."
- "If satisfied with respect thereto, layout the same in the manner most advantageous to the person or persons applying for the way or road and least detrimental to the owner or owners of the land through which the same shall pass."

Our assessment focuses on the design and construction of the private way and not the impact of the private way on the property value. Following is a summary of our assessment:

Location Options for Private Way

Refer to attached figures for basic location and layout of the three options. Green lines represent new or upgraded retaining walls.

Option 1 (Red) – Tow path (front of Cron property, parallel to water and sea wall)

Option 2 (Blue) – Rear of Cron property

Option 3 (Black) – From east side of Sheehan property (through Marterra owned lands)

Figure 1 – Option 1 and 2

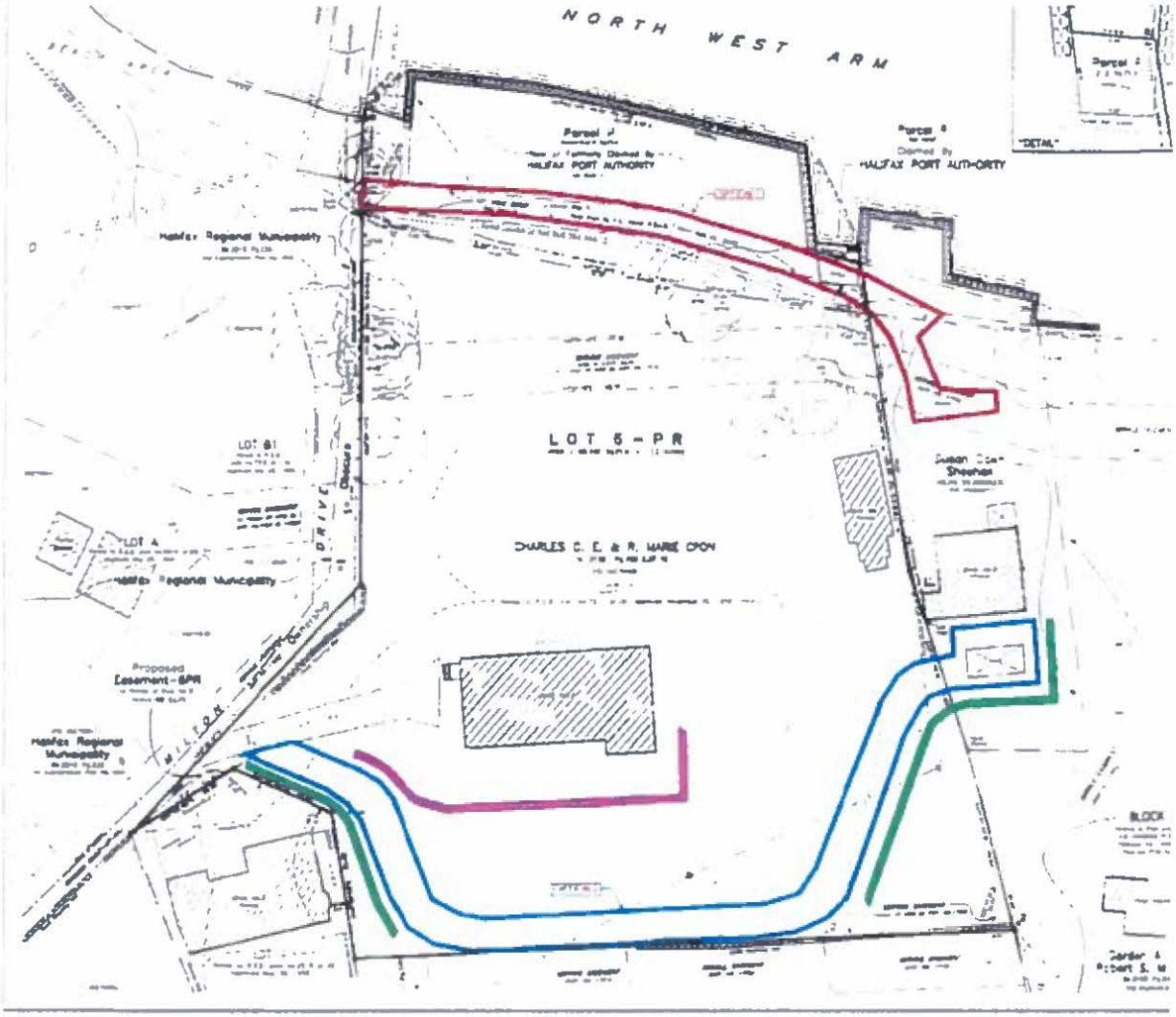
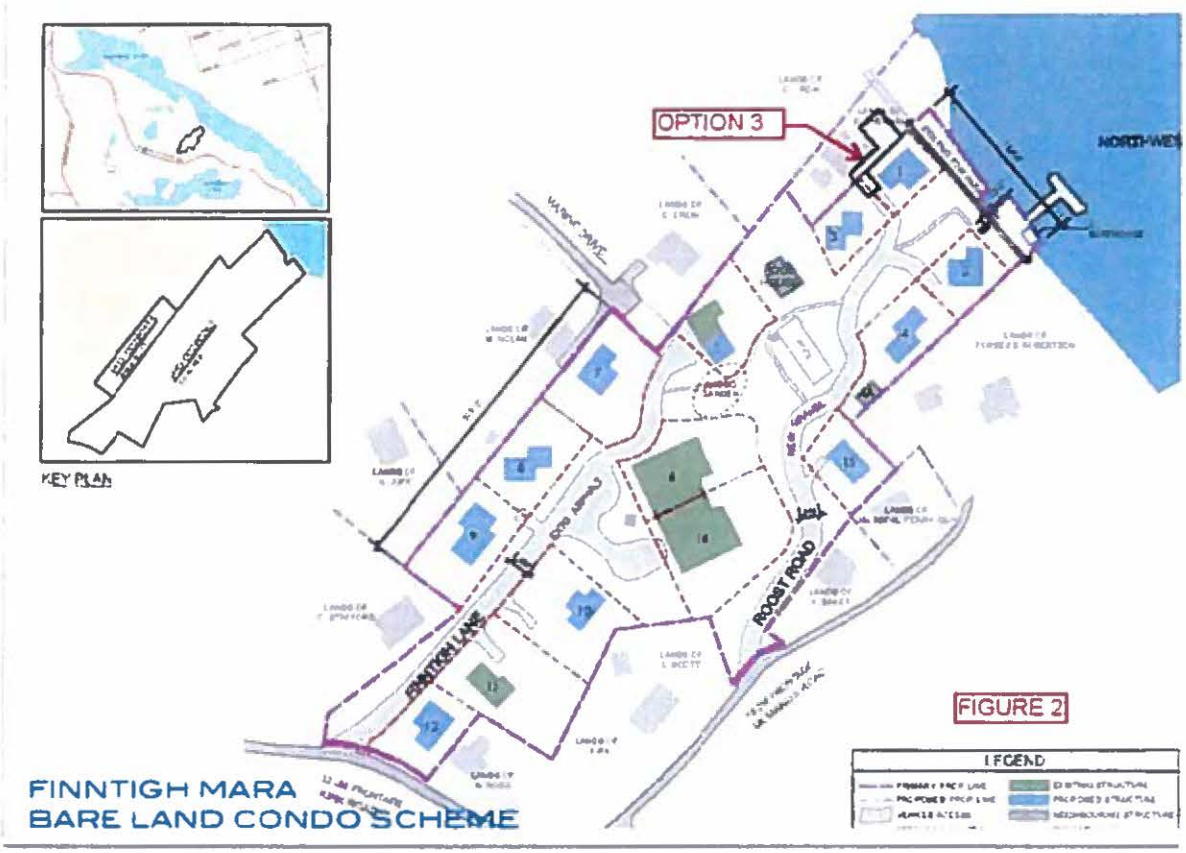


Figure 2 – Option 3



Geometric Design Requirements and other Considerations:

- NBCC – Cl. 9.10.20.3 states that
  - ✧ "Access for Fire department equipment shall be provided to each building by means of a street, private roadway or yard."
  - ✧ "Where access to a building as required in sentence (a) is provided by means of a roadway or yard, the design and location of such roadway or yard shall take into account connection with public thoroughfares, weight of firefighting equipment, width of roadway, radius of curves, overhead clearance, location of fire hydrants, location of fire department connections and vehicular parking"
  - ✧ Adequate access for firefighting and turning movements is required
- TAC, HRM Specifications and NS standard specifications all indicate that the recommended minimum driveway width is 3 m (10').

Option 1

General

- Construction of the infill behind seawall is unknown and a geotechnical assessment would likely be warranted if a 3 m (10') private way is to be established. The estimated cost for this evaluation is $10,000.

- Increasing the existing access to provide the minimum recommended with of 3m will require the following construction activities:
  - ✧ Possible tree trimming and/or removals
  - ✧ Removal of the top organic layer (known as grubbing)
  - ✧ Grading of private way for appropriate drainage including temporary erosion and sediment control
  - ✧ Infill and/or removal of existing historic boat slip
  - ✧ Placement of appropriate base materials (gravels) to support the required vehicle loads, in accordance with HRM and NSTIR specifications.
  - ✧ Space will also have to be provided for the Tow Path to be relocated to either side of the private way with an appropriate surface.
  - ✧ Reinstatement of any damaged areas of adjacent lands.
- The estimated cost to design and construct the driveway with a gravel surface over the Cron property is $7,500.
- Once the private way is developed there is a potential for vehicles to park on the property near the seawall and it is not known if the seawall construction has been designed to support the additional loads. This may require a structural assessment of the seawall if a barrier is not installed to prevent the public from parking in this area. This would cost an estimated $2,500-10,000.
- The private way for this option will pass in front of the Cron residence and will present a visual and audible disturbance to the Cron's
- Due to the size of the lot, subdivision of the Cron lot to produce a high-valued waterfront building lot would be feasible, but would be much more complicated if a right of way existed at the location of Option 1

Safety

- The proximity to the water and seawall will present a hazard to users of the private way, including residents, guests, service vehicles, emergency vehicles and foot traffic
- By constructing the private way, the access will become more prominent and will attract additional foot traffic and overflow parking from the Dingle Park. This will result in a liability and a nuisance to both the Cron property and the Sheehan property.
- Currently there is a small section barrier near the southern boundary of the Cron property; however, it is not sufficient to prevent someone from driving off the infill area if there is an errant vehicle. It is recommended that if this private way that the existing barrier be lengthened or a new barrier installed. An access point to cross the barrier can be provided.
- With the development of the Finntigh Mara-Bare Land Condo there is the potential of increased foot traffic along the existing tow path and this may result undesired vehicle and pedestrian interaction further, supporting the need to install a barrier along the full length of the private way.
- The barrier could be designed to be aesthetically pleasing
- The estimated cost for a barrier would be $2,000 - $10,000 depending on the level of aesthetics desired
- The above safety concerns would not exist if the Sheehan property were accessed through the Marterra property rather than the Cron property.

Environmental and Historical

- The "Tow Path" has significant historical value as it has reportedly been in use for more than 200 years. Based on Allnorth's site visit in June of 2011, it is still used on a regular basis. Discussion on this can be found in HRM's discussion on the Marterra Development on the other side of the Sheehan property.
- Due to the proximity to the water and associated vegetation, an environmental impact assessment may be warranted to identify any potential concerns such as contamination of the water, endangered species of plants or animals and construction techniques.
- The estimated cost to prepare this assessment and design any required mitigation is $5,000-10,000.

Total Cost

- As described herein, the total estimated cost to construct the private way across the front of the Cron property is $37,000 to $57,500.

Option 2

General

Option 2 involves construction of a private way along the rear property boundary of the Cron property. Construction of this access will maintain as much clearance from the Cron property as possible, minimizing impact to the Crons, but will involve a relatively steep climb and decent at the beginning and end of the access road. The access will start at the entrance to the existing property.

- To construct option 2, the following construction will be required:
  - ✧ Widening of the existing driveway for the Cron property to allow parking and access to the new private way
  - ✧ Tree removal and removal of the top organic layer (known as grubbing)
  - ✧ Grading and new retaining wall construction in 3-4 areas. This will include upgrades to the existing retaining structure (old rock walls). The retaining wall will likely be 10-15' high in places.
  - ✧ Temporary erosion and sediment control
  - ✧ Removal of the shed in the rear of the Sheehan property
  - ✧ Possible relocation of the power and phone services for Cron and Sheehan
  - ✧ Placement of appropriate base materials (gravels) to support the required vehicle loads, in accordance with HRM and NSTIR specifications.
  - ✧ Reclamation of the existing driveway and parking area in front of the Sheehan property
  - ✧ Reinstatement of any damaged areas of adjacent lands.
- The footprint of the private way in Option 2 will be larger than Option 1
- Option 2 would eliminate many of the Cron's existing gardens, however, many new planting areas could be implemented into retaining wall structures
- Trees and other plantings could be incorporated to minimize the visual and audible impact on the Cron residents
- The driveway for the Sheehan property would be in the rear of the house, rather than the front as currently exists, which is more desirable for a waterfront property

Safety

- The primary safety concern will be created by retaining walls on the water side of the proposed private way. Mitigation of this can be built in to the retaining wall structure and provided by lighting

Environmental

- Few environmental concerns would exist for this alternative.
- Concerns can be mitigated by incorporating appropriate erosion and sediment control devices and methods during construction

Total Cost

- The estimated cost to design and construct the driveway with a gravel surface over the Cron property is $75,000 to $150,000 dependent on the style of retaining walls selected
- A topographical survey and preliminary design is recommended prior to selection of this option to confirm that this option is technically possible if it is chosen as the most desirable option.

Option 3

Based on a review of the Marterra development presented in HRM's development approval process, it appears as though there will be an access to a proposed dwelling constructed within 5m of the Sheehan southern boundary.

- To construct this shorter access, a short retaining wall may be required
- There are no environmental or safety concerns
- The Marterra Development will be a condominium development and the access road will remain as a private way. It will be designed to meet HRM, and NSTIR standards, but there will likely be costs associated with acquiring access through this property.
- The estimated total cost to construct the private way from the proposed Marterra private way to the Sheehan property is $5,000-10,000.
- Timing of the Marterra Development is unknown. The development could begin as early as 2012, but there is a possibility that it is never constructed which would eliminate this option.

Summary

Based on our site visit and review of existing information, Option 3 appears to be the least-cost option at $10,000 where Option 2 will be the most expensive option and could be in excess of $150,000. From an environmental perspective, Option 2 would be the preferred option where Option 1 would be the least desirable. Relating to safety, Options 2 and 3 are both safer for the travelling public than Option 1.

Aside from cost, Option 2 appears to be the most desirable for the following reasons:

- It has the potential to be the safest;
- It will likely have less environmental impact than Option 1;
- It will likely be more aesthetically pleasing than Option 1;
- It has less impact on the space between the residence and the waterfront than Option 1;

- It would allow the historic tow-path to remain as is with less impact from traffic;
- Maintains the ability to sub-divide a waterfront lot;
- It is not dependent on another development (Marterra);

Please contact the undersigned if you have any questions or concerns.

Yours truly,

ALLNORTH CONSULTANTS LIMITED

Original Signed

Colin Fisher, P.Eng.

TD Insurance
Meloche Monnex

7051 Bayers Road, 2nd Floor
Halifax, Nova Scotia B3L 2C1
T: 1 800 268 8955
www.melochemonnex.com

September 19, 2012

Mr. Ezra van Gelder
Cox & Palmer
P.O. Box 2380, Station Central
Halifax, N.S. B3J 3E5

Re: Dr. Charles and Mrs. Marie Cron, 57456200

COPY

Dear Mr. van Gelder,

I have put together a list of potential issues and risks we would have with the proposed easement across the Crons' property. They are expressed in quite general terms at this point as the actual details of the easement are as yet unclear. However, I have reviewed the All North Consultants Report dated September 25, 2011, which depicts where the proposed easement is likely to be located. The Report also depicts where an easement might be located in the rear of the Crons' property.

- *Construction, maintenance, repair and upkeep of the driveway.* If part or all of these obligations are passed to some other party it would dilute the Crons' control over their property without alleviating their liability for any incidents resulting from use of the driveway.

- *Access to the driveway.* It is intended for the neighbour and/or her guests, but the Crons' ability to restrict access may be limited as the proposed road would be a public footpath. This would leave the Crons potentially liable for incidents resulting from use of the driveway on their property but with no ability to control access to the driveway

- *Use of the driveway.* It is intended for entry and exit to and from the neighbour's property, but you have indicated it may be difficult to prevent people from stopping or parking on it.

- *Safety for users of the driveway.* Based on the All North Report, this would seem to be less of a concern if the road is placed in the back, but would take on more significance if the waterfront path is used – both because the driveway would be more visible and inviting to the public in that location, leading to increased use, and because of the need for extra precautions to prevent users accidentally entering the water.

- *Environmental liability exposure.* This is also a potential concern with the proposed waterfront road because that road would travel over infill located below the ordinary high watermark. In addition, it would include a newly filled boat slip located at the water's edge. What measures would be in place to ensure pollutants (such as salt or chemicals required to maintain the driveway, or even pollutants left behind by users of the driveway) do not seep or drain into the Arm?

The greatest risk presented by the proposed location is its proximity to the water and a public footpath. This risk does not exist with a road in the back of the property. Based on what we presently know, it appears likely that a road in the back of the Crons' property, as depicted in the All North Report, presents less risk from an insurance perspective and therefore is likely to be more easily insured and at a lower cost.

Although we have no defined guidelines when it comes to easements, we have insured grantees of easements in the past. Typically these are easements from the Crown in one form or another. In cases we've dealt with the grantor has insisted within the easement terms that the grantee maintain third party liability insurance in an amount not less than $1,000,000 and that the grantor be added to that policy as an Additional Insured, as its interest may appear, with regard to the easement and be furnished with a copy of that policy. A hold harmless and indemnity clause is included in most of those agreements.

I hope this information is of some help even though it is very broad at this time, due to unresolved details around the proposed easement. If there is anything we can do to assist you as this matter moves forward please let me know.

Yours truly,

Original Signed

Kelly Leydon, FCIP
Senior Specialist, Underwriting

Occupiers' Liability Act, SNS 1996, c 27

Current version: in force since Dec 20, 1996

Link to the latest version :	http://canlii.ca/t/880x
Stable link to this version :	http://canlii.ca/t/jq6d
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Occupiers' Liability Act

CHAPTER 27

OF THE

ACTS OF 1996

An Act Respecting the Liability of Owners and Other Occupiers of Land and Other Premises

Short title

1 This Act may be cited as the *Occupiers' Liability Act*. 1996, c. 27, s. 1.

Interpretation

2 In this Act,

(a) "occupier" means an occupier at common law and includes

(i) a person who is in physical possession of premises, or

(ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on the premises or the persons allowed to enter the premises,

and, for the purpose of this Act, there may be more than one occupier of the same premises;

(b) "premises" includes

(i) land and structures, or either of them, except portable structures and equipment,

(ii) water,

(iii) ships and vessels,

(iv) notwithstanding subclause (i), trailers and portable structures designed or used for a residence, business or shelter,

(v) railway cars, vehicles and aircraft, except while in operation. 1996, c. 27, s. 2.

Replacement of common law rules

3 This Act applies in place of the rules of common law for the purpose of determining the duty of care that an occupier of premises owes persons entering on the premises in respect of damages to them or their property. 1996, c. 27, s. 3.

Duties of occupier

4 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.

(2) The duty created by subsection (1) applies in respect of

(a) the condition of the premises;

(b) activities on the premises; and

(c) the conduct of third parties on the premises.

(3) Without restricting the generality of subsection (1), in determining whether the duty of care created by subsection (1) has been discharged, consideration shall be given to

(a) the knowledge that the occupier has or ought to have of the likelihood of persons or property being on the premises;

(b) the circumstances of the entry into the premises;

(c) the age of the person entering the premises;

(d) the ability of the person entering the premises to appreciate the danger;

(e) the effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk; and

(f) whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.

(4) Nothing in this Section relieves an occupier of premises of any duty to exercise, in a particular case, a higher standard of care that, in such case, is required of the occupier by virtue of any law imposing special standards of care on particular classes of premises. 1996, c. 27, s. 4.

Willing assumption of risk

5 (1) The duty of care created by subsection 4(1) does not apply in respect of risks willingly assumed by the person who enters on the premises but, in that case, the occupier owes a duty to the person not to create a danger with the deliberate intent of doing harm or damage to the person or property of that person and not to act with reckless disregard of the presence of the person or property of that person.

(2) A person who is on premises without the permission of the occupier for the purpose of committing an offence against the person or the right of property contrary to the *Criminal Code* (Canada) is deemed to have willingly assumed all risks and the duty of care created by subsection (1) applies.

(3) The question of whether a person is on premises for the purpose set out in subsection (2) shall be determined on a balance of probabilities. 1996, c. 27, s. 5.

Deemed willing assumption of risk

6 (1) This Section applies to

(a) land used primarily for agricultural or forestry purposes;

(b) vacant or undeveloped rural land;

(c) forested or wilderness land;

(d) recreation facilities when closed for the season;

(e) utility rights-of-way and corridors, excluding structures located thereon;

(f) highway reservations under the *Public Highways Act*;

(g) mines as defined in either the *Metalliferous Mines and Quarries Regulation Act* or the *Coal Mines Regulation Act*, where the harm or damage suffered is not, in whole or in part, the result of non-compliance with a law relating to the security of such mine and the safety of persons and property;

(h) private roads situated on lands referred to in this subsection;

(i) private roads to which this Section does not otherwise apply, reasonably marked by notice as private, where persons are physically restricted from access by a gate or other structure; and

(j) recreational trails reasonably marked by notice as such.

(2) Subject to subsection (3), a person who enters premises described in subsection (1) is deemed to have willingly assumed all the risks and the duty created by subsection 5(1) applies.

(3) This Section does not apply to a person who

(a) enters premises for a purpose connected with the occupier or any person usually entitled to be on the premises;

(b) has paid a fee for the entry or activity of the person on premises, other than a benefit or payment received by the occupier of the premises from a government or government agency or a non-profit recreation club or association;

(c) is being provided, in exchange for consideration, with living accommodation by the occupier; or

(d) is authorized or permitted by any law to enter or use the premises, for other than recreational purposes, without the consent or permission of the occupiers. 1996, c. 27, s. 6.

Agreements modifying duties

7 (1) An occupier may, by express agreement, express stipulation or notice,

(a) extend or increase the duty created by subsection 4(1); or

(b) restrict, modify or deny the duty created by subsection 4(1),

subject to any prohibition or limitation imposed by this or any other Act of the Legislature, against or on, the restriction, modification or denial of the duty.

(2) No restriction, modification or denial of the duty pursuant to clause (1)(b), whether by express agreement, express stipulation or notice, is valid or binding against any person unless in all the circumstances of the case it is reasonable and, without limiting the circumstances to be considered in any case, in determining the reasonableness of any restriction, modification or denial of the duty, the circumstances to be considered include

(a) the relationship between the occupier and the person affected by the restriction, modification or denial;

(b) the injury or damage suffered and the hazard causing it;

(c) the scope of the restriction, modification or denial; and

(d) the steps taken to bring the restriction, modification or denial to the attention of the persons affected thereby.

(3) Subject to subsections (4) and (5), where an occupier restricts, modifies or denies the duty created by subsection 4(1), the occupier shall take reasonable steps to bring the restriction, modification or denial to the attention of the person to whom the duty is owed.

(4) An occupier of premises shall not restrict, modify or deny the duty imposed by subsection 4(1) with respect to a person who is empowered or permitted by any law to enter or use the premises without the consent or permission of the occupier.

(5) This Section applies to express agreements, stipulations and notices that are made prior to or after the coming into force of this Act. 1996, c. 27, s. 7.

Independent contractors

8 (1) Notwithstanding subsection 4(1), where damage is caused to persons or property on premises solely by the negligence of an independent contractor engaged by the occupier of the premises, the occupier is not on that account liable pursuant to this Act if, in all the circumstances,

(a) the occupier exercised reasonable care in the selection of the independent contractor; and

(b) it was reasonable that the work that the independent contractor was engaged to do should have been done.

(2) Subsection (1) does not restrict, modify or deny the liability imposed by any other Act of the Legislature on an occupier of premises for the negligence of independent contractors engaged by the occupier.

(3) Where damage is caused to persons or property on premises by the negligence of an independent contractor engaged by an occupier of the premises and there are two or more occupiers of the premises, subsection (1) applies to each of those occupiers. 1996, c. 27, s. 8.

Duties of landlord

9 (1) Where under a lease of premises a landlord is responsible for the maintenance or repair of the premises, the landlord owes the same duty to each person entering on the premises as is owed by the occupier of the premises.

(2) Where premises are sublet, subsection (1) applies to any landlord who is responsible for the maintenance and repair of the premises.

(3) Nothing in this Act relieves a landlord of any duty imposed on landlords by any law.

(4) For the purpose of this Section, obligations imposed on a landlord by any law shall be deemed to be imposed under the lease and "lease" includes any statutory lease or any contract or statutory provision conferring the right of occupation of premises on a person who is not the owner thereof and "landlord" shall be construed accordingly.

(5) This Section applies to leases that are made prior to or after the coming into force of this Act. 1996, c. 27, s. 9.

Application of certain Acts

10 The *Contributory Negligence Act* and the *Tortfeasors Act* apply to and in respect of damages arising from a breach of the duties imposed by this Act. 1996, c. 27, s. 10.

Application of Act to Crown

11 (1) Subject to subsection (2), this Act is binding on Her Majesty in right of the Province and in right of Canada.

(2) This Act does not apply to Her Majesty in right of the Province or in right of Canada as the occupier of

(a) a public highway or a public road;

(b) drainage works; or

(c) a river, stream, watercourse, lake or other body of water except those areas thereof that have been specially developed by Her Majesty for recreational swimming or for the launching and landing of boats. 1996, c. 27, s. 11.

Application of Act to municipalities

12 (1) In this Section,

(a) "highway" includes any public road or street;

(b) "municipality" means a regional municipality, incorporated town or a municipality of a county or district.

(2) This Act does not apply to a municipality as the occupier of a highway, public walkway or public sidewalk. 1996, c. 27, s. 12.

Exemption from application of Sections 5 to 9

13 Sections 5 to 9 do not apply to or affect

(a) the liability or duties of an employer to employees of the employer;

(b) the liability or duties of any person arising under a contract for the hire of, or for the carriage for reward of persons or property in any vehicle, vessel, aircraft or other means of transportation;

(c) the liability or duties of any person under the *Tourist Accommodations Act*;

(d) the liability or duties of any person by virtue of a bailment; or

(e) the liabilities or duties of any person under the *Trails Act*. 1996, c. 27, s. 13.

Causes of action affected by Act

14 For greater certainty, subject to subsections 7(5) and 9(5), this Act applies only in respect of a cause of action arising after the coming into force of this Act. 1996, c. 27, s. 14.

Repeal

15 Chapter 322 of the Revised Statutes, 1989, the *Occupiers of Land Liability Act*, is repealed. 1996, c. 27, s. 15.

Yvan - 499-2416

Echo Mechanical

Date: Sept. 14/00
Job Number:

TO:
Shaun & Sue Sheehan
9 Milton Dr
Halifax, NS

477-1257

We are pleased to submit the following bid

Job Description: infilling seawall and driveway

MATERIALS

QUANTITY	DESCRIPTION	UNIT PRICE	TOTAL
7.00	truckloads of gravel	200.00	1,400.00
1.00	backhoe	600.00	600.00
		Materials total:	2,000.00

SERVICE

HOURS	DESCRIPTION	CHARGES	TOTAL
1.00	Yvan	500.00	500.00
1.00	Labor	300.00	300.00
0.15	HST	2800.00	420.00
		Service total:	1,220.00
		Total bid price:	3,220.00

Price valid until: Oct. 15/00

Expro

MUNICIPALITY OF THE COUNTY OF HALIFAX
PROVINCE OF NOVA SCOTIA

CERTIFICATE

I, the undersigned, Rudd. G. Hattie, of Halifax, in the County of Halifax, Province of Nova Scotia, hereby certify that the attached plan and description of lands which are situated in the Registration District of the County of Halifax in which it is desired to expropriate the hereinafter described limited interest under the provisions of Chapter 72 of the Acts of Nova Scotia, 1953, and amendments thereto for the purpose of constructing and maintaining sewer and water mains through portions of Jollimore, in the County of Halifax, the said limited interest in the said lands being deemed by the Council of the said Municipality necessary for the said purpose are a true and correct plan and description respectively of lands a limited interest in which is to be expropriated. The said plan and description respectively were signed by the undersigned on the 21st day of February, A. D. 1966 and the same are to be deposited on record and registered in the office of the Registrar of Deeds for such Registration District.

The limited interest to be expropriated is as follows:
The right at any time to enter upon the said lands for the purpose of laying down and constructing sewers and drains, and pipes for water and gas, and conduits for wires of all kinds in, under and upon the said lands and of keeping and maintaining the same at all times in good condition and repair, and for every such purpose the Municipality of the County of Halifax shall have access to the said lands at all times by its servants, employees, workmen and agents.

MUNICIPALITY OF THE COUNTY OF HALIFAX

Original Signed

.....
CLERK

DESCRIPTION

This is a description of certain lands situate, lying and being at Jollimore, in the County of Halifax, in the Province of Nova Scotia in which a limited interest is to be taken under the authority of Chapter 72 of the Acts of Nova Scotia, 1953, and amendments thereto, for the perpetual use of the Municipality of the County of Halifax, for the purpose of constructing and maintaining sewer and water mains through portions of Jollimore, in the County of Halifax.

ALL that certain lot, piece or parcel of land situate, lying and being in Jollimore in the County of Halifax, Province of Nova Scotia bounded and more particularly described as follows:

BEGINNING at a point on the southern boundary of a right-of-way now or formerly called Milton Drive said point being distant north seventy-five degrees forty-four minutes East (N75°44'E) a distance of seventy-two and six tenths feet (72.6') from the point of intersection of the north boundary line and the southwest boundary line of Milton Drive;

THENCE North seventy-five degrees forty-four minutes East (N75°44'E) along the north boundary line of the above mentioned right-of-way a distance of twenty feet (20.0');

THENCE South fifteen degrees seventeen minutes East (S15°17'E) a distance of one hundred and sixty-six and one tenth feet (166.1');

THENCE South four degrees forty-eight minutes West (S04°48'W) a distance of thirteen feet (13.0') or to the north boundary line of a lot of land now or formerly owned by one Harold J. Sutherland;

THENCE South sixty-five degrees two minutes West (S65°02'W) along the north boundary line of the above mentioned lot a distance of twenty-three feet (23.0');

THENCE North four degrees forty-eight minutes East (N04°48'E) a distance of twenty and nine tenths feet (20.9');

THENCE North fifteen degrees seventeen minutes West (N15°17'W) a distance of one hundred and sixty-three feet (163.0') or to the place of beginning;

ALL the above described lot, piece or parcel of land being more particularly shown outlined in red on a plan made by Donald V. Purcell, P.L.S. and dated the 21st day of October, 1965.

Original Signed


Original Signed

NORTH WEST ARM

GRID NORTH

CONCRETE LAUNCH

OHWM

SEAWALL

PID 00279794

84.06' (To OHWM)

ADDITIONAL DRIVEWAY AREA
(STAKES PAINTED ORANGE)

ADDITIONAL AREA FOR DRIVEWAY
1290 SQ.FT

35.28' (To OHWM)

PID 00279802

PID 00279810

9.0'

S40°01'08"E 171.38'

0.5'

0.5'

18.26'
S19°56'08"E

20.01'

N52°21'17"E

67.46'

S40°01'08"E 168.76'

22.41'

24.80'
S19°56'08"E

62.65'

S43°04'26"W

PROPOSED CENTERLINE
(STAKES WITH BLUE FLAGS)

20 FOOT WIDE
SERVICE EASEMENT
IN FAVOUR OF HRM

LOT B1

LOT A

PID 00279828

DRIVE

PID 00279968

LOT 6-PR

PID 00280271

Civic No.7

Civic No.9

PID 00279836

MILTON

CIVIC No.5

LEGEND

⊠	WOOD STAKE SET ALONG SERVICE EASEMENT JUNE 13, 2013
⊠	WOOD STAKE SET ALONG ADDITIONAL AREA FOR DRIVEWAY NOVEMBER 21, 2013
⊠	WOOD STAKE SET ALONG CENTERLINE OF PROPOSED DRIVEWAY NOVEMBER 21, 2013
OHWM	ORDINARY HIGH WATER MARK
SQ.FT	SQUARE FEET

SKETCH SHOWING LAYOUT OF ADDITIONAL AREA FOR DRIVEWAY ALONG SERVICE EASEMENT AND PROPOSED CENTERLINE

LOT 6-PR

MILTON DRIVE
HALIFAX, HALIFAX COUNTY, NOVA SCOTIA

Servant, Dunbrack, McKenzie & MacDonald Ltd.
NOVA SCOTIA LAND SURVEYORS & CONSULTING ENGINEERS
36 OLAND CRESCENT
BAYERS LAKE BUSINESS PARK
HALIFAX, NS B3S 1C6
PHONE (902)455-1537
FAX: (902)455-8479
WEB: www.sdmm.ca

NOVEMBER 21, 2013
SCALE 1" = 30'
FILE NO. 1-2-23 (30126)

SDMM

Servant, Dunbrack, McKenzie & MacDonald Ltd.
NOVA SCOTIA LAND SURVEYORS & CONSULTING ENGINEERS
36 Oland Crescent
Bayers Lake Business Park
Halifax, Nova Scotia B3S 1C6

Phone (902) 455 1537 Email rlandry@sdmm.ca
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RAYMOND A. LANDRY MASc., P.Eng.
CHRISTOPHER J. FORAN P.Eng.
GEOFFREY K. MacLEAN P.Eng.
RACHAEL W. CANNINGS P.Eng.
KYLE R. T. BOWER P.Eng., NSLS
DANIEL S. GERARD P.Eng., NSLS
CARL K. HARTLEN NSLS
H. JAMES McINTOSH P.Eng., NSLS, CLS
KEVIN A. ROBB NSLS
MICHAEL S. TANNER NSLS
SANDRA G. WHITE B.Comm., CGA

April 26, 2013

Dispute Management
c/o Deborah Baker, B.A., M.A., LL.B
58 Snowy Owl Drive
Bedford, NS
B4A 3L3

Re: Milton Drive Civic #9 – Proposed Driveway Option2 Review Comments

SDMM was engaged by Dispute Management to review and comment on a proposed driveway route for passenger vehicles and fire truck access to 9 Milton Drive (from Milton Drive and across the western boundary of civic #5 (Cron property)). We understand from Dispute Management that Option 2, as proposed in Allnorth's Figure 1, is the Cron's preferred route.

Review Documents

In our review of the proposed driveway, SDMM has considered the following;

- The Allnorth driveway route Option 2
- The SDMM Plan of Survey of Lot 6-PR (Cron property)
- Site photos provided by Dispute Management
- Explore HRM 1m interval contour mapping
- HRM 2013 Municipal Design Guidelines
- HRM bylaw number S-300 – Bylaw Respecting Streets
- National Building Code (2010) Fire Truck Access Routes and Route Design
- Correspondence from Dispute Management on fire truck specifications with the local fire department.

SDMM reviewed the horizontal and possible vertical design of the proposed route while respecting the National Building Code requirements and HRM requirements for residential driveways.

National Building Code requirements for a fire truck access;

- A minimum driveway width not less than 6m.

- A minimum centreline radius not less than 12m for any turn.
- Provide a turnaround for routes longer than 90m.
- Have a change in gradient not more than 1 in 12.5 over a minimum distance of 15m.

HRM Redbook and bylaw requirements;

- Two way driveways shall not be permitted to join the roadway at an angle less than 70 degrees.
- Two way driveways servicing residentially used property with 4 or fewer units shall have a width not less than 3m and not greater than 5m, except where property frontage exceeds 18m, a driveway width of up to 6m may be permitted.
- The maximum grade for a residential driveway shall be limited to 15%.

Review Observations

Horizontal Alignment

SDMM reviewed the proposed driveway route considering the above standards. Our observations on the proposed horizontal alignment are as follows;

1. The proposed driveway is shown at approximately 4.5m wide. Building code requires a minimum 6.0m width for fire trucks.
2. The existing driveway to civic #5 joins Milton Drive at approximately 35 degrees. HRM requires two way driveways to join the roadway at an angle not less than 70 degrees.
3. The proposed driveway has centreline radii ranging from 5.5m to 9.0m. Building code requires a minimum centreline radius not less than 12m for fire trucks.
4. The driveway length is approximately 120m in length. Building code for fire truck access requires a proper turning area beyond a length of 90m.

Recommendations (see attached sketch 1);

1. The driveway needs to be widened to a minimum of 6m to provide fire truck access.
2. The intersection of the driveway alignment with Milton Drive must be no less than 70 degrees.
3. The minimum driveway centreline radius is 12m for fire trucks.
4. Confirm the above recommendations with the local fire authority.

Vertical Alignment

Based on the proposed driveway access route, SDMM reviewed 3 options for the vertical grading design while considering the HRM bylaws and Canadian Building Code (see attached sketch);

1. Try and follow the existing ground to limit site disturbance and cost.
2. Use the maximum 15% grade for a residential driveway suitable for passenger vehicles.
3. Use the maximum 15% grade for a residential driveway and a maximum change in gradient not more than 1 in 12.5 over a minimum distance of 15m for fire access.

Our observations on the vertical alignment are as follows *(see attached sketch 2)*;

1. Trying to follow the existing ground provides grades along the proposed route in excess of 60 percent. Too steep.
2. Following a maximum of 15% grade for residential driveways results in retaining walls on either side of the driveway for the majority of the driveway to a maximum height of 5.5m near civic 6 and 8 Marine Drive. This still would not permit access for fire trucks as the change in gradient is more than 1 in 12.5 over a minimum distance of 15m.
3. Considering the maximum 15% grade for a residential driveway and a maximum change in gradient not more than 1 in 12.5 over a minimum distance of 15m will result in retaining walls on either side of the driveway for the majority of its length to a maximum height of 5.7m near civic 6 and 8 Marine Drive. Alternatively, a 3 Horizontal to 1 Vertical slope could be used in place of a retaining wall along the east side of the driveway, however this will require a larger area of site disturbance and tree clearing.

Recommendations (see attached sketch 3);

1. To provide fire truck access, only Option 3 provides the maximum grades allowable. Provide a maximum 15% grade and a maximum change in gradient not more than 1 in 12.5 over a minimum distance of 15m.
2. Based on item 1 above, retaining walls would be required on both sides of the proposed route. As a minimum, an approximate 105m length of wall ranging in height of 0.5m to 5.7m would be required along the west side of the driveway and an approximate 115m length of wall ranging in height of 0.5m to 2.6m would be required on the east side of the driveway.
3. The existing stone retaining wall will need to be removed along the west boundary of civic 5 Milton. This will require approval from the adjacent land owners (civic 4, 6, & 8 Marine Drive and 3 Milton Drive).
4. Excavation for the proposed retaining wall along the west boundary of civic 5 Milton may impact the existing sewer service located in the easement adjacent to this boundary.
5. With retaining walls on either side of the driveway, space may be limited and need to be confirmed for minimum width with the local fire authority.

Review Summary

Based on our review of the proposed driveway route, west of the civic 5, significant tree removal, retaining wall construction and site disturbance would be required on the property at 5 Milton Drive. A preliminary estimate for retaining wall construction would be approximately $350,000 (excluding rock excavation and probable blasting) based on the approximate lengths and heights. In addition, approval is required for; tree removal, existing retaining wall removal, construction access to install the required retaining walls would be required from; 3 Milton Drive, 4 Marine Drive, 6 Marine Drive, and 8 Marine Drive. Based on the local geology, rock breaking would more than likely be required to construct this driveway. There is an existing service easement along the shared boundary of civic 5 Milton and civic 4, 6, & 8 Marine Drive and excavation for the retaining wall may undermine the existing sewer. Approval would be required from Halifax Water or other easement holder. The existing power poles would also likely be affected by the construction excavation and rock breaking may impact existing

foundations and potable water wells in the area. In order to meet a maximum vertical grade of not greater than 15% and a change in gradient of not more than 1 in 12.5 over 15m, the majority of this driveway will be a cut with retaining walls supporting the existing ground on both sides. In winter, snow clearing and storage will likely narrow the access with snow piling up along the sides of the retaining walls and the access will be prone to infill by drifting snow as the majority of the driveway will be below surrounding ground elevations (see section A-A on sketch 3). As the driveway will be for the most part below existing grade, both surface water runoff and groundwater drainage will also need to be addressed as part of the overall design. As per the proposed vertical grades, surface water will be directed to either end of the driveway from a high point at the approximate mid pint in its length.

Recommendation

Based on; the significant expected construction costs, large area of tree removal and disturbance, number of properties affected besides civic 5 Milton, potential rock breaking nuisance to neighbouring properties, potential for damage to existing properties, drainage issues, and winter maintenance issues this option should only be considered if no other access option was available.

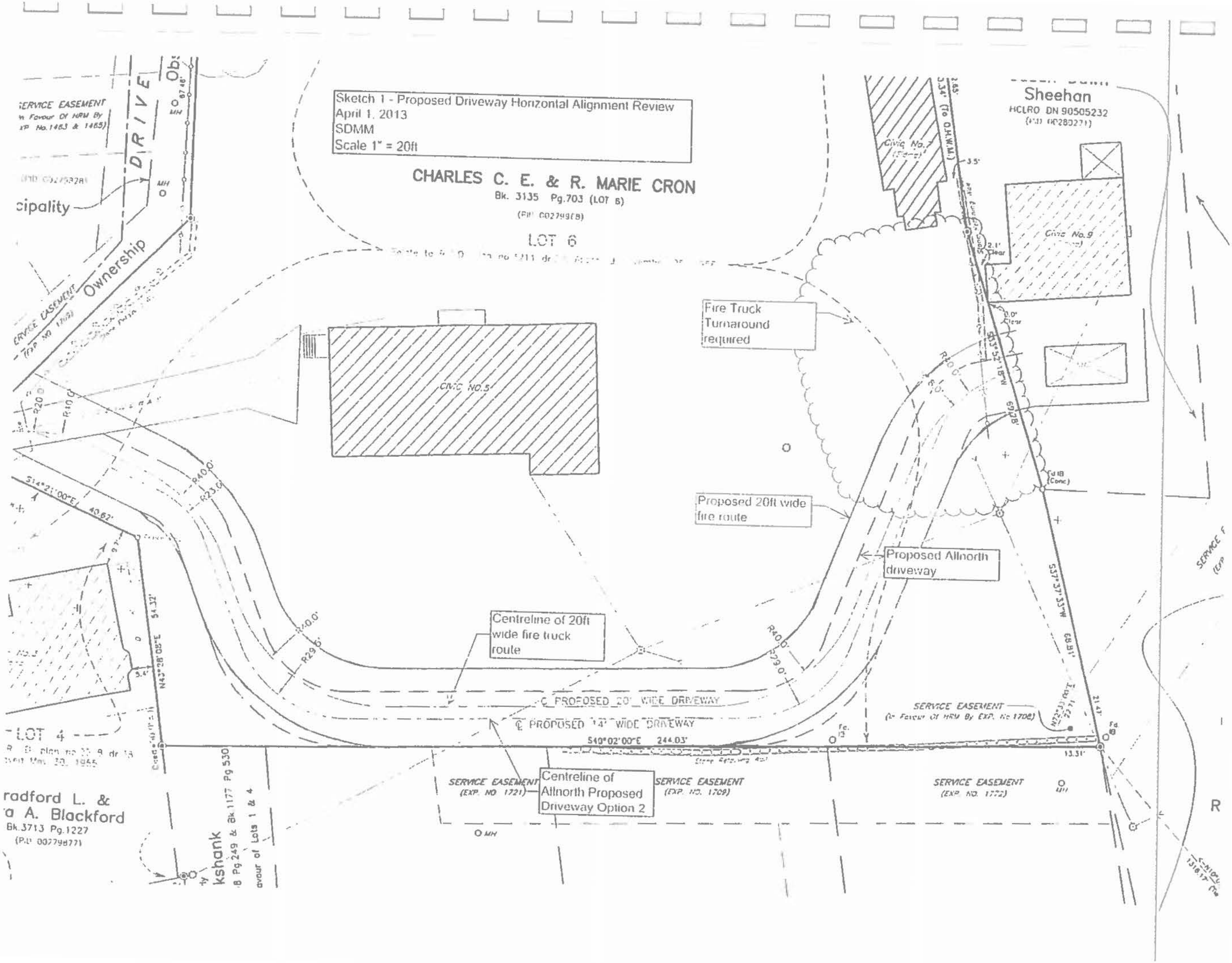
Option 1 identified on the Allnorth Figure 1 or a driveway following the service easement (to the east of the Cron's home) would be; significantly less expensive and less intrusive options to all properties, provide much more favourable grades, provide a shorter route, significantly reduce the area of tree clearing, eliminate the need for retaining walls, possible rock breaking and significant excavations, and not affect; existing power poles, existing sewers, adjacent properties than Allnorth's Option 2 proposed to the West of the Cron's home.

For any additional discussion regarding above, please contact the undersigned.

Regards
Servant, Dunbrack, McKenzie & MacDonald Ltd.

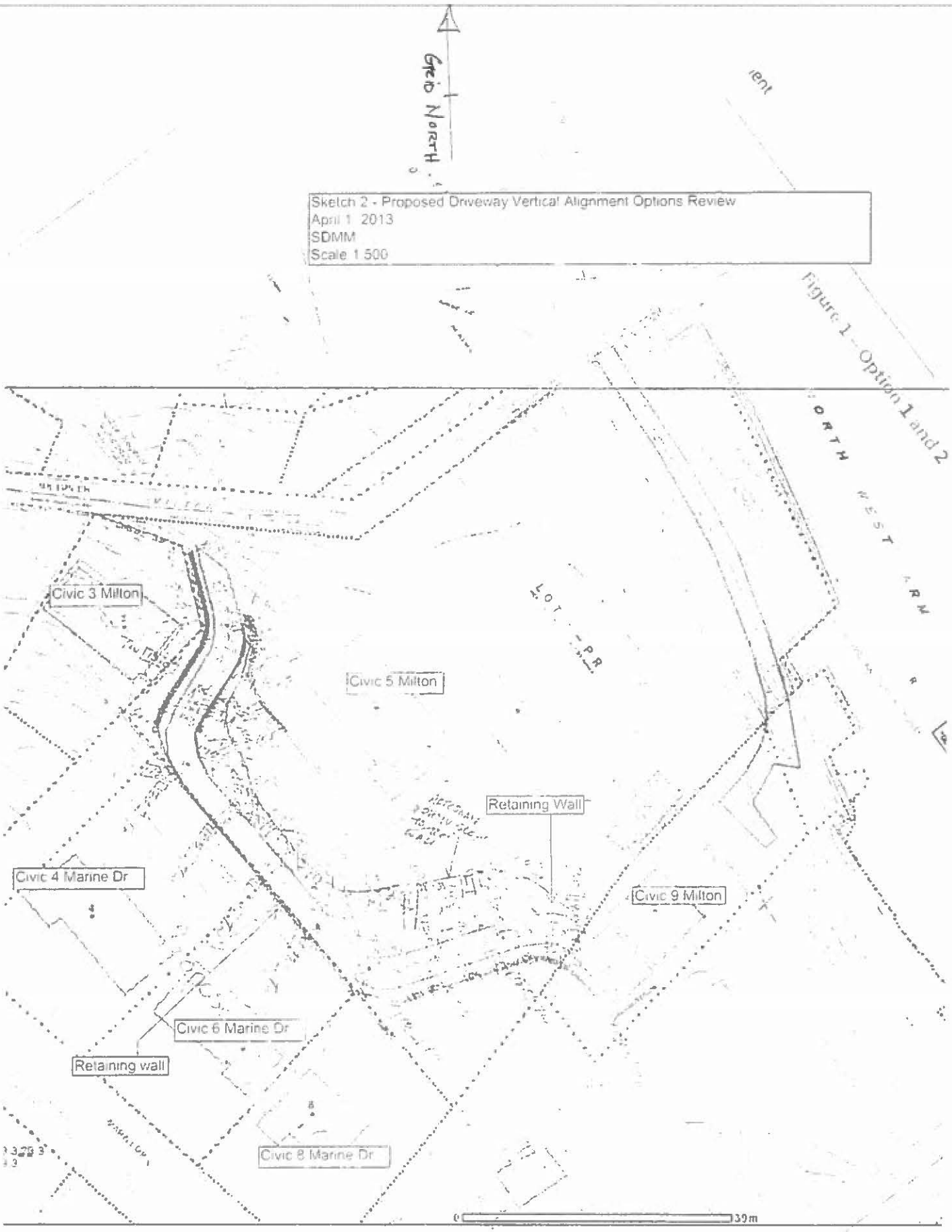
Original Signed

Ray Landry, MASc., P.Eng.
Project Engineer

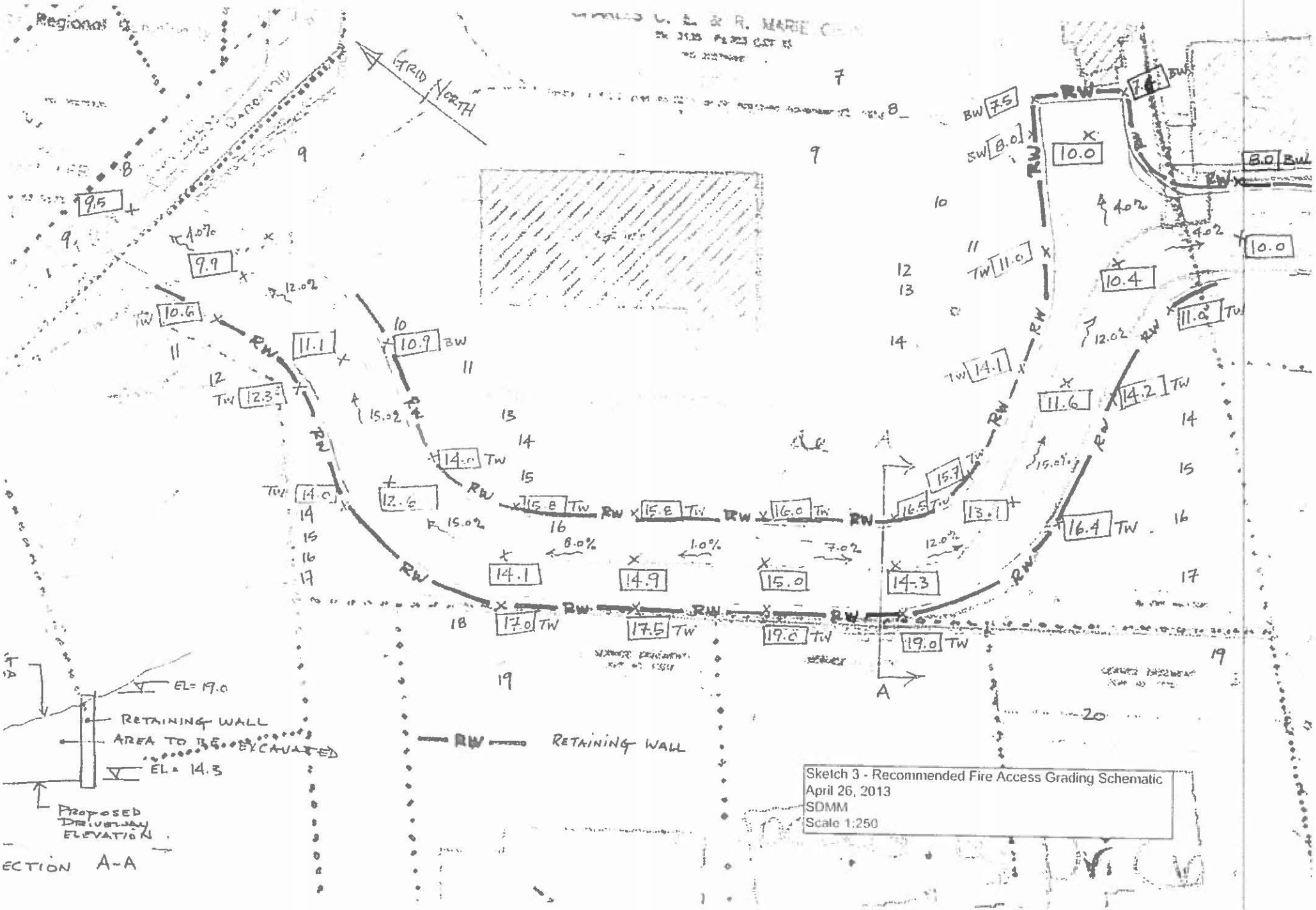

Sketch 1 - Proposed Driveway Horizontal Alignment Review
April 1, 2013
SDMM
Scale 1" = 20ft
CHARLES C. E. & R. MARIE CRON
Bk. 3135 Pg.703 (LOT 6)
LOT 6
Sheehan
HCLRO DN 90505232
Fire Truck Turnaround required
CIVIC NO.5
Proposed 20ft wide fire route
Proposed Allnorth driveway
Centreline of 20ft wide fire truck route
℄ PROPOSED 20' WIDE DRIVEWAY
℄ PROPOSED 14' WIDE DRIVEWAY
S40°02'00"E 244.03'
Centreline of Allnorth Proposed Driveway Option 2
SERVICE EASEMENT (EXP. NO. 1721)
SERVICE EASEMENT (EXP. NO. 1709)
SERVICE EASEMENT (EXP. NO. 1772)
SERVICE EASEMENT
LOT 4
radford L. &
a A. Blackford
Bk.3713 Pg.1227
kshank
Ownership
cipality
DRIVE
R40.0'
R23.0'
R29.0'
S14°21'00"E 40.62'
N43°28'08"E 54.32'
S37°37'33"W 69.81'
13.31'

Sketch 2 - Proposed Driveway Vertical Alignment Options Review
April 1 2013
SDMM
Scale 1:500

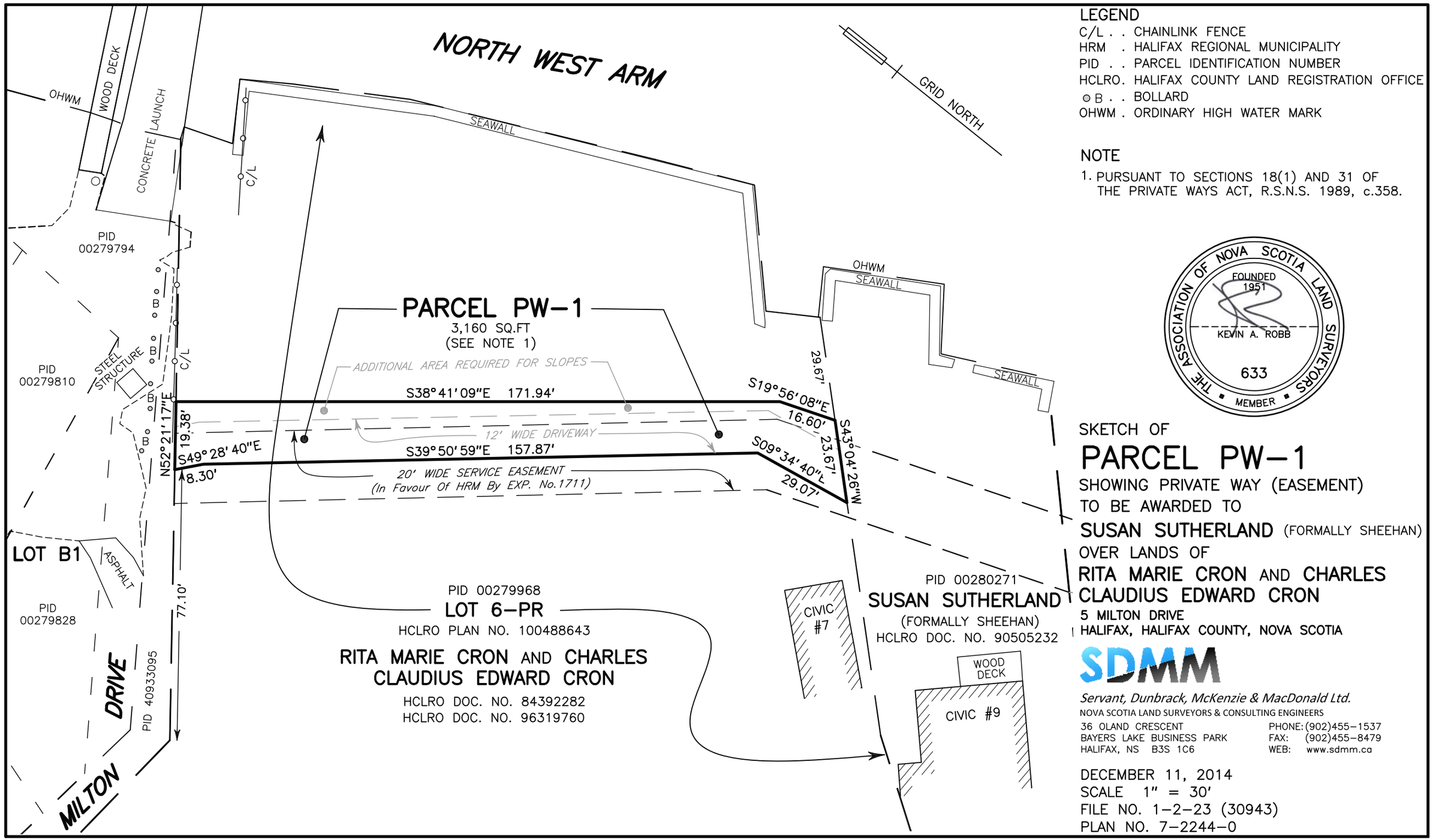
Figure 1 - Option 1 and 2



Option 1 - FOLLOW EXI - CONTOURS
Option 2 - MAXIMUM 5% POTENTIAL
Option 3 - MAXIMUM 6% CHANGE IN


Regional
GRID NORTH
RW
RETAINING WALL
EL= 19.0
RETAINING WALL
AREA TO BE EXCAVATED
EL= 14.3
PROPOSED DRIVEWAY ELEVATION
ECTION A-A
Sketch 3 - Recommended Fire Access Grading Schematic
April 26, 2013
SDMM
Scale 1:250

Attachment "C"



LEGEND

C/L . . CHAINLINK FENCE
HRM . HALIFAX REGIONAL MUNICIPALITY
PID . . PARCEL IDENTIFICATION NUMBER
HCLRO. HALIFAX COUNTY LAND REGISTRATION OFFICE
⊙B . . BOLLARD
OHWM . ORDINARY HIGH WATER MARK

NOTE

1. PURSUANT TO SECTIONS 18(1) AND 31 OF THE PRIVATE WAYS ACT, R.S.N.S. 1989, c.358.

THE ASSOCIATION OF NOVA SCOTIA LAND SURVEYORS
FOUNDED 1951
KEVIN A. ROBB
633
MEMBER

SKETCH OF

PARCEL PW-1

SHOWING PRIVATE WAY (EASEMENT)
TO BE AWARDED TO
SUSAN SUTHERLAND (FORMALLY SHEEHAN)
OVER LANDS OF
RITA MARIE CRON AND CHARLES CLAUDIUS EDWARD CRON
5 MILTON DRIVE
HALIFAX, HALIFAX COUNTY, NOVA SCOTIA

SDMM
Servant, Dunbrack, McKenzie & MacDonald Ltd.
NOVA SCOTIA LAND SURVEYORS & CONSULTING ENGINEERS
36 OLAND CRESCENT
BAYERS LAKE BUSINESS PARK
HALIFAX, NS B3S 1C6
PHONE: (902)455-1537
FAX: (902)455-8479
WEB: www.sdmm.ca

DECEMBER 11, 2014
SCALE 1" = 30'
FILE NO. 1-2-23 (30943)
PLAN NO. 7-2244-0

IN THE MATTER OF the ***Private Ways Act, R.S.N.S 1989 c. 358,*** **as amended;**

AND IN THE MATTER OF the lands of Rita Marie Cron and Charles Claudius Edward Cron at 5 Milton Drive, Halifax, Nova Scotia

AND IN THE MATTER OF an arbitration for compensation pursuant to the Private Ways Act, R.S.N.S 1989 c. 358, as amended held on September 23rd, 20154 at Halifax;

DECISION OF THE ARBITRATION PANEL

Kevin Downie, Charles Hardy, Kathryn Dumke (Chair)

1. This is the decision of the Arbitration Panel in the matter of appraisal for compensation pursuant to s. 20 of the *Private Ways Act, supra.* The Arbitrators entered the lands of Rita Marie Cron and Charles Claudius Edward Cron ("the Crons") on July 28th, 2014 to view and familiarize themselves with the property of the Crons and a hearing was held on September 23rd, 2014 to receive expert evidence and submissions of the parties to the arbitration.

2. Susan Sutherland ("Sutherland") petitioned the Halifax Regional Municipality ("HRM") pursuant to the *Private Ways Act, supra* for an access road to her landlocked property which lies adjacent to and to the southeast of the lands of the Crons ("the lands"). On November 27th, 2013 Commissioner Baker, who had been appointed by HRM as the Commissioner under s. 3 of the *Private Ways Act, supra,* gave her decision which determined the location of the road and future right of way. Her sketch is attached as Schedule "A".

3. In 1966 the predecessor of HRM expropriated a service easement ("HRM easement") from the predecessors in title to the Crons' across the land for water, gas, cable and sewer services. The HRM easement is described as follows:

> The right at any time to enter upon the lands for the purpose of laying down and constructing sewers and drains, and pipes for water and gas, and conduits for wires of all kind, in, under, and upon the said lands and the keeping and maintaining the same at all times in good condition and repair, and for every such

purpose the Municipality of the County of Halifax shall have access to the lands at all times by its servants, employees, workmen and agents.
[Emphasis added]

The service easement services the Sutherland lands as well as several other properties to the south-east and south of the lands.

4. The lands are also encumbered by a public footpath, which originated approximately 200 years ago as the towpath used to tow boats and ships to the mouth of the Northwest arm. This tow path is now shown as a public footpath crossing the Crons' lands and their neighbouring properties to the south- east.

5. At the time of the viewing of the lands, the area in which the proposed road was laid out presented itself as a generally level area overgrown with some trees, bushes and tall grass, on which the location of the road had been laid out by wooden stakes. We have attached several pictures showing the area in Schedule "B".

6. During the hearing on September 23rd, 2014 both the Crons and Sutherland presented expert evidence through their respective expert appraisers to the arbitration panel. Both experts, Peter MacLellan ("MacLellan") for the Crons and Paul Fennell ("Fennell") for Sutherland, were familiar with the lands having prepared previous reports for their respective clients for different purposes. The reports presented at the hearing were stand-alone reports specifically addressing the issue of compensation to which the Crons are entitled.

7. Both experts concluded that the correct approach to appraising the loss suffered by the Crons was by a direct comparison approach, meaning that data sets on properties of similar location and character were compiled and compared to the subject lands to arrive at a value for the use of the lands taken. Both experts agreed that the subject area was 3570 square feet, being the lands within the area delineated by Commissioner Baker in her decision of November 27th, 2013.

The evidence of Peter MacLellan for the Crons

8. In his report Peter MacLellan describes the assignment as follows:

> The value of the Property Rights being appraised in this report are those which currently belong to the owner of 5 Milton Drive which rights are being diminished by the imposition of a driveway.

9. MacLellan compiled a set of six comparison properties in similar character and locations.

10. MacLellan then adjusted these for time, that is for any time which had passed since the last sale of the comparison properties and the effective date of the appraisal report prepared by him. He came to the opinion and concluded for the purposes of the report that property values had increased by 3% per annum and adjusted the comparison properties accordingly. The comparison properties were vacant land properties.

11. MacLellan showed an adjusted range of $16.99 to $136.50 per square foot value in the comparison properties. Interestingly, the total adjusted value of all properties ranged between $918,000.00 and $1,350,000.00 or on average $1,090,500.00 regardless of size.

12. MacLellan then adjusted the properties for size. Based on his theory that the per square foot price for properties varied according to their size, MacLellan opined that a size adjustment was required to correctly reflect a per square foot value. He prepared a trendline graph showing that with decreasing size, per square foot value went up exponentially.

13. According to his calculation MacLellan formed the opinion, that the per square foot value of properties between ten and fifteen thousand square feet had to be adjusted upwards by 20% , properties between twenty and thirty-five thousand square feet had to be adjusted upwards by 30% and properties over forty thousand square feet had to be adjusted upwards by 300%.

14. MacLellan then applied these adjustments to square foot value of the comparison properties resulting in the per square foot value range of $76.44 to $163.80.

15. Based on these adjustments, MacLellan concluded that the average adjusted per square foot value of the property being appraised was $86.51 which he rounded down to $80.00 per square foot. This amount was applied to the area of the proposed easement which resulted in an amount of $285,600.00. This amount was then rounded up to $300,000.00 which in MacLellan's opinion was to cover any removal of trees and other construction damage caused as a result of the construction of the driveway.

16. MacLellan made no adjustment for the existence of the service easement on the basis that it was subsurface and on the basis that "HRM has the right to go on the land and fix the services" but that otherwise the easement did not impede uses such as lawns, gardens etc. MacLellan did not take into consideration the scope of the service easement permitted by

the wording of the easement. The service easement specifically permitted services to be installed "upon the land" in addition to "in, under….".

17. On cross-examination, MacLellan admitted his conclusions would have been different if he had taken the approach of total land value of the lands . He also admitted that the area he valued was not waterfront even though all of his comparables were waterfront lots. He testified that by comparison his concluded square foot value for the easement strip exceeded the value of the remainder of the lands by a factor 2.7 or 270%.

18. MacLellan described that the highest and best use of the property was as a residential estate lot and specifically with respect to the driveway area as an easement, presumably because of the existing HRM easement. Curiously, on questions from the panel MacLellan testified that the size adjustment method he used was created by him to adjust for the unusual circumstances arising from a compensation claim pursuant to the *Private Ways Act, supra* but he could not point to any authority for such an adjustment.

The Evidence of Paul Fennell for Sutherland

19. Fennell described his assignment as follows:

> The purpose of this appraisal is to estimate the market value of the proposed Right of Way parcel of land as at the effective date, May 8th, 2014 for asset valuation – to assist in determination of compensation to the land owners for the granting of a Right of Way as described in Section B of this report.

20. While the agreed to effective date of appraisal was to be August 8th, 2014, Fennell concluded that his values would not have changed between May 8th and August 8th, 2014. He also concluded that the highest and best use of the lands of the Crons is as a residential estate with water frontage with a single family dwelling. He concluded in his report that both before and after the placement of the driveway the highest and best use of the property of the owner was:

    - Continuation of use as a single family dwelling
    - Continuation of use as a single family dwelling with potential for subdivision to one additional lot.

21. In his report Fennell sets out the considerations he applied while preparing his appraisal. He took into consideration the following factors:

- Location of the property;
- Size, shape and physical features;
- Legal and physical access to the property;
- Municipal services available;
- Local zoning and planning considerations;
- Size, condition and functional qualities of the improvements;
- Surrounding land use schemes;
- Area real estate and development trends;
- Current use of property; and
- Existence of two easements bisecting the property at its water frontage area.

22. Fennell compiled a set of four comparison sales and two listings. The comparison properties ranged in un-adjusted per square foot basis, between $2.75 and $127.36.

23. He then adjusted the sales and the listings in accordance with the factors set out above and dropped one of the sales comparables and one of the listing comparables because of their poor quality as comparables to the lands of the Crons. Fennell arrived at an adjusted value range between $12.65 and 36.37 per square foot. He concludes that a market rate of $28.00 per square foot is an appropriate valuation.

24. Fennell then considered the existence of the service easement to the extent to which it reduces the value of the proposed driveway area. Concluding that the existing easement reduced the value of its square footage by 50%, he applied a rate of $14.00 to that portion of the area which overlapped the existing service easement area. Based on these calculations Fennell concluded that the value of the use of the land so taken is $73,276.00 which he rounded down to an even $73,000.00.

25. To this number, Fennell added $5,000.00 for any physical damage occasioned by the construction of the driveway and arrived at the total amount of $78,000.00 in compensation.

26. Fennell gave an opinion that a size adjustment as was done by MacLellan was not helpful since the 3570 square foot lot assumed was not a free standing lot and could only be used in conjunction with the surrounding residential property. He also testified that a potential subdivision of the Cron property would not require the consent of Sutherland.

27. On cross-examination Fennell testified that this was a unique case and that he had never been called upon to do a valuation under the *Private Ways Act*. In his evidence he testified that the driveway would not materially affect the view plane from the residence of the Crons because of the topography of the lands.

The Law

28. The *Private Ways Act, supra* confers statutory power to impose access to a property over the lands of a neighbouring owner and to compensate that owner for the loss suffered.

29. The authority to appoint arbitrators and their power in carrying out the appraisal pursuant to the Act is as follows:

> 20 Where no agreement for compensation is made, arbitrators to appraise the same shall be appointed in the following manner:
>
> (a) one arbitrator shall be appointed by the commissioner, another by the owner of the land and a third by the warden;
>
> ....
>
> 23 (1) The arbitrators shall enter upon the land and appraise the compensation payable to the owner in respect thereto.
>
> (2) The award of the majority of such arbitrators is valid and binding.
>
> (3) The precept, with the report of the commissioner and the award, accompanied by a plan and containing or referring to a description of the land, shall be transmitted to the municipal clerk to be laid before the council. *R.S., c. 358, s. 23.*

30. Specifically, section 28 of the Act sets out the nature of the compensation to be awarded as follows:

> 28 The compensation to which an owner shall be entitled shall include the value of the use of the land so taken, if any, and the damages to the land of the owner directly caused by such private way or road.

31. The ascertainment of compensation is limited by s. 36 of the Act as follows:

> 36 For greater certainty,

(a) an order, award or decision made or any other action taken pursuant to this Act is not an expropriation for the purpose of the Expropriation Act or at common law or otherwise; and

(b) the Expropriation Act does not apply to this Act or to any order, award, decision or any other action made or taken pursuant to this Act. *2011, c. 25, s. 2.*

32. The arbitrators for this arbitration were appointed in accordance with s. 20 of the Act. Each of the Crons, the commissioner and the Municipality appointed one arbitrator.

33. Section 23 of the Act requires the Arbitrators to "…enter the lands and appraise the compensation…". It is clear from the wording of the Act that the Arbitrators shall **conduct the appraisal of the compensation**. In doing so they are entitled to consider any evidence presented by the parties to the arbitration. In this case both Crons and Sutherland chose to present an appraisal report prepared on their behalf. The hearing on September 23rd, 2014, was scheduled to receive that evidence and submissions with respect to the evidence.

34. Both appraisers adopted the "Comparison Approach" to appraise the value of the use of the land so taken pursuant to s. 28 of the Act.

35. Both appraisers interpreted the second branch of s.28 "..and damages to the land of the owner directly caused by such private way or road", to mean physical damage occasioned by the construction of the road, such as removal of trees etc. Only one of the appraisers, Fennell, considered in his report any reduction or diminution of value of the lands of the owners caused by the private way or road as laid out by Commissioner Baker.

36. The Act is remedial in nature. It permits a property owner by Petition to the Municipality in which the lands of the Petitioner are situated to lay out an easement across a neighbouring property to provide access to the Petitioner's land and to compensate the owner of the lands which become encumbered by the petitioned-for easement. Pursuant to s. 9 (5) of the Interpretation Act, R.S.N.S 1989 c. 235:

(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.

37. At the commissioner stage of the proceedings under Act, Sutherland was entitled to a broad, remedial and favourable interpretation of the Act. It resulted in Commissioner Baker laying out the right of way road to be appraised. At the compensation stage of the proceedings under the Act the owners, the Crons, are entitled to a broad, remedial and favourable interpretation of the Act in setting the compensation.

Analysis

38. The Arbitrators take the view that correct compensation for the Crons includes compensation for:

    a. the use of the land taken by the easement;
    b. physical damage to the land resulting from construction of the road; and
    c. monetary damages for the reduction in value of land of the Crons directly resulting from the private way as laid out by Commissioner Baker.

39. Under s. 23 of the Act, the arbitrators are required to enter the lands and appraise the compensation for the owner of the lands. Section 28 does not limit the considerations of appraisal but rather requires the Arbitrators to consider and value both loss of use and damages occasioned by the granting of the access easement.

40. During evidence both experts and during submissions both counsel were asked for the interpretation of the words contained in s. 28. The arbitrators agree and find that "the loss of the use of the land so taken" is properly compensated for by determining the value of land. Given the nature of this easement as a road or private way, one would be hard pressed to find residual uses of the area taken other than use as a road by the owner and the owner's right to cross the road. Essentially all other uses are removed.

41. With respect to the second branch of s.28, it must be noted that the Act speaks of "damages" rather than "damage". The proper definition of these words are found in any dictionary. Quoting from *Websters, 2014*, :

    > **Damages** *n.* injury, harm – *pl.* sum claimed or adjudged in compensation for harm or injury.

42. The wording of s. 28 of the *Private Ways Act*, *supra*, makes it clear that damages "directly caused to the land of the owners" are to be compensated. Taking into consideration the wording of the Act, the Panel finds that a diminution of the value of the land of the owners creates an injury and harm to the land of the owners that is directly caused by the easement or right-of-way. The land of the owners will be functionally diminished by the right-of-way as laid out by Commisioner Baker.

Analysis of the Appraisal Evidence

Lot Values

43. The two appraisers, MacLellan for the Crons and Fennell for Ms Sutherland, both adopted the Direct Market Comparison Approach. Both appraisers compared waterfront sales that had taken place and made adjustment to the sale prices to arrive at values which could be used for comparison with the land to be taken in order to establish value. Both appraisers made adjustments to the sale prices to estimate what the price would have been if it had sold on the effective date. MacLellan used a time adjustment based on three percent a year using MLS data and National Bank statistics. Fennell only adjusted one of his sales for a total of ten percent.

44. MacLellan on the other hand made only one other adjustment after time which was for size. MacLellan's logic was that the parent lands over which the easement was being taken did not have a uniform value for every square foot, and that the land taken would be more valuable than the land at the rear of the lot which was steep and unusable. In order to account for this, he made the assumption that the land under the easement was itself a waterfront lot that could be developed and made all of the size adjustments based on the size of the easement area. The adjustments made were based upon the formula:

Lot size	10,000 to 15,000 square feet	20%
	20,000 to 25,000 square feet	30%
	40,000 + square feet	300%

45. Aside from the fact that the formula omitted sites between 15,000 to 20,000 square feet, and 25,000 to 40,000 square feet, the Panel found no evidence to support this hypothesis, nor any logic to it.

46. Fennell made adjustments for location, size, services and 'other'. The total of these adjustments on the time adjusted sales was very large, resulting in adjustments for each

of the sales of: plus 95%, minus 76%, plus 70% and plus 317% for the first four of his comparable properties. The largest adjustment was on the second comparable which was adjusted from $127.36 per foot to $30.36 per foot. When questioned by thePanel, Mr. Fennell could not provide evidence for the adjustments, stating that it was his "experience".

47. Both appraisers used as one of their comparable sales a property located at 1047 Belmont on the Arm. Both appraisers agreed that it was a relevant sale to use; however, MacLellan adjusted the sale price from $129.38 per square foot to $163.80 per square foot which was in excess of double his final value conclusion.

48. Fennell's adjustment of this same sale was from $127.36 to $30.36 per square foot, still higher than his conclusion of $28.00 per square foot. The Panel, after hearing the evidence, found that the Belmont on the Arm sale was not a useful comparable to either the subject lands or the other comparable properties used. The exclusion of this sale narrowed the range of sale prices and time adjusted sale prices significantly.

49. Both appraisers broke the sale price down into a value per square foot ending up, even after large adjustments, with a large range of value. It is apparent to the Panel that when taking the time adjusted values for all of the comparables used by MacLellan that there is a fairly tight value range in lot value as opposed to the value per square foot. Taking the time adjusted values per square foot on page19 of the MacLellan report and applying them to the area of each, the range of values are:

Index Sale No.	**Time Adjusted Price/Sq.Ft.**	**Total Adjusted Lot Value**
1	$133.64	$1,394,399
2	$54.62	$1,147,020
3	$48.92	$1,217,520
4	$24.00	$1,017,720
5	$25.83	$1138713
6	$17.49	$1,065,193

50. When removing the Belmont on the Arm sale (Sale No.1), the adjusted value range falls tightly between $1,017,720 to $1,217,520, indicating that the value of the subject lands would most probably fall between $1m and $1.2 m. Both appraisers mentioned that the

possibility of being able to subdivide the subject property may have an effect on value but no evidence was given as to the actual possibility of being able to subdivide or as to the effect on value.

The Effect of the Existing Easements in Favour of HRM

51. The access right-of-way in favour of Ms Sutherland follows, for the most part, the route of an existing easement in favour of HRM. The existing easement encumbers the parent lot parcel. The appraisers dealt with this encumbrance in different ways. Fennell assumed that the existing encumbrance had removed 50% of the land value affected by the easement in that it had removed certain rights from the land. No evidence was provided by Fennell as to the 50% value but was used as an empirical measure. Fennell applied 50% of his concluded value per square foot to the encumbered land and 100% of value to the land falling outside of the existing right-of-way.

52. MacLellan was of the opinion that the existing right-of-way in favour of HRM had no effect on the value of the lands and applied 100% of his land value opinion to the access easement area. In support of this opinion he gave reference to a recent Pipeline Arbitration Committee Decision, *Miller and Miller Maritime and Northeast Pipeline* 2012 PAC. In the cited decision the Committee had awarded 100% of value to land to be encumbered with a subsurface oil pipeline. In the Panel's opinion, the decision suggests that the existence of the service easement may have taken away 100% of the value of the affected land which would leave 0% for compensation to the Crons to the extent to which the existing service easement and the proposed right of way coincide.

53. The Panel is satisfied that the value of the land affected by the HRM Easement has been reduced in value and in the absence of any other evidence accepts the evidence of Mr. Fennell at 50% of value. The Panel has arrived at this conclusion taking into consideration the specific circumstances of the subsurface easement in *Miller, supra*, which differed from the HRM service easement in that in *Miller, supra* all functional use of the property was removed.

Damages to the Land of the Owner Directly caused by Such Private Way or Road

54. MacLellan did not address this matter in his report. In his evidence he indicated that the approach that he used might have taken this into account. Fennell does address areas of potential loss of value to the land owner relating to: Loss of Privacy; Effect on Ability to

Subdivide; Loss of easy access from the dwelling to the water frontage; effect on ability to construct additional structures and; effect on views of the waterfront from the dwelling. After this analysis, it was Fennell's opinion that there was no adverse effect with the exception of a cost of $5,000 to replace some trees.

Findings

55. The Panel has reviewed all of the evidence provided and also looked at its responsibilities under the Act to appraise the compensation payable to the owner.

56. With regard to the value of the land, the Panel agrees that the Direct Market Comparison Approach is the most appropriate method to use. The Panel has utilized the time adjusted lot sales as used in the MacLellan report to arrive at a lot value of $1.15 million dollars giving a value per square foot to be applied to the land affected by the access easement of $17.50 per square foot.

57. With regard to the value of the land affected by the HRM easement, we accept the 50% of value as used by Fennelll, together with the 100% loss of value for the lands outside the easement.
The appraisal of the land taken is therefore:

Value of land of right-of-way over freehold area -

1,665 sq. ft. @ $17.50	=	$29,137

Value of land of right-of-way over existing easement area-

1,904 sq. ft. @ $8.75	=	$16,660
		$45,797
Rounded		$45,800

58. The Panel has heard the evidence regarding the damages to the land of the owner directly caused by the private road. The Panel has also viewed the property. It is quite apparent that there will be vehicles crossing the property between the residence and the water frontage. The existing HRM easement is passive and the driveway is not. Neither appraiser looked at the damages, or loss of value of the total property which may be caused by this encumbrance. Pursuant to its powers set out in section 20 of the Act, the Panel finds that that there is a negative effect on the value of lands owned by the Crons. The extent of this negative effect and its valuation, was arrived at bearing in mind the existing easements crossing the front of the Crons lands and the appraisal expertise of one of the Panel members. The only evidence of the total property value is in the MacLellan

report, at $1,900,000. The Panel has appraised the damages for loss in value of the Crons' lands directly caused by the right-of-way at 5% of the value of the lands as assessed by MacLellan. That amount based on the evidence before us is $95,000.00.

59. The total award is therefore:

Value of land under Access Easement	$ 45,800
Loss in Value	$ 95,000
	$140,800

Additional Expenses and Costs

60. The exercise of the provisions of the *Private Ways Act, supra*, is an exercise of statutory power in the public interest.

61. The Act contemplates a taking of rights from property owners for the benefit of landlocked neighbours and the compensation payable for such a taking. *In Nova Scotia (Attorney General) v. Williams* [1995] NSJ No 331 (CA) the Nova Scotia Court of Appeal stated the following at paragraph 20:

> When the public interest demands that property rights must be taken from an individual owner against his of her will, the owner has no option but to rely in good faith on the professionalism of an appraiser for advice as to their value. It is unlikely the owner will have experience in dealing with appraisers or any means of controlling the cost of ascertaining the value of the expropriated property interests. It is not the intention of the *Act* that an owner whose lands are taken should have to spend the compensation received for them on professional fees.

62. In this proceeding the parties by agreement determined that both Schedule A to the *Commercial Arbitration Act* S.N.S. 1999, c. 5, as amended, shall apply and agreed as follows:

> The arbitrators shall be authorized to determine what, if any, additional expenses are to be paid by the Petitioner, together with the amount of any such additional expenses. The categories of additional expenses claimed by the Owners include legal fees and expert fees. The Petitioner denies liability for those expenses.

63. In Schedule "A" of the *Commercial Arbitration Act, supra* paragraph 8(n) states:

Under this Schedule, the power of the arbitrator includes, but is not limited to,

....

(n) fixing and awarding costs, including solicitor/client costs and the costs of the arbitration proceeding.

64. The results of the arbitration are mixed. Expert evidence presented by the parties was partially adopted and partially rejected. Neither party addressed, sufficiently, the issue of "damages directly caused" in their submissions and their appraisals did not address the diminution in value of the land caused to the owners, in this case the Crons.

65. The Panel finds that the Crons in light of the mixed results are entitled to their costs on a party party basis and is prepared to allow, based on an amount involved of $140,800.00 the sum of $16,800.00 plus their expert appraiser fees and reasonable disbursements.

66. The compensation assessed, together with the costs awarded is in the amount of $157,600.00 plus the additional expenses for expert fees of the Crons and reasonable disbursements. If the parties cannot agree on the disbursements, the Panel will set disbursements on receipt of proof of such disbursements.

DATED at Halifax, this 17th November, 2014

The Panel

Kathryn Dumke	Charles Hardy	Kevin Downie