DECISION **2019 NSUARB 108**
M05310

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE EXPROPRIATION ACT

- and -

IN THE MATTER OF AN APPEAL by **KEVIN PARTRIDGE** and **JANE DEWOLFE** to determine compensation to be paid by **THE ATTORNEY GENERAL FOR THE PROVINCE OF NOVA SCOTIA,** representing Her Majesty the Queen in Right of the Province of Nova Scotia with respect to the partial expropriation of lands located at 5 South Side Harbour Road, Antigonish

BEFORE:	Richard J. Melanson, LL.B., Member
CLAIMANTS:	**KEVIN PARTRIDGE & JANE DEWOLFE** Gavin Giles, Q.C. Michael Blades, LL.B.
RESPONDENT:	**DEPARTMENT OF JUSTICE** Mark V. Rieksts, LL.B.
HEARING DATES:	February 5 – 14, 2018; May 2 – 3, 2018; May 22 – 23, 2018; August 13 – 24, 2018.
FINAL SUBMISSIONS:	November 6, 2018
SUPPLEMENTARY SUBMISSIONS:	**May 29, 2019**
DECISION DATE:	**August 8, 2019**
DECISION:	**The Claimants are entitled to the amount of $70,469.80 in compensation, plus applicable interest as outlined in this decision. The Board will determine costs and any income tax issue arising from this decision; if the parties cannot agree.**

Table of Contents

1.0 INTRODUCTION

[1] On October 3, 2011, the Province of Nova Scotia (Province) expropriated an easement over lands located at what was formally known as civic #5 South Side Harbour Road (now 5 South Harbour Lane), Lower South River, Nova Scotia, identified as PID #01263945 in the Nova Scotia Land Registry System (Property). This case is about the amount of compensation which Kevin Partridge and Jane DeWolfe (Claimants) are entitled to receive from the Province.

[2] A photograph showing the Property at a point in time prior to the events addressed in this Decision is reproduced below:

[Exhibit P-30, Vol. F, Tab 28, p. 5079]

[3] The Property is located on the east bank of the South River. It is downstream from and near a bridge on Highway 104 which spans the South River. The circumstances giving rise to the claim relate to the replacement of the old Highway 104 bridge and the construction and use of a temporary bridge. The temporary bridge was

required so traffic could continue to flow over a major highway while the replacement bridge was being constructed.

[4] The Property is legally owned by Mr. Partridge. The Claimants have lived at the Property, as common law spouses, for over 30 years. From 2008 until 2012, Mr. Partridge operated a sole proprietorship, with the assistance of Ms. DeWolfe, under the business name "Roaming Restorations". This business was operated from the Property. It was devoted almost exclusively to log home restorations.

[5] The Claimants say the expropriation and associated construction of the temporary bridge caused major flood damage, the loss of their business, a reduction in the value of their remaining lands, and various personal damages and costs, including professional fees.

[6] The Claimants say they are entitled to the following:

- $8,000.00 for injurious affection representing the market value of the expropriated easement interest, with interest at 12% per annum from October 20, 2011 to the date of judgment;
- $436,875.00 for injurious affection representing the assessed present value of the Claimants' business losses and asset value, with interest at a rate of 12% per annum from May 1, 2014 to the date of judgment;
- $17,289.30 for injurious affection representing the expenses of an attempted business mitigation move, with interest at a rate of 12% per annum from June 1, 2011 to the date of judgment;
- $363,000.00 for injurious affection representing the loss in value to the remaining lands as a result of the taking, together with the construction of the works, with

interest at a rate of 12% per annum from November 1, 2012 to the date of judgment;

- $450,000.00 for injurious affection representing personal damages for both of the Claimants resulting from the taking and the construction of the works, with interest at a rate of 12% per annum from November 1, 2012 to the date of judgment;
- $14,522.63 for injurious affection representing miscellaneous personal damages, with interest at a rate of 12% per annum from December 1, 2011 to the date of judgment; and
- $81,316.87 for disturbance damages representing a consultant's fees, with interest at the contractual rate of interest.

[7] The Province contests virtually every aspect of the claim.

[8] After a lengthy hearing, involving 20 witnesses, and a large number of documents, photographs and videos, the Board has assessed the evidence and determined the Claimants are entitled to the following:

- $15,857.55 with respect to mitigation damages associated with an attempted business move, with interest thereon at 6% per annum from October 29, 2011 until the date of payment;
- $6,000.00 as compensation for the value of the land expropriated, with interest thereon at 6% per annum from October 29, 2011 until the date of payment;
- $11,657.25 for injurious affection relating to driveway drainage issues, with interest thereon at 6% per annum from October 29, 2011 until the date of payment;

- $20,000.00 for injurious affection relating to loss of use and enjoyment of the Property, with interest thereon at 6% per annum from October 29, 2011 until the date of payment; and
- $16,950.00 for disturbance damages related to professional fees. No interest is payable for disturbance damages.

2.0 ISSUES

[9] The issues in dispute between the parties are:

- What caused the flood damage suffered by the Claimants?
- Are the Claimants entitled to compensation for injurious affection with respect to business losses, including mitigation expenses? If so, in what amount?
- What amount of compensation should the Province pay for the value of the lands expropriated?
- Are the Claimants entitled to compensation for injurious affection related to the loss of use and enjoyment of the Property, and personal pain and suffering? If so, in what amount?
- Are the Claimants entitled to compensation for injurious affection related to the diminished value of the remaining property? If so, in what amount?
- Are the Claimants are entitled to compensation for injurious affection for miscellaneous costs? If so, in what amount?
- What applicable interest applies on the amounts awarded in relation to the above categories?
- Are the Claimants entitled to compensation for disturbance damages related to professional fees? If so, in what amount?

3.0 STATUTORY PROVISIONS

[10] This claim is determined under the *Expropriation Act,* R.S.N.S. 1989, c. 156, as amended. The relevant provisions of the *Act* have been attached as Appendix "A".

4.0 THE CAUSE OF THE FLOOD DAMAGE

[11] A major portion of this claim rests on the Claimants' assertion that the Province's bridge replacement project altered the performance of a large flood plain to the west of the South River, and immediately opposite the Property. The Claimants say that the Province blocked a flood plain channel which had previously directed rising waters in the South River into the flood plain and away from the Property. As a result, the Claimants allege the Property, and associated business, suffered flood damage on a number of occasions from October 30, 2011 to January 12, 2014.

[12] The Province says there is no flood plain channel. It asserts the bridge replacement work had no appreciable impact on the flood plain, which continued to operate as it should. The Province submits this position is supported by the opinion of Glen Woodford, P.Eng., the only expert who provided evidence on flood causation.

[13] As with other major components of this claim, many facts were in dispute, the credibility of witnesses was challenged, and the weight afforded to expert evidence was in issue.

4.1 Legal Principles - Causation

[14] The Claimants have the burden of proving that the Province's work on the bridge replacement project caused the flooding, which they say destroyed their business and damaged the Property, resulting in losses which can be claimed pursuant to the *Expropriation Act.*

[15] *Clements v. Clements,* [2012] 2 S.C.R 181, 2012 S.C.C 32, a negligence case, provides a good summary of the legal principles related to causation.

[16] The following principles can be extracted from *Clements:*

- The test for showing causation is the "but for" test;
- The claimants must show, on a balance of probabilities, that "but for" the actions of the Province, related to the bridge replacement project, they would not have sustained flooding damages;
- The "but for" test must be applied in a robust common-sense manner;
- An inference of causation may be made even if positive or scientific proof has not been presented. There is no need for scientific or expert evidence of the precise contribution of the Province's actions to the flooding which occurred;
- If the "but for" causation test is established by inference, the Province may present evidence to show its actions were not a necessary cause of the flooding;
- The Claimants have the ultimate burden of proof. If some evidence which supports another cause is presented, all the evidence must be weighed by the Board. The Board must keep in mind what evidence one side had the ability to produce and the other to contradict.

4.2 A summary of the evidence related to flooding

[17] Both Mr. Partridge and Ms. DeWolfe testified that, prior to the bridge project, they observed the operation of a flood plain channel over the long period of time they occupied the Property. The Claimants said that they often described it as a "bathtub drain." According to Mr. Partridge, when the waters in the South River rose, due to such factors as major rain events or the spring thaw, the water would shoot out through the

flood plain channel into a back channel. It would then disperse into the wider flood plain and the nearby estuary.

[18] The Claimants, along with Mr. Partridge's son, Greg Partridge, and the Claimants' daughter, Jaclyn Clark, testified that immediately downriver from the flood plain channel, a portion of the land along the west bank of the South River effectively became an island during high water events. In the evidence, this area is sometimes referred to as the "big island".

[19] Mr. Partridge said that prior to the start of the bridge construction in September, 2011, the water had never risen high enough on the Property side of the South River to cause damage to his business equipment, vehicles or his home. Ms. DeWolfe testified she had never seen water above the banks of the Property. Both Greg Partridge and Jaclyn Clark testified they had never seen waters rise on the Property sufficient enough to cause damage.

[20] Mr. Partridge acknowledged that there were numerous areas in and around Antigonish which were subject to flooding. He said the Property had never experienced high water events significant enough for him to take note, even when areas prone to flooding were inundated.

[21] Ms. DeWolfe's testimony was much the same as that of Mr. Partridge. She said there had been many occurrences over the years where flooding had occurred in Antigonish, but not on the Property. She said she had seen rising waters in the South River flow through the flood plain channel into the flood plain roughly 600-700 times in her life at the Property, prior to the start of the bridge replacement project.

[22] The Province called four witnesses from the Antigonish area. They were Harry Daemen, his wife Annette, Terence Haliburton and David Cameron. The purpose of their evidence was to show that the Property had previously flooded before the start of the bridge replacement project.

[23] Annette Daemen testified honestly and to the best of her recollection. It was apparent from her demeanor, her answers, and her inability to identify the Property, that she was confused in her recollection. It was unclear to the Board what area her testimony related to and the Board assigns little weight to her evidence.

[24] Mr. Daemen's recollection was that he had seen what he described as flooding on the Property on two occasions prior to the 2011 construction. He described this flooding as occurring in the late 1990's and approximately 2000. His recollection of the extent of the flooding was focused primarily on the deck area of the Partridge/DeWolfe home. He described what he saw as the water surcharging the main riverbank at the Property. As well, using the photograph at Tab 35, Vol. F, in Exhibit P-30, Mr. Daemen indicated water rising to the area where the work sheds are currently located. He pointed to an area below where a pool was formerly located on the Property.

[25] Mr. Haliburton testified to his knowledge of flooding in relation to the Property from 1991 to 2005. He said the whole area around the Property is a flood plain. He described a spruce tree on a little island, which he said was about the same height as the Property, and which he used as a reference point.

[26] When shown the aerial photograph in Exhibit P-30, Vol. F, Tab 35, he said the water rose probably "... close to where his buildings are." Mr. Haliburton was referencing the work sheds shown in the photograph. In cross-examination,

Mr. Haliburton acknowledged he saw water rising above the banks of the South River, but he did not know if it touched Mr. Partridge's house, veranda, buildings, or his vehicles.

[27] David Cameron lives in the vicinity of the Property. He indicated he had seen flooding at the Property prior to 2011. Using the photograph at Exhibit P-30, Vol. F, Tab 35, he pointed to the area he believed had flooded on occasion. He pointed to areas which he said flooded at the same time as the Property, including the flood plain to the west.

[28] Mr. Cameron said flooding usually occurred in the spring. He also testified there were often other areas in and around Antigonish which flooded at the same time as when he had seen flooding at the Property.

[29] In cross-examination, it became apparent Mr. Cameron's most specific recollections related to when he was a child, and he could not recall that there had ever been flooding five or six times in a single year.

[30] Apart from the historical evidence presented during the hearing, the issue of potential flooding related to construction was raised with the Province by the Claimants. This formed part of discussions and negotiations which took place prior to the deposit of the expropriation documents. At the time, the Province was attempting to obtain a license agreement for the required land, rather than proceeding to expropriation. The Claimants said the issue was brought up in initial meetings, with Rod MacInnis, who was negotiating the proposed license agreement on behalf of the Province. A note prepared by Ms. DeWolfe indicates the issue was raised in a meeting at least as early as February 14, 2011.

[31] The flooding concern was documented in a meeting involving the Claimants; their consultant, Jeff Feigin, P. Eng., M.S.E.E.; the Claimants' lawyer, William F. Meehan; and, Mr. MacInnis. In a briefing note prepared by Mr. MacInnis dated March 8, 2011, he states:

> The following items were raised by the land owners and or their representatives as items for consideration and or clarification by TIR engineering staff.
>
> 1) Apparently there is an existing drainage channel that extends along the toe of slope on the north side of Hwy 104 from the west bank of the river to a former branch of the river. It was indicated that this channel should be maintained to ease the effects of flood water conditions.
>
> [Exhibit P-30, Vol. A, Tab 18, p. 259]

[32] Andrew MacPherson, the Province's Project Engineer, sent an internal email, dated March 15, 2011, which was copied to Mr. MacInnis. He made the following comment in relation to the issue of a drainage channel:

> 4) I am also hoping to include a trench/channel on the drawings that go to tender that would re-instate the existing trench/channel connecting the 2 bodies of water on the north side of the existing bridge. Mr. Partridge had an engineer to consult with on site and he indicated that there is currently a trench/channel that alleviates the Lower South River when it rises too high and diverts some of this water to an adjacent body of water. The body of water is to the west of the Lower South River and can be seen on some of the current drawings. When we place our fill on the North West side for the temporary bridge, this existing channel will get filled in. Mr. Partridge is looking for this detail prior to allowing his property for lease.
>
> [Exhibit P-30, Vol. E-1, Tab 60, p. 3779]

[33] In a letter dated March 23, 2011, Mr. MacInnis responded to the concern raised by Mr. Meehan as follows:

> The Project Engineer reviewed the site and indicated that any altered watercourse requirements would be included in tender documents.
>
> [Exhibit P-30, Vol. A, Tab 18, p. 259]

[34] In a letter dated March 25, 2011, Mr. Meehan pointed out the answer provided, amongst others which referred matters to the project engineer, did not amount to a resolution, unless a solution was proposed. He requested that engineering issues be coordinated with Mr. Feigin and that final design documents and specifications be

provided. Mr. MacInnis responded by suggesting Mr. MacPherson would present the engineering issues with design drawings in the tender.

[35] Mr. Feigin indicated that prior to the 2011 construction, he had personally seen what he would describe as an overflow swale or a flood plain channel in the same area as described by the Claimants. When he was there the day of or the day after a major rain event, he saw water flowing through this channel and into the estuary. After construction, Mr. Feigin said this overflow swale had been blocked, and the river became engorged after a significant weather event.

[36] Mr. MacPherson confirmed that Mr. Feigin had raised the issue of a drainage area "...between the main South River and a channel in back of the main south."

[37] In an email dated March 24, 2011, Mr. MacPherson says "...DFO were under the impression we would not be filling in the channel for the detour. It is clear we will be". [see Exhibit P-30, Vol. E-1, Tab 67, p. 3795].

[38] The Board is satisfied the evidence establishes the reference in this email was not to the low-lying area the Claimants described as a drainage channel. It was the back channel. This is more apparent in an email from Mr. MacPherson on the same date (see Exhibit P-30, Vol. E-1, Tab 66, p. 3793).

[39] Mr. MacPherson also discussed the flood plain with Mr. Partridge. In an email to a colleague dated March 31, 2011, Mr. MacPherson indicated:

> We also discussed the flood plain in his area and talked about the re-installation of a temporary channel between the two water bodies during the detour. This would also have to be re-installed after the detour is removed. They would like to see this included in drawings before signing off.
>
> [Exhibit P-30, Vol. E-1, Tab 79, p. 3833]

[40] Colin Maas was employed by Alva Construction, the company which won the tender to construct the temporary detour bridge. He was the bridge superintendent

involved in the construction. Reg Tramble, a civil engineer employed by Alva Construction, was also involved in the project. Mr. Tramble worked on the tender submission. He coordinated and reviewed issues with SNC Lavalin during the design phase. He also provided oversight on technical issues during construction. Neither Mr. Maas nor Mr. Tramble saw a drainage swale or channel in the area described by the Claimants and Mr. Feigin.

[41] A narrow shallow rock-scoured drainage swale was eventually incorporated in the final engineering drawings prepared by SNC Lavalin dated May 24, 2011. Mr. MacPherson testified this had been included in an effort to appease the Claimants; not because he had verified the existence of a drainage swale.

[42] Construction on the temporary detour bridge started on the opposite side of the South River from the Property in mid-September, 2011. The evidence shows that the temporary bridge, and in particular the toe of the slope of the earthworks and armour rock required to support the abutments, and consequently support the temporary bridge, on the west side of the South River, extended into the area where the Claimants and Mr. Feigin said there was a drainage channel or swale.

[43] On or about October 24, 2011, Mr. Partridge said he was told by someone employed by Alva Construction there had been a flood at the Property on October 5, 2011. On this date, the Claimants had been away visiting Greg Partridge and his family in Alberta. Mr. Partridge testified he was shown indications of the high-water mark for the October 5, 2011 event. As no damage had occurred, Mr. Partridge and Ms. DeWolfe said they were not aware of this event, until Mr. Partridge was informed of it, and shown the mark, by the Alva Construction employee.

[44] During the evening of October 30, 2011, and into morning hours of October 31, 2011, a major flooding event occurred at the Property. The Claimants testified the flood waters infiltrated their home, carried away logs associated with their business that were on the Property for preparation work, and damaged most of their work equipment.

[45] From October 5, 2011 to January 12, 2014, the Claimants say there were nine flood events which they documented, and others which they did not. This main flooding took place on the following dates:

- October 5, 2011;
- October 30, 2011;
- February 12, 2012;
- December 22, 2012;
- December 30, 2012;
- January 31, 2013;
- February 4, 2013;
- March 14, 2013; and
- January 12, 2014.

[46] The Claimants said the house flooded on October 30, 2011, February 12, 2012, January 31, 2013, and January 12, 2014. The October 30, 2011 flooding was the most significant.

[47] The Board was shown numerous pictures and videos of various floods, including the one during the night of October 30, 2011. The Claimants said that some of these videos and pictures show how the construction on the west side of the South River blocked the area described as a flood plain channel, preventing rapidly flowing water from

entering the channel. They said this caused the water to rise higher on the Property side of the river. They also testified that they saw this with their own eyes.

[48] There was contradictory evidence as to when, and if, all the potential obstructions related to the temporary detour bridge were removed. Mr. MacPherson said that as of November 23, 2012, the temporary detour bridge, and all the in-fill associated with the temporary structure, had been removed. The Alva Construction witnesses indicated the temporary bridge in-fill had been removed by this date.

[49] Mr. Partridge said there was still in-fill, or obstructions, in what he described as the flood plain channel into 2014. He testified work on twin bridges, another part of the highway twinning project, was proceeding on the west side of the river. An access road was built in the area where the temporary bridge had been. He and Ms. DeWolfe testified some of the infill used to construct the temporary bridge had been moved and used in the construction of these access roads. Although Mr. Partridge said the situation was better now, the armour rock for the new replacement bridge still extended somewhat into the flood plain channel. Mr. Feigin's testimony was generally consistent with that of Mr. Partridge.

4.3 Findings of Fact – Key Background Facts in dispute

[50] The main background facts in dispute relevant to the Board's analysis of causation are:

- Whether the Property experienced flooding prior to the bridge replacement project;
- Whether there was a flood plain channel or overflow swale adjacent to the old Highway 104 bridge across the South River from the Property;

- What could be observed by the lay witnesses with respect to the operation of the flood plain;
- Whether the South River rose as high as the Claimants' home on the Property, on the four occasions described by the Claimants; and
- The status of infilling beyond November, 2012.

[51] Another factual area of dispute between the parties related to what could be observed in relation to the operation of the flood plain after construction on the replacement bridge project had started and infilling was in place. This will be addressed in the Board's analysis on causation.

4.3.1 Prior Flooding

[52] The Province submits the Claimants are lying when they say the Property did not experience flooding prior to the bridge replacement work in 2011. The Province says the evidence of its four lay witnesses, and Mr. Woodford's opinion evidence, support the proposition that flooding had occurred on the Property, and the Claimants must have known about this. The Province argues that the Claimants' attempt to distinguish between flood damage and flooding is meant to deflect attention from the significance of the prior flooding.

[53] The Board must assess the credibility and reliability of the evidence. With respect to Mr. Woodford's reports, as discussed in more detail later, the Board does not accept they provide precise measurements of the extent the South River may have flooded the Property. The Board notes that even a 0.5-meter discrepancy in the modeling, would indicate flood elevations had not previously reached the Claimants' home or work sheds.

[54] When assessing the credibility of the Claimants on this point, the Board notes the following:

- The Claimants have a direct interest in the proceedings. The son and daughter, Greg Partridge and Jaclyn Clark, are not disinterested parties. This is no different than many litigated matters. While the Board may look for independent corroboration, it is not a requirement to accept their testimony;
- The Board saw nothing in the content of Greg Partridge and Jaclyn Clark's testimony, or in their demeanour, to suggest they were falsifying their evidence or their observations with respect to prior flooding. On the other hand, they did not live at the Property for as long as the Claimants;
- Mr. Partridge was very upset with the outcome of the negotiations with the Province. He was frustrated and angry. His evidence tended to show every action the Province took in a negative light. His evidence with respect to flooding tended to depend on the manner in which the question was asked. On balance, his response to a question from Mr. Giles that there had never been flooding which caused any damage, which is consistent with the evidence of the children, is the most accurate description on this point offered on behalf of the Claimants;
- In fact, the evidence that there was no flooding which caused any damage is consistent with the evidence of the lay witnesses called by the Province;
- While the Province's lay witnesses could not recall details of water elevation which they saw in passing, many years ago, the Board is convinced that at least Mr. Daemen, Mr. Haliburton and Mr. Cameron saw water elevations at the Property that overtopped the banks of the South River, but did not reach the home;

- The Board further notes that this is consistent with Mr. Partridge's comment to Mr. Woodford that he would not know the highest point the water reached on the Property. Since no damage was caused, he took no notice.

[55] Finally, the Board observes that Mr. Partridge and Ms. DeWolfe did not notice evidence of the October 5, 2011 flood event until it was pointed out to them by the Alva Construction employee. This flood event had clearly gone as high as the work sheds. It is therefore possible other prior flood events took place, which caused no damages. The Claimants may not have noted them.

[56] Based on the foregoing, the Board finds as a fact that the waters of the South River had overtopped its banks and moved onto the Property prior to the bridge replacement project. The Board accepts the evidence that it had not infiltrated the Claimants' home. It did not cause damage to the work equipment, whether in the yard, or in the work sheds, after these sheds had been placed on the Property. The exact extent of this flooding is unknown.

4.3.2 Existence of flood plain channel

[57] Mr. Rieksts objected to the use of the words "flood plain channel" during questioning by counsel for the Claimants on the basis the existence of such a channel had not been established. The Board allowed the use of the words for the sake of expediency.

[58] The Board knows the use of language to convey a concept is a powerful tool in an advocate's arsenal. The Board's determination as to whether a flood plain channel or overflow swale existed, where the Claimants assert it did, was not influenced

by how the area was described in counsels' questions. Rather, the Board has analyzed the evidence to arrive at its conclusions.

[59] While Mr. Feigin, the Claimants, Greg Partridge and Jaclyn Clark all asserted such a channel or swale existed, this was not based on any topographical measurements. It was based on their observations of the flow of the South River during high water events.

[60] The Board has examined the available pre-construction photographs. What can be seen in the photographs depends on the season and the water level in the river. While the Board will not analyze every photograph, a few examples are useful.

[61] The bottom, undated, photograph in Exhibit P-30, Vol. F, Tab 28, p. 5084, shows the area in question with full green vegetation. The area beside Highway 104 is overgrown with bushes, grasses, and some trees. The water levels are clearly below the banks of the South River and no channel or swale is visible. This area is also depicted in the photograph at Tab 32, p. 5169, of the same exhibit. The same observations are applicable.

[62] A photograph dated February 2011, in Exhibit P-30, Tab 32, p. 5147, shows the subject area during the winter. At this time of year, the toe of the slope of the old Highway 104 bridge, together with the embankment along the bridge and highway, are visible. A low-lying area can be seen adjacent to the embankment. The South River has overtopped its banks on the west side. The water, which appears to be at the same level as the river, extends into the area beyond the trees on the bank. The picture does not show whether the area immediately adjacent to the highway bridge is any lower than the rest of the flood plain. There are trees growing in this area. It is difficult to see the exact

elevation of the river on the Property side of the South River. A similar scene is depicted in the photograph at Tab 28, p. 5081.

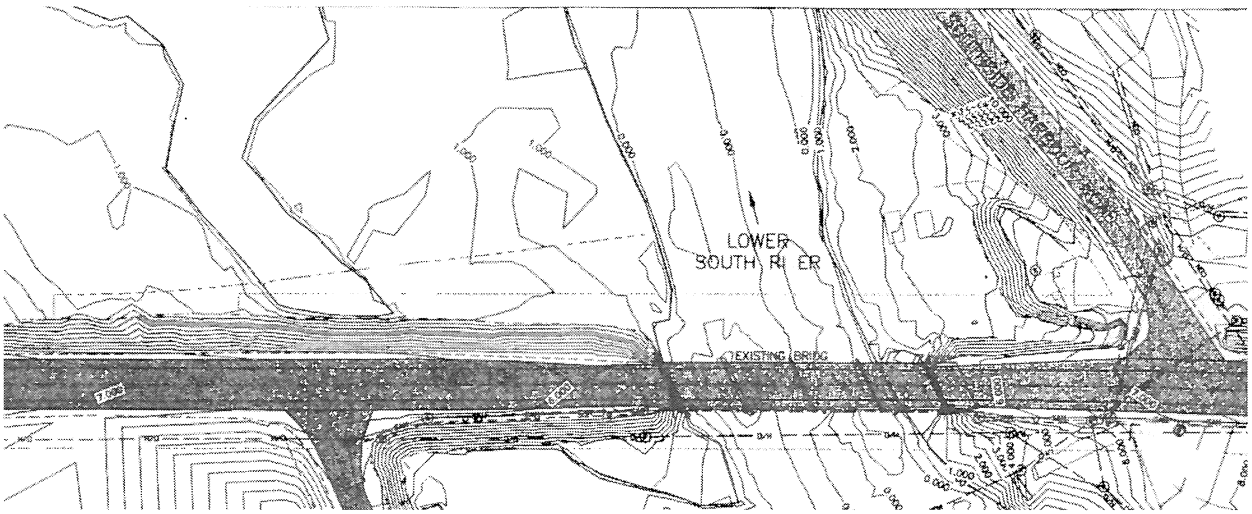
[63] A photograph dated April 15, 2011, in Exhibit P-30, Vol. F, Tab 1, p. 4881, shows the area before vegetation is in full leaf. The river is below its banks. While a low-lying area is visible, it is impossible to distinguish it from the remainder of the flood plain in this photograph. As well, no channel or swale is visible.

[64] Extensive use was made of the photograph at Tab 35 in Vol. F of Exhibit P-30. It is a blow-up aerial photograph of the site. Claimants' counsel argued this shows a clear channel joining the South River and the back channel, when water levels are elevated. The Board does not agree.

[65] Clearly a portion of the darkened area is the toe of the slope of the old Highway 104 bridge. As well, there appears to be green vegetation throughout the photograph which appears very dark in this representation. Despite counsel's assertion otherwise, and Ms. DeWolfe's testimony pointing out the drainage channel can be seen in this photograph, it is not clear to the Board this photograph even depicts a high-water event on the South River.

[66] The Board was not directed to any plans or drawings which show a channel or swale. Sheet 1 of 12 of the SNC Lavalin final drawings [Exhibit P-49] shows the site prior to construction. It has contour lines. It shows the toe of the slope of the old Highway 104 bridge approach, along with the flood plain on the west side of the South River, across from the Property. While Exhibit P-49 was admitted by the Board during the hearing, a similar drawing, containing the same information, was part of the Joint Exhibit Book (see

Exhibit P-30, Vol. A, Tab 6, p. 114). The parties agreed the Board could use the evidence in Exhibit P-30. A portion of the drawing is reproduced below:



[Exhibit P-49, sheet 1 of 12]

[67] The drawing shows a contour line with at least 1.0 meter of elevation from the toe of the slope of the old bridge, into the flood plain, in an irregular shape, looping back to the toe of the slope.

[68] This drawing indicates that the land elevation is 0.0 meters at the river's edge. It rises to at least 1.0 meter, but not to 2.0 meters, in the area described by the Claimants as the flood plain channel or swale. The elevation falls back to 0.0 meters as the land slopes down to the back channel.

[69] This is consistent with what is shown in the photographs in Exhibit P-30, Vol. F, Tab 28, p. 5088. These photos are date stamped September 20 and September 22, 2011, respectively. There is work being conducted in the area adjacent to the old Highway 104 bridge approach. No armour rock or infill is yet in place along the edge of the South River bank. The photographs show a rise in the general area where an elevation is shown on the contour map.

[70] The Board realizes construction work had already begun at this stage, but little gravel infill, if any, appears to have been deposited in this area. While the photographs, in and of themselves, would not be conclusive of the pre-construction topography, they tend to confirm what is shown in the contour drawing.

[71] Mr. MacPherson had a drainage swale incorporated in the SNC Lavalin drawings. The Board accepts that neither he, nor Mr. Maas, who oversaw the vegetation grubbing for this project, saw a channel or swale. With respect to grubbing, the Board prefers the evidence of Mr. Maas, to that of Mr. Tramble, who indicated there had been no grubbing. Mr. Maas had more day to day hands-on experience with the project.

[72] While Mr. MacPherson discusses the existence of a channel in his emails, it appears both he and Mr. MacInnis were relying on the assertions made by Mr. Partridge and Mr. Feigin. When Mr. MacPherson refers to a body of water visible in drawings, he is probably referring to the back channel. The Board saw no drawings showing a channel between the South River and the back channel.

[73] The size of a drainage swale incorporated in the drawings, and visible in some photographs, is similar to the one constructed by Alva Construction across the river, on the Property. Its only function would have been to direct water runoff from the toe of the slope of the detour bridge towards either the South River or the back channel.

[74] From the photographs and the SNC Lavalin drawings, and the description of the "big island" during high water events, the Board concludes and makes the following findings of fact:

- Prior to construction, there was an area of low-lying land, across the South River from the Property, next to the old Highway 104 bridge approach, which formed part of the flood plain on that side of the river;
- This was not a defined channel in the traditional sense. It was not a defined depression joining two bodies of water. It was covered with trees and vegetation;
- There was a back channel to the west of the western flood plain and the South River. This channel appeared to end when it abutted Highway 104;
- The area described as a swale actually rose in elevation, before reaching the back channel. At its highest point, the low-lying area in question was at a much lower elevation than the toe of the slope of the old bridge. It was at a slightly lower elevation than the area in the flood plain described as the "big island"; and
- When the water elevations rose beyond the banks of the South River, water would flow into the low-lying area, which was part of the flood plain.

4.3.3 What could be observed with respect to the operation of the flood plain

[75] The Claimants said that, during high water events, the low-lying area to the north of the old Highway 104 bridge, on the western bank of the South River, allowed water to flow into the back channel and wider flood plain such that it did not reach the Property. The Province challenged the credibility and reliability of the Claimants, and the witnesses who testified in support of the proposition they advanced.

[76] On the issue of the operation of the low-lying area and the flood plain, the Board is satisfied that the Claimants had and continue to have a genuine belief that it operates in the manner they described. They believe that this operation can be observed

and that with a measure of common sense, others should understand this and be able to observe the same thing.

[77] The Board does not accept Mr. Partridge's description that, prior to the construction, the flow of the river "shot" into the low-lying area adjacent to the old Highway 104 bridge and into the wider flood plain. This does not make inherent sense, when one takes into account the contour of the riverbank, the low-lying nature of the lands all along this bank, and the almost perpendicular angle where the low-lying area met the toe of the slope of the old bridge. Eddying and ripple or small rapid effects were likely visible as the water flowed into the flood plain. This may be what is meant by Mr. Partridge's descriptive language.

[78] After reviewing the testimony of Mr. Partridge, Ms. DeWolfe, Greg Partridge, Jaclyn Clark and Mr. Feigin, the Board finds that what could be observed prior to the replacement bridge construction, during highwater events, was water flowing in the low-lying area beside Highway 104 and into the flood plain. This is consistent with what is shown in the photographs discussed previously.

[79] The Board finds that if the water levels in the flood plain and South River did not reach levels higher than the highest elevations of the land described as the "big island", that land area would remain visible as waters flowed into the larger portion of the flood plain, back channel, and the estuary beyond. No part of the "big island" rose to an elevation of 2.0 meters. This can be seen by the interval markings on the SNC Lavalin drawing.

[80] There is no dispute that the low-lying area immediately adjacent to Highway 104, on the west bank of the South River, was infilled to allow for the construction of the

temporary bridge. The extent of the infill along the bank, and the associated armour rocks, is clearly visible in the photographic evidence.

[81] The photographs in Exhibit P-30, Vol. F, Tab 78, pp. 5089-5094, show the progression and extent of the infill. The armour rock and infill rise to just below the deck of the old Highway 104 bridge. The concrete abutment and temporary bridge structure are essentially level with the old bridge.

[82] The infill area, including the toe of the slope for the temporary bridge, extends into the low-lying area almost to the point of the "big island". As the temporary bridge approach angles back to Highway 104, the extent of incursion into the low-lying area diminishes further away from the riverbank. The location and extent of the infill can also be seen in SNC Lavalin's final drawings, and in particular sheet 2 of 12, which shows the plan and profile of the detour work, including the temporary bridge.

4.3.4 Post-construction flood water levels

[83] The Province submitted that there was no evidence, other than from the Claimants themselves, that post-construction flood waters had ever risen high enough to enter their home.

[84] The Province said the Claimants were not credible witnesses. Given the manner in which they had documented the river during the flooding, the Province argued the failure to take videos or pictures of the water damage in the home was suspect. In essence, the Province submitted the Claimants had orchestrated a form of conspiracy to substantiate a claim, when the negotiations with the Province, which preceded the expropriation, did not yield the result they had anticipated.

[85] The demeanor of the Claimants, the manner in which they spoke, and the evidence about their background, confirmed that they were people who had made their way through life by the sweat of their brow, using their acquired skills, knowledge and wits. They were not sophisticated litigants. The Board does not believe their evidence concerning water entering their home on various flooding occasions was part of an elaborate scheme to defraud the Province.

[86] The evidence about the October 30, 2011 flood event, which is the first point in time when the Claimants said their home had flooded, and the one which caused most of the damage, has been consistent throughout. Hoping, and then knowing, there would be an investigation by the Province to determine the cause of this flooding, it is unlikely the Claimants would have embellished this part of their evidence, which could have been readily verified by the Province. They would not have known, at that stage, the Province's flood investigation would turn out to be relatively cursory.

[87] The Board accepts the Claimants' evidence, and finds as a fact, that their home suffered water damage on the four occasions described in their testimony.

4.3.5 Status of infilling after completion of the bridge replacement project

[88] Pursuant to the terms of the contract between Alva Construction and the Province, the temporary detour and bridge, together with all infill associated with the construction, had to be removed.

[89] A form filed with Nova Scotia Environment dated November 29, 2017, indicated all work related to the Lower South River bridge replacement project was completed on November 23, 2012. Mr. MacPherson, Mr. Maas and Mr. Tramble all said

by this date, the temporary detour and bridge, together with associated infill, had been removed.

[90] Mr. Partridge, Ms. DeWolfe and Mr. Feigin said that some infill remained in the low-lying area. They said that work was proceeding on another project involving bridge twinning further downriver, and the low-lying area was used for an access road to this project.

[91] When shown the photograph in Exhibit P-30, Vol. F, Tab 8, p. 4903, Mr. Tramble indicated it showed the state of the area after Alva's work was completed. Mr. MacPherson said it did not. It appears to the Board the angle of the photograph does create some confusion. In any event, there are a number of photographs which assist the Board in coming to a determination on this point.

[92] The Board is satisfied the photographs provide a relatively good picture of the state of the low-lying area after the new Highway 104 bridge was in place, and the temporary detour and bridge had been removed.

[93] When comparing the photographs with the evidence of the witnesses, the Board is able to make the following findings of fact:

- By November 23, 2012, most of the infill, armour rock and works associated with the temporary detour and bridge had been removed;
- A road was constructed to access a bridge twinning project further downriver from the Property. This access road was located in the low-lying area adjacent to the new Highway 104 bridge. The access road did not extend to the bank of the South River across from the Property. Some of the infill used for the temporary bridge construction was moved to form part of the access road;

- At certain points in the winter, snow was plowed and deposited near the end of the access road, between Highway 104 and the "big island".
- The access road was removed at some point in 2014; and
- The armour rock associated with the new Highway 104 bridge, and to some extent the toe of the slope, extended a little further into the low-lying area than was the case with the old bridge. This situation continued to the dates of the hearing.

4.4 Opinion evidence

4.4.1 Preliminary issues

[94] Following a preliminary hearing to discuss process issues, the Board issued the following direction in a February 24, 2014, letter:

> With respect to the qualification of experts, the Board notes that the following language has been standard in Board proceedings for several years, and the Board intends to apply it here as well:
>
> > If a party does not consider the individual to be qualified as an expert as outlined in the qualification statement, the person must give notice of their disagreement within seven (7) days of having received the qualifications. If this notice is not provided, then the person shall be deemed to have accepted the qualification of the expert. Merely because a person accepts the individual as an expert does not prevent the party from cross-examining the expert or to argue at the hearing that the Board should give less or no weight to the expert's opinion.

[95] Mr. Woodford prepared an expert report on flood causation dated June 6, 2014. He also prepared an addendum report dated May 25, 2017. In accordance with the Board's direction, these reports were filed, and copies provided to the Claimants' counsel. As well, the Province provided a qualification statement to the Claimants on or about June 6, 2014. No objection was made in relation to this qualification statement.

[96] During the hearing, following a *voir dire* on Mr. Woodford's qualifications, the Claimants sought to have both reports struck. The Board notes the main basis for the

motion was not Mr. Woodford's qualification statement. The Claimants challenged Mr. Woodford's reports primarily on the basis they contained opinion evidence which was beyond Mr. Woodford's expertise, and were based on inadmissible hearsay, including opinion evidence hearsay.

[97] Considerable emphasis was placed on RTK GPS survey elevation results. These survey results were used as inputs in computer modeling to project water levels at the Property under different scenarios. Mr. Woodford indicated specialized skill and knowledge was required to conduct this survey work. It had been conducted by qualified persons in his office. He did not profess to be an expert in this field.

[98] When it became apparent that the Claimants' motion could not be heard in the allotted time remaining in the hearing, and new dates would have to be scheduled, Claimants' counsel withdrew the motion, on the understanding that they could still argue that Mr. Woodford's opinions should be given little or no weight. In effect, the result was the same as the process envisaged in the Board's original direction.

[99] Mr. Woodford's reports were therefore admitted into evidence, and he was qualified as follows:

> ... as an expert in the field civil engineering, capable of giving opinion evidence on the subject of storm drainage engineering and flood studies, including the causation of flooding, and hydrological and hydraulic characteristics of the flood plain and river in relation to the subject property, before, during, and after bridge construction activities.
>
> [Exhibit P-18(a), p. 2]

[100] Given Mr. Woodford's testimony that he was not an expert in the field, and was not qualified as such, the Board further decided that Mr. Woodford would not be allowed to provide opinion evidence in the form of oral testimony on the RTK GPS survey process. The Board would further not allow the addition of experts to the witness list to provide opinion evidence in relation to RTK GPS surveys at such a late stage in the

proceeding. The statutory time limit for providing a report on this topic had also passed. The Board ruled that the Province could elicit evidence from Mr. Woodford as to the basis upon which he concluded the RTK GPS measurements were reliable.

4.4.2 Mr. Woodford's opinions and counsels' arguments on weight

[101] Mr. Woodford offered the following opinions:

- The construction of the temporary detour bridge, the removal of the existing Highway 104 bridge, and the installation of the new bridge had no effect on the flooding which occurred at the Property;
- The flooding of the Property did not result from the work on the previously described new twin bridges;
- High water levels in the estuary caused the flooding at the Property; and
- The Property experienced flooding prior to the construction associated with the bridge replacement project and will do so again.

[102] The Claimants argued the Board should offer no weight to Mr. Woodford's opinions for the following reasons:

- Mr. Woodford strayed into advocacy;
- Mr. Woodford had very limited experience with the South River. He had no experience with the part of the South River or the flood plain near the Property. As well, he did not visit the site prior to construction;
- Mr. Woodford's analysis and opinions were based largely on the RTK GPS survey opinions, which are outside Mr. Woodford's expertise and are opinion hearsay evidence which the Claimants cannot test, and the Board cannot evaluate; and

- Mr. Woodford's analysis and opinions are based on hydrological and hydraulic computer modeling which he did not create, and the modeling is entirely based on second-hand hearsay data inputs.

[103] While some of the language in the Claimants' arguments related to admissibility, the reports and evidence provided by Mr. Woodford have already been admitted and Mr. Woodford has been qualified. The Board will treat all the Claimants' submissions as an argument that Mr. Woodford's opinions should be given no weight.

[104] The Province submits there is no basis for giving little or no weight to Mr. Woodford's opinions for the following reasons:

- It is permissible for an expert to relate what would otherwise be inadmissible hearsay to show the information relied upon to reach an opinion;
- Mr. Woodford had extensive experience with the modeling programs utilized for the purpose of this report. These modeling programs are of the type often used by experts in the field;
- Mr. Woodford provided a description of the manner in which the models were developed and the source of the input data;
- The input data is the type usually used by an expert in the field and Mr. Woodford explained why the data is reliable;
- The elevation data related to high water marks was prepared by qualified survey technicians. Mr. Woodford explained the controls employed by himself and his company to ascertain that such survey data was reliable;
- There was visual evidence which supported the reliability of Mr. Woodford's conclusions; and

- No evidence was presented to show any of the data, survey or otherwise, used by Mr. Woodford was inaccurate.

[105] The Claimants submit Mr. Woodford acted as an advocate. They stressed the fact Mr. Woodford retracted some concessions made in his initial report with respect to the impact of the history of flooding at the Property on his opinion. He also added a discussion with respect to ice effects in his Addendum Report.

[106] The Claimants also suggest certain admissions on cross-examination should have been included in Mr. Woodford's reports. They say the failure to do so amounts to advocacy.

[107] The Board does not agree with the Claimants that Mr. Woodford acted as an advocate. There is no indication of this in the wording of his reports. Any omissions raised in cross-examination do not rise to the level of advocacy. Mr. Woodford testified in a straightforward manner. He was not evasive. He conceded points in cross-examination when, it appears to the Board, it was appropriate to do so.

[108] To alter an opinion after being provided additional information does not amount to advocacy on the part of Mr. Woodford. To more fully discuss potential ice impacts which had been raised generally in his initial report, at the request of counsel for the Province, is not advocacy.

[109] Mr. Woodford's limited experience with the South River in the area of the Property, prior to the engagement, in and of itself, has limited impact on the weight of his opinion evidence. Mr. Woodford has extensive training and experience in the field of flood causation, hydrological modeling and hydraulic modeling. As with most professionals, this expertise can be applied to new settings, including different fact

scenarios. The degree to which Mr. Woodford was able to familiarize himself with pre-construction South River topography and characteristics is of more importance. This is discussed more fully later.

[110] Counsel for both parties referred the Board to *R v. Lavallee,* [1990] 1 S.C.R. 852, 1990 CanLII 95 (SCC), where the Supreme Court of Canada summarized the findings on expert opinion evidence, reliability, and hearsay in the earlier case of *R v. Abbey,* [1982] 2 S.C.R. 24, 1982 CanLII 25. The majority of the court held:

> For present purposes I think the ratio of *Abbey* can be distilled into the following propositions:
>
> 1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
> 2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
> 3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
> 4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.
>
> . . .
>
> In my view, as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion.

[111] In a concurring opinion, Sopinka, J., raised an apparent contradiction in the *Abbey* analysis; namely, how a relevant expert opinion can be admissible but entitled to no weight. The Board notes it's 2014 direction and the ruling made during the hearing, which was consistent with this direction, raises the same apparent contradiction. Justice Sopinka's analysis on this point is persuasive:

> The resolution of the contradiction inherent in *Abbey*, and the answer to the criticism *Abbey* has drawn, is to be found in the practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise (as in *St. John*), and evidence that an expert obtains from a party to litigation touching a matter directly in issue (as in *Abbey*).

> In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second- or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this Court has taken to the analysis of hearsay evidence in general, exemplified in *Ares v. Venner*, 1970 CanLII 5 (SCC), [1970] S.C.R. 608. In *R. v. Jordan* (1984), 1984 CanLII 635 (BC CA), 39 C.R. (3d) 50 (B.C.C.A.), a case concerning an expert's evaluation of the chemical composition of an alleged heroin specimen, Anderson J.A. held, and I respectfully agree, that *Abbey* does not apply in such circumstances. (See also *R. v. Zundel* (1987), 1987 CanLII 121 (ON CA), 56 C.R. (3d) 1 (Ont. C.A.), at p. 52, where the court recognized an expert opinion based upon evidence "... of a general nature which is widely used and acknowledged as reliable by experts in that field.")
>
> Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight. In this respect, I agree with the statement of Wilson J. at p. 35, as applied to circumstances such as those in the present case:
>
> ... as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion.

[112] The theoretical underpinning of the common law analysis related to the reliability of expert opinion evidence is to some extent modified by s. 19 of the *Utility and Review Board Act,* S.N.S. 1992, c. 11, as amended (*UARB Act*), which provides the Board with a broad latitude to admit evidence which would not otherwise be admissible in another forum:

> 19. The Board may receive in evidence any statement, document, information or matter that, in the opinion of the Board, may assist it to deal with the matter before the Board whether or not the statement, document, information or matter is given or produced under oath or would be admissible as evidence in a court of law.

[113] Based on this broad power, s. 19 of the *UARB Act* allows the Board to admit hearsay evidence. In order to be useful, and therefore of assistance to the Board, it has to have a sufficient degree of reliability. Further, the common law rules of evidence have

been developed over time to address, amongst other things, reliability, relevance and fairness. The Board regularly makes rulings based on these rules.

[114] The Board is mindful that the timing of the exchange of expert reports is specifically addressed in the *Expropriation Act*. This highlights the fact the Legislature turned its mind to the importance that expert opinions can play in an expropriation matter, although these reports usually focus on valuation.

[115] As well, while the Board's mandate includes numerous regulatory, appellate and adjudicative roles, expropriation cases are perhaps the most directly comparable to the adversarial process in civil trials.

[116] For the foregoing reasons, the Board must proceed with caution when determining how much weight to afford an expert's opinions based on hearsay input data. Mr. Woodford's opinions are expressed, in their final form, in relatively absolute terms. The Board must weigh whether these opinions are supported. Established common law principles should guide this analysis, with s. 19 of the *UARB Act* providing some flexibility. The degree to which the hearsay data comes from a reliable source and is commonly used by experts in the field assists in determining the weight to be given to opinions based on hearsay. This provides external indications of accuracy and trustworthiness.

[117] Mr. Woodford performed hydrological and hydraulic modeling using computer programs. He did not create nor design these programs. Hydrological modeling was used to predict theoretical river flows at the Property. Hydraulic modeling was used to predict theoretical water behavior and levels at the Property.

[118] The Board is satisfied that the computer programs related to hydrological and hydraulic modeling were well-known to Mr. Woodford. Their use was disclosed in his

initial report. These programs have commonly been used for the purposes for which Mr. Woodford employed them. He could use his professional judgment to determine if the computer program modeling was suitable for his analysis. The Board finds the computer program models have sufficient indications of trustworthiness. The weight of Mr. Woodford's report is not reduced simply on the basis that the programs were not discussed in detail in his report and the creators of the programs were not called to give evidence.

[119] In any event, the Board did not perceive this as the main thrust of the Claimants' arguments. Rather, it was the hearsay nature of the input data that went into the computer models which the Claimants say generates results that are of no use to the Board.

[120] The Board is satisfied that Mr. Woodford did not rely to any significant extent on hearsay evidence from the mouth of parties to the litigation. The issue is the weight the Board will give to Mr. Woodford's opinions because they rely on the following:

- Land area tributary data obtained from a Province of Nova Scotia database;
- Upriver flow data obtained through Water Survey Canada from a gauge located near St. Andrews on the South River;
- Rain fall data obtained from Environment Canada with respect to rain gauges located at Lyon's Brook, Tracadie and Caribou Point, Nova Scotia;
- Soil type data, land use data and run-off slope data;
- Watershed topographical information obtained from a Province of Nova Scotia database;

- Portions of design construction drawings obtained from the Department of Transportation and Infrastructure Renewal (DTIR);
- A Thompson Conn topographical survey which was part of the information provided by DTIR; and
- Water elevation data from the GPS RTK surveys prepared by qualified surveyors who were employed by WSP Canada, Mr. Woodford's employer at the time he prepared his reports.

[121] The river flow data and rainfall data came from a reliable source. The data was disclosed to the Claimants and would commonly be used in the type of modeling performed by Mr. Woodford. Its secondhand nature does not, in and of itself, limit its utility to the Board in weighing the opinions expressed by Mr. Woodford.

[122] The watershed topographical data was obtained from a database compiled by the Province of Nova Scotia. This is a reliable source and would be used by professionals in Mr. Woodford's field of expertise. It would be unreasonable, and create undue expense, to expect that an expert would recreate this work. The use of this information has no negative impact on the weight afforded to Mr. Woodford's opinions.

[123] The run-off slope data was based on contour mapping obtained from a provincial government source described in Appendix B to the initial report as "NSGC". Mr. Woodford said during the hearing this source was a geodata collection made available by the Province of Nova Scotia. The Board finds this is a reliable source and clearly is used by professionals in Mr. Woodford's field of expertise to generate the types of contour maps prepared by Mr. Woodford.

[124] Even after hearing from Mr. Woodford, the sources of the soil type data and the source of the land use data are not clear. The sources were not specifically described in Mr. Woodford's reports, and not clearly addressed in the oral evidence.

[125] Mr. Woodford discussed a lookup table that provides a coefficient number based on soil and land use type. In response to a question about run-off slopes, Mr. Woodford referred to it coming "again" from the contour maps derived from the provincial mapping source. This is following questions on the source of soil type data. It is reasonable to conclude Mr. Woodford obtained all the information related to soil type and land use from provincial geodata mapping sources.

[126] Mr. Woodford utilized construction drawings and a Thompson Conn survey to determine the shape of the South River in the area where the temporary bridge and replacement bridge were constructed. He did not specify which construction drawings were used. He did not attach the construction drawings to his report. He did not attach the Thompson Conn survey to his report.

[127] There are drawings prepared by Waugh Associates Ltd. in the DTIR Project Records. They appear to show, to some extent, the shape of the South River at the sight of the replacement bridge (see for example, Exhibit P-30, Vol. C-1, Tab 4, pp. 1016-1020).

[128] The final drawings prepared by SNC Lavalin, which were used for construction purposes, are set out in Exhibit P-49. Sheet 1 of 12 of this exhibit shows the site of the Highway 104 bridge, prior to the replacement project. It shows contour lines for the area adjacent to the highway bridge and the South River.

[129] The Board does not know if these are some of the drawings referenced by Mr. Woodford. No explanation was provided as to how the design drawings provided

sufficient information to detail the shape of the South River. Neither Mr. Woodford, nor counsel for the Province, directed the Board to the Thompson Conn survey.

[130] The Board reviewed the entire record of the evidence admitted during the hearing. It did not locate this Thompson Conn survey. The Board notes there appear to be drawings which show the shape of the river, including the river bottom, at p. 6126 of Exhibit P-30, Vol. H, Tab 7. It is unclear who prepared these drawings. In any event, the reproductions are so small as to essentially be illegible, even in electronic form, which can be enlarged.

[131] Ordinarily, design or construction drawings prepared by third parties for use in construction activities, including permit applications to government departments, would have acceptable guarantees of accuracy. The weight of an expert's report which relies on these drawings would not be discounted by the Board solely on the basis they are secondhand information. Professionals rely on the work of other professionals in conducting their work.

[132] The difficulty in this case is that the existence or non-existence of a channel or swale adjacent to the old Highway 104 bridge, connecting the South River and a back channel into the western flood plain and estuary, was a key issue in dispute in the proceeding. This was known to both Mr. Woodford and the Province.

[133] In these circumstances, the Thompson Conn survey and the specific drawings used by Mr. Woodford should have been made known to the Board and the Claimants as part of Mr. Woodford's initial report. This is particularly so where Mr. Woodford admitted on cross-examination that:

- The report did not identify when the Thompson Conn survey was performed;

- The report does not identify the overall geographic scope of the Thompson Conn survey or what specifics Mr. Woodford relied upon; and
- The report does not disclose whether the design drawings and the Thompson Conn survey reflected the shape, elevations, depth, width, length, contours or bottom profile of the area in dispute.

[134] The lack of detail in Mr. Woodford's reports related to the shape and contours of the river and river bottom at the location of the replacement bridge does place limitations on the weight which can be placed on Mr. Woodford's opinions. It is more this lack of detail, than the secondhand nature of the information, which the Board finds problematic.

[135] The RTK GPS elevation survey results are in the nature of secondhand opinion evidence which was generated by Mr. Woodford's colleagues. The fact that RTK GPS technology was used is described in the initial report, albeit in one sentence. The report does not specify who conducted the surveys, what methodology was used, how the equipment was calibrated and what means were taken to ensure accuracy. It is beyond dispute that the elevation data is a critical modeling data input.

[136] In this case, where the work of colleagues, which was a critical component of Mr. Woodford's opinion, was beyond his expertise, the colleagues should have been clearly identified. An expert able to testify to these matters should have been called to testify. This manner of proceeding is implicitly recognized by the Province in addressing business loss valuation, where an expert in business loss and an expert in physical asset valuation were both called to address issues within their own field of expertise.

[137] This situation is somewhat different than the case with other hearsay data, previously discussed. That hearsay data was not prepared for the purposes of litigation and has its own inherent external indications of trustworthiness. In the case of the RTK GPS survey data, it was specifically generated in Mr. Woodford's office to address a key component of the expert's opinion.

[138] The foregoing does not mean that, in the circumstances of this case, no weight should be afforded to the water elevation data. The Board is satisfied, based on Mr. Woodford's evidence, that the surveys were performed by qualified surveyors. The Board is further satisfied that there were significant internal quality control measures to verify accuracy. It is also the type of expert opinion data that experts in the field of hydrological and hydraulics would commonly utilize. These are the types of indications which persuade the Board the secondhand opinion data should not be entirely disregarded.

[139] In this case, based on the form of cross-examination of Mr. Woodford during the *voir dire*, and the submissions on admissibility made during the hearing, it does not appear any of the alleged defects in Mr. Woodford's use of data came as a surprise to counsel for the Claimants.

[140] There was an interrogatory process where it appears the alleged defects were not pursued to any degree. As Mr. Giles put it when Mr. Rieksts expressed concern about raising all these issues once Mr. Woodford was on the stand:

> . . . I know you want to bring this to ground, Mr. Chair, as do we all. But you know, I ask this only rhetorically. What obligations do we have, as the representatives for the Claimants, to assist the Respondent in bringing its case?
>
> . . .
>
> And here we're being chastised, if you will, we're being chastened, if you will, because we haven't raised an objection. We're quite within our rights to lie in the weeds and jump up

> like an alligator attack a wildebeest and do what we want to do. We don't have an obligation to respond to my friend and we don't have an obligation to say to him, Oh, by the way, my friend, you don't have proof set out in your report of a salient element of your case. We're entitled to rely on the fact that it's not in there for whatever reason and that the witness is going to testify to it to the extent he's able. Or to the extent that he's not able, the Chair is going to say, you can't testify to it. We're certainly acting within what is expected of us, I would suggest.
>
> [Transcript ID #T1555, p. 804, August 23, 2018]

[141] While framed as an answer to a rhetorical question, the Board is satisfied this was in essence the strategy used by the Claimants. This litigation strategy does not guarantee a particular result. Claimants' counsel submits Mr. Woodford's reports did not provide sufficient information to even pursue further inquiry. The Board does not agree. While perhaps clearer statements would have been helpful, and would in fact be required in civil trials under the *Nova Scotia Civil Procedure Rules,* Mr. Woodford's reports sufficiently identified, in general terms, the underlying secondhand data and opinions upon which his conclusions were based.

[142] While the *Nova Scotia Civil Procedure Rules* are not applicable to this case, they require that notice be provided to opposing counsel if a party intends to seek the exclusion of an expert's report on the grounds it does not sufficiently conform to the *Rules.* Before this Board, these issues have generally been addressed in preliminary hearings. While apparently Mr. Rieksts had received an email indicating there might be issues with qualifications, it was evident he was not aware of the Claimants' position on exclusion before the hearing. Fairness principles are an important consideration when assessing how to treat expert evidence. Fairness is a two-way street. Given the available discovery process, in the circumstances of this case, it is fair for the Board to assess the reliability of the hearsay data and determine what weight should be given to Mr. Woodford's reports.

[143] The Board has made this assessment. In the final analysis, it is not convinced Mr. Woodford's opinions can be accepted as a satisfactory answer to the

causation issue. It is not the source of the underlying data, or the nature of some of the underlying data as secondhand opinion evidence, which leads to this conclusion. Rather, it is the applicability of the data to the Property, a lack of detail and an inconsistency in the modeling results that raises concerns.

[144] Some concerns the Board has with Mr. Woodford's reports are as follows:

- The river flow data is for a location roughly six kilometres from the Property. While Mr. Woodford explained the calibration exercise to verify that his model correctly provided the river flow at the St. Andrews gauge, no such calibration was done, or could now be done, in relation to the pre-construction river flow at the Property. The obvious reason is that Mr. Woodford had not been retained at the time and the pre-construction topography had been altered when he prepared his reports. He therefore had to rely on an extrapolation formula;
- There are no rain gauges located close to the Property. Even if the rainfall amounts obtained from Environment Canada are assumed to be accurate, the correlation with rainfall amounts flowing into the South River in the vicinity of the Property is not known with precision;
- There is limited data on storm surge and tidal effects on the Property location for the time of most of the flooding events;
- The Board does not know with sufficient precision how the shape of the river and river bottom near the Property was determined; and
- The Board does not know with sufficient precision how the topography of the low-lying area adjacent to the old Highway 104 bridge was determined.

[145] Of even greater significance, Mr. Woodford's modeling does not explain how the flooding during the evening of October 30, 2011, could have reached a level sufficient to infiltrate the Claimants' home. His modeling shows water elevation to a height of 2.4 meters, while the Claimants' property is shown at 2.9 meters elevation. The Board is satisfied the 2.9 meter elevation is consistent with the contour map and the photographic evidence showing the elevation of the house. While the northeastern corner of the house deck is within a few feet of the South River, it is elevated on posts.

[146] The Board notes that on the other flood dates, where water infiltrated the Claimants' home, ice on the South River could provide a theoretical explanation. This said, no ice measurements were actually taken at the relevant times. In any event, there was no ice on the river in late October, 2011.

[147] Mr. Rieksts argued that there was no evidence water had ever infiltrated the home. While the infiltration was not detailed in photographs and videos in the same way as the river flow and flooding, as addressed earlier, the Board is satisfied such infiltration did in fact occur.

[148] Modeling of the type undertaken by Mr. Woodford cannot attain the same accuracy as, for example, using properly calibrated instruments to create a survey plan. It is simply not the same type of exercise. The sheer number of variable inputs, and the inability to exactly recreate the pre-construction circumstances, means what are expressed as water elevations, with precise numbers, are in fact calculated estimated elevations, based on professional judgement on numerous assumptions.

[149] In this case, dealing with flat low-lying lands, a difference of 0.5 meters in what is projected, and what in fact occurred, means there is sufficient uncertainty so that

the Board cannot rely on the precision of the water elevation data in the reports. This creates some doubt on all conclusions arising from this data. The Board has therefore made little use of Mr. Woodford's opinions. Given its analysis of the Claimants' theory of the case, it was not necessary. Prior to engaging in this analysis, the Board will address two arguments raised in the parties' submissions.

[150] The Province argued a negative inference should be drawn because the Claimants did not produce an expert's report, and in particular one from Mr. Feigin, supporting their theory of causation. Whether this would ever be appropriate is questionable. No precedent was produced for the proposition. It is certainly not appropriate in this case.

[151] It is obvious the Claimants did not have the funds to pay Mr. Feigin's substantial account. As opposed to any negative inference, a reasonable inference would be that by the time Mr. Woodford had prepared his report, the Claimants had run out of funds to retain any expert. The Claimants made an unsuccessful application for interim costs in June, 2015. Given Mr. Woodford's account, the cost would have likely been considerably more than the invoices generated by Mr. Feigin after litigation began.

[152] While an inequality in spending power does not lessen the burden of proof which the Claimants must meet to establish their claim, it is also no reason to make negative inferences with respect to causation because they could not afford to retain an expert.

[153] The Claimants argued that at a meeting which took place on October 24, 2011, Mr. MacPherson indicated the Province would be liable for flood damage. This is

based on an email dated October 26, 2011, from Mr. Feigin summarizing a part of the meeting:

> 2. ...Further as you stated the Government of Nova Scotia will remain 100% liable for all and any damage to the buildings or the contents there in, caused by flood or actions resulting from the construction or use of the temporary or permanent bridge.
>
> [Exhibit P-30, Vol. E-3, Tab 194, p. 4156]

[154] Mr. MacPherson did not contradict the contents of the email in subsequent exchanges. This said, Mr. MacPherson stated on the stand he was quite certain he would not have used the exact words attributed to him by Mr. Feigin.

[155] In any event, the Board does not find there was any admission of liability. The more reasonable interpretation, even assuming the exact words quoted by Mr. Feigin were used, is that Mr. MacPherson was indicating that if causation was linked to the Province's work, the Province would be responsible.

4.5 Analysis of Flood Causation

[156] The Claimants say that but for the installation of the temporary bridge approach in the low-lying area on the west bank of the South River, their property would not have sustained flood damage.

[157] The Claimants' theory of the case can be summarized as follows:

- The Property did not experience any problems or damage associated with flooding over decades of occupation prior to the temporary detour bridge construction;
- They had seen the operation of the low-lying area across the South River from the Property, which acted as a relief valve when the South River overtopped its banks;
- They, with the assistance of their consultant engineer, Mr. Feigin, had warned the Province about flooding if infill was placed in the low-lying area;

- No meaningful measures were taken by the Province to address this concern;
- A short time after the infill work on the west bank of the South River began, a flood occurred;
- A series of floods occurred while the temporary detour bridge, and subsequently the access road for the bridge twinning project, were in place;
- The flooding has not occurred since the low-lying area has been partially restored; and
- During high water events, the temporary infill diverted the water from the flood plain on the western side of the South River, forcing water to rise onto the Property, before it could find its way into the flood plain beyond the "big island".

[158] The Claimants say the operation of the low-lying area was observable both before and after the infilling. They submit, in these circumstances, an expert opinion on flood causation is not required to prove their claim. Rather, the Claimants submit the Board must make a *prima facie* determination of causation in their favour. They say the Province's evidence and expert opinions have failed to rebut this *prima facie* inference of causation.

[159] Mr. Woodford made a statement, in his initial report, which he later modified, that the Claimants' reported pre-construction and post-construction flooding pattern did not support his conclusion that the bridge work did not cause the flooding. However, the Board is aware it is axiomatic that because two events happen in close proximity as to time and place does not necessarily mean that one event caused the other. There is a difference between correlation and causation. This is particularly the case when assessing a complex causation issue such as flooding.

[160] As discussed in *Clements,* the Board must weigh the evidence in a robust common-sense manner. It must determine if the Claimants description of the impact of the temporary bridge structure and approaches on river flow leads to a *prime facie* inference of causation, when viewed in combination with all the evidence, including, in particular, the photographic and video evidence.

[161] Having made this assessment, the Board has determined that the Claimants have not established a *prima facie* inference that, on a balance of probabilities, the Province's construction work, associated with the detour bridge, caused the flooding which occurred on the Property.

[162] In the first place, while there was some dispute with respect to the amount of infill, the Board is satisfied the amount used in relation to the temporary bridge structure was very small, when compared to the vast size of the floodplain. Therefore, it has not been established the volume of water which the floodplain could accept was diminished to a degree significant enough to impact flooding.

[163] In any event, this was not the theory of the case advanced by the Claimants. Their theory rests on water blockage and diversion caused by the infill. This is succinctly stated at page 17 of the Claimants' rebuttal closing submissions:

> 64. The DTIR places a great deal of (misguided) emphasis on the fact that photos and videos taken while the Claimants were suffering flood events at the Property show water spilling into the floodplain on the west side of the river (see for example paragraphs 51-67 of the DTIR's Closing Written Submissions).
>
> 65. The photos and videos do very much show water having spilled over top of the entire west bank of the river and into the floodplain, **but that was only after the water had risen high enough in the main channel to already completely flood and submerge the Claimants' Property**. Of course water will always seek its own level and will **eventually** spill into the flood plain once it rises high enough.
>
> 66. The point is that before the construction infilling caused a total blockage of the floodplain channel, the water in the main channel of the river did not have to rise high enough to submerge the Partridge Property before it could spill into the floodplain. As those photos and videos all show, the directional water flow in the river butted up against, but

was completely unable to flow through, the area where the western Detour Bridge abutment and approaches had been constructed.

67. The DTIR similarly states in paragraph 74 of its closing submissions that:

> *Of course, with such a theory, and for it to be valid in any way, the Claimants would have to assert that the floodplain did not flood during the construction work, while the area was infilled. If this is the cause of the flooding, its blockage would have to cause the floodplain to be blocked.*

Again the DTIR completely misrepresented or at least misunderstood the facts. To state it accurately, for the Claimants' theory to be valid, the Claimants would have to assert that the floodplain could not receive elevated downriver flows until the water levels in the main channel were so high that they spilled over the entirety of the elevated west bank, by which time the Claimants' Property was already submerged. That is precisely what the Claimants assert. [emphasis added in original]

[Claimants' Rebuttal Closing Submissions, pp. 17-18]

[164] One of the difficulties with this theory is that the evidence indicates the Claimants' home is approximately one meter higher in elevation than the highest point of the "big island". The home is approximately 2.9 meters in elevation, while no area of the "big island" has an elevation attaining 2.0 meters. The "big island" is located across from the Claimants' home. During flood events, the video evidence shows water overtopping the "big island" and flowing into the flood plain.

[165] In order for the Claimants' theory to be valid, the obstruction caused by the infill associated with the temporary bridge structure would have to cause the South River to rise approximately one meter higher on the Property side of the South River than on the western shore, which, including the "big island", is at a lower elevation. This while water is overtopping the "big island" and into the vast flood plain beyond. The Board is aware there are trees and vegetation on the "big island" which could impede water flow. Prior to the Province's construction project, there were also trees and vegetation in the low-lying area next to Highway 104. While the Board accepts that water must find its

level, the evidence does not establish that it only found its level after it had gone past the "big island" and the Property.

[166] Having said this, the Board does not see any attempt on the part of the Claimants to be deceitful. They honestly believe the videos and photographs show what they say is illustrated. The Board reviewed all the photographs and videos presented in this matter. Unfortunately for the Claimants, the Board simply cannot see, on an objective basis, what the Claimants say is depicted.

[167] That parties to litigation come to see the evidence in the light most favourable to their position is not surprising. The Board does not find the videos and photographs to be compelling evidence that advances the Claimants' theory.

[168] For example, the Claimants say the videos show the temporary bridge infill is blocking water from going into the low-lying area next to Highway 104. There is no doubt in some videos water is flowing past the infill at a relatively rapid rate. However, while there are some small rapids at this particular point, the video does not show what impact this is having on the Property, or how an impact at this particular point would cause the water to rise to the degree it did at the point where the Claimants' home is located.

[169] There was evidence some of the armour rock used to protect the toe of the slope of the temporary detour bridge had been displaced by the fast-flowing waters. This indicates there was a rapid flow. It does not show there was a blockage of the flood plain.

[170] Similarly, while Mr. MacPherson expressed surprise with respect to the water level in the South River on the night of October 30, 2011, this does not tend to establish the temporary detour bridge caused the high water. One can see a darkened area along the toe of the slope of the temporary detour bridge, and its approaches, in the

low-lying area adjacent to Highway 104 [see video KP00733 taken on October 31, 2011]. The inference which can be drawn is that there was a very high-water event which took place in the river that night.

[171] The Claimants say the Province left an uphill slope leading towards the access road when the temporary bridge was removed. It must be kept in mind the precise pre-construction ground topography was not visible to the Claimants. In fact, the SNC Lavalin contour drawing, supported by the previously discussed photographic evidence, indicates there was already some upward sloping in this area. The Board further notes that in some of the photographs, the South River had not even reached the top of the riverbank, let alone been impacted by sloping. As well, the photographs in an appraisal report dated June 4, 2015, prepared by Linda MacKay, show the topography in this area appears similar to what appears in the photos after the temporary bridge had been removed. [see Exhibit P-31, Tab 9, pp. KP0202/10-11].

[172] The Property is on the tide line, or the furthest point in the South River where the tide intersects with the river. There are many factors which can contribute to flooding. As discussed in Mr. Woodford's report, these include rainfall amounts, topography, river flow, storm surge, and tidal effects in the estuary beyond the flood plain.

[173] While an expert opinion on causation is not required, where the South River had overtopped its banks at the Property in the past, the fact that no damage occurred prior to the bridge replacement project, is not sufficient to establish a causal connection. There must be a theory which can be established by observations which survive a common sense and robust examination. The Board finds, on a balance of probabilities, this burden has not been met in this case.

[174] What can be observed by the Board in the post-construction photographs and videos is water flowing past the detour bridge. Some of the water continues to flow into the remaining low-lying area next to either the detour bridge, while it was still in place, or the new Highway 104 bridge approaches, after the temporary bridge was removed.

[175] Under both scenarios, water continues to overtop the west bank of the South River and the "big island", both of which are at a lower elevation than the home on the Claimants' property.

[176] What is most noticeable in the videos is that the flow of the river is markedly different from one occurrence to another. As well, the winter videos contain the most noticeable features impacting the flow of the water, which the Board can ascertain. They are the amount of ice in the river and the amount of ice along the west bank caught in the trees on the "big island". The Board can also observe considerable ice which has accumulated downriver from the Property. Finally, there is snow accumulated in the access road. The impact of this is difficult to gauge. In any event, this relates to a different construction project.

[177] The videos of the October 30, 2011 flood event, which the Claimants say caused most of the damage to their home and business, were taken at night, or the following day after the event. They do not provide any insight into the flooding mechanisms, except perhaps to the extent a howling wind can be heard in the nighttime video. As well, no fast flow is observable in the portion of the river which can be seen in the video.

[178] On October 30, 2011, the rainfall amount, and the flow rate in the South River, were not the most dramatic in the records over the relevant time period. It is not

apparent why the water would be pushed onto the Property side of the river by the infill in these circumstances. Mr. Woodford suggested that something downriver from the Property was probably impacting the rise in elevation of the South River. The Board sees merit in this suggestion, which was not based on the GPS RTK measurements, or the river bottom mapping, but on a general hydrological and hydraulics theory.

[179] The Claimants alleged that their Property was not subject to flooding when areas prone to flooding in the Antigonish area experienced such flooding. Mr. Partridge's evidence was somewhat confused on this point in relation to the October 30, 2011 flood date. Ms. DeWolfe was clear in her recollection that certain areas subject to flooding had not done so during this event. This said, the evidence establishes that for some of the flood dates described in this proceeding, some of the flood prone areas were indeed inundated.

[180] In the end, the Board does not know what caused the flooding events in question. It does know the Claimants have not established it is more likely than not it was caused by the works with which the expropriation was associated.

[181] Having made this finding with respect to flood causation, the Board must now consider whether any of the following claims for compensation advanced by the Claimants are sustainable and, if so, to what extent:

- Injurious affection for business losses and mitigation expenses;
- Compensation for the value of the lands expropriated;
- Injurious affection for the loss of use and enjoyment of the Property and personal pain and suffering;
- Injurious affection for the diminished value of the Claimants' remaining property;

- Injurious affection for miscellaneous other costs;
- Increased interest; and
- Disturbance costs for professional fees.

5.0 INJURIOUS AFFECTION – BUSINESS LOSSES AND MITIGATION EXPENSES

[182] As the Province acquired an easement interest over a part of the Property, the Claimants may be entitled to injurious affection related to business damages, including expenses incurred to mitigate such damages. The Claimants have advanced claims under both aspects in this proceeding.

5.1 Business Losses

[183] While the potential overlap between business damages for injurious affection and disturbance damages was raised, the Claimants have clearly elected to proceed with their claim based on injurious affection. This is confirmed in the Claimants' closing submissions:

> 224. Part (B) of the injurious affection definition arising from the *Act* covers business damages, which the Claimants claim in relation to the destruction of the operations of RR, because the destructive flooding of RR's assets occurred only as a result of the construction of the Detour Bridge. Important to note, however, is that such damages could equally and fairly be considered to be business disturbance damages pursuant to the provisions of section 29 of the *Act:*
>
> > 29(2) Where it is not feasible for the owner of a business to relocate, there shall be included in the compensation payable an amount for the loss of the business where the compensation for the land taken is based on the existing value of the land.
>
> . . .
>
> 228. To summarize, the destruction of RR's operations as a going concern fits within both the applicable definition of injurious affection as it does business disturbance damage. The Claimants preference is to claim this head of loss as injurious affection, and they do not seek to double recover.
>
> [Claimants' Submission dated October 12, 2018, pp. 66-67]

[184] The destruction of the Claimants' business was caused by flooding. The Board has determined the Claimants have failed to prove, on a balance of probabilities, the Province's actions related to the construction of the temporary detour bridge caused this flooding. Therefore, there will be no award of damages for business losses.

5.2 Mitigation

[185] *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority,* [1997] S.C.J. No. 6, addresses the interpretation of expropriation legislation:

> 20 The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected. This principle has been stressed by eminent writers and emphasized in decisions of this Court. See P.- A. *Cote, The Interpretation of Legislation in Canada* (2nd ed. 1991), at p. 402; E. Todd, *The Law of Expropriation and Compensation in Canada* (2nd ed. 1992), at p. 26; *Manitoba Fisheries Ltd. v. R* (1978), [1979] 1 S.C.R. 101, at pp. 109-10; *Diggon-Hibben Ltd. v. R*, [1949] S.C.R. 712, at p. 715; and *Imperial Oil Ltd v. R*, [1974] S.C.R. 623.
>
> 21 Further, since the *Expropriations Act* is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose. Substance, not form, is the governing factor. See *Pacific Coast Coin Exchange of Canada v. Ontario (Securities Commission)* [l978] 2 S.C.R. 112, at p. 127. In *Laidlaw v. Metropolitan Toronto (Municipality)*, [1978] 2 S.C.R. 736, at p. 748, it was observed that "[a] remedial statute should not be interpreted, in the event of an ambiguity, to deprive one of common law rights unless that is the plain provision of the statute".
>
> 22 The application of these principles has resulted in the presumption that whenever land is expropriated, compensation will be paid. This has been the consistent approach of this Court. In *British Columbia v. Tener*, [1985] 1 S.C.R. 533, at p. 559, Estey J. writing for the majority, relied on a passage of Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel Ltd,* [1920] A.C. 508 (H.L.), at p. 542:
>
> > ... unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.
>
> Although Wilson J. wrote a separate concurring opinion in *Tener*, she agreed with the majority on this point. Writing for herself and Dickson C.J., she stated at p. 547:
>
> > Where expropriation or injurious affection is authorized by statute the right to compensation must be found in the statute....
> >
> > Where land has been taken the statute will be construed in light of a presumption in favour of compensation (see Todd, *The Law of Expropriation and Compensation in Canada*, pp. 32-33) ....
>
> 23 It follows that the *Expropriations Act* should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a landowner whose property has been taken.

[186] The above approach is consistent with s. 9(5) of the *Interpretation Act,* R.S.N.S. 1989, c. 235.

[187] The objective of the *Expropriation Act* was recently discussed in *S&D Smith Central Supplies Limited v. Nova Scotia Utility and Review Board,* 2019 NSCA 22, where the majority judgment, at p. 21, stated:

> [80] As to the legislative objective, the Board (para. 675) cited the Interpretation Act, R.S.N.S. 1989, c. 235, s. 9(5)(c), that the legislation is to be interpreted as remedial to achieve its object. The Board said the Expropriation Act's object was full compensation:
>
> > [676] The Board considers that "the 'object to be attained' in the [Expropriation] Act is the full compensation of a landowner whose property has been taken. This is confirmed in Dell [Toronto Area Transit Operating Authority v. Dell Holdings Ltd., 1997 CanLII 400 (SCC), [1997] 1 S.C.R. 32 and recognized by the Board in previous decisions. The Board also considers that it should interpret the Act to consider the "mischief to be remedied." Thus, it should not interpret the provision of the Act and, in particular, s. 27(3) so as to interfere with or prevent compensation by a narrow interpretation of occupation.
>
> [81] The Board's view is consistent with s. 2(1) of the Act: "[i]t is the intent and purpose of this Act that every person whose land is expropriated shall be compensated for such expropriation". It also applies the Supreme Court of Canada's directives on the interpretation of expropriation statutes: Toronto Area Transit Operating Authority v. Dell Holdings Ltd., 1997 CanLII 400 (SCC), [1997] 1 S.C.R. 32, paras. 20-21, 23, 26-27 (quoted below, para. 104).

[188] At paragraph 40, *Dell Holdings* confirms the Claimants' duty to take steps to mitigate damages which may arise from the expropriation:

> [40] ... it is true that parties do have a duty to mitigate and that all steps taken in order to mitigate the damages will be compensable in expropriation cases.

[189] This position is further elaborated upon by Eric C. E. Todd in *The Law of Expropriation and Compensation in Canada,* 2nd edition, Carswell 1992, pp. 318-319:

> As a general principle compensation for disturbance damage is assessed on the same bases as damages in tort and contract.
>
> . . .
>
> Damages in tort and contract are subject to the "duty" to minimize the damage. The duty comprises three rules namely that the claimant (1) cannot recover for avoidable damage, i.e. all reasonable steps must be taken to mitigate damage; (2) can recover for damage incurred in taking reasonable steps to mitigate even if the resultant damage was greater

> than it would have been had no mitigation steps been taken; and (3) cannot recover for damage which is in fact avoided by mitigation.
>
> A typical example of the "duty" to mitigate arises where the expropriation owner claims relocation expenses. An owner who is allowed to remain on the property for some time after the expropriation and before possession is required by the authority should attempt to mitigate such expenses "by an orderly move".
>
> . . .
>
> The general principle that a claimant is under a "duty" to mitigate disturbance damage applies also to damage by severance and/or injurious affection arising out of a partial taking.

[190] On May 8, 2011, Mr. Partridge purchased a property in Heatherton (Heatherton Property), which is a community located near the Property. The circumstances which gave rise to the purchase; the consequences flowing from this purchase; and, whether it gave rise to a mitigation claim, were all in issue.

[191] The Board is satisfied the following amounts claimed by the Claimants with respect to the Heatherton Property have been proven:

$22,085.65 for the purchase of the Heatherton Property;

$3,979.00 for placing gravel in the Heatherton Property yard;

Wages of $1,200.00 for employee assistance to prepare the Heatherton for operation;

$75 for hardware needed at the Heatherton Property;

$80.49 for hardware needed at the Heatherton Property;

$391.38 for further hardware needed at the Heatherton Property;

$397.90 for roof materials needed at the Heatherton Property;

Total Mitigation Costs: $28,209.42.

[192] The Board rejects an amount claimed related to replacing equipment damaged by flooding on the basis of its previous findings related to causation.

[193] The Board is also satisfied the Heatherton Property was sold at a loss in 2014, by which time it was obvious the Claimants' business would not resume. The net proceeds of sale were $12,351.87.

[194] Therefore, the Claimants suffered a loss of $15,857.55, which is potentially attributable to injurious affection, in relation to the Heatherton Property. The issue remains whether this was a proper mitigation expense.

[195] The purchase of the Heatherton Property arose during the course of negotiations between the Province and the Claimants. At the time, in an effort to find a resolution with the Claimants, Mr. MacInnis was attempting to negotiate a lease or license agreement for the portion of the Property required for the temporary detour bridge. These negotiations had begun in early February, 2011. Mr. MacInnis wrote an internal email dated February 21, 2011 which said:

> A follow up meeting was held with Mr. Partridge on Feb 18th and a license agreement was presented with a time frame to extend from Apr 1, 2010 to Dec 31, 2012 for an all inclusive lump sum of $36,000. I have no expectation that he will accept the terms of the license as presented. Mr. Partridge informed me that he has hired a lawyer and an engineer to present his case for compensation. His main areas of concern:
>
> 1) Loss of use of lands that he uses in his business.
> 2) Flooding created by construction.
> 3) Noise created by the panel detour bridge.
>
> It was pointed out that the bridge replacement is a public safety concern and that the project will be moving forward. Mr. Partridge acknowledged his understanding of the reasoning and I suggested that a negotiated settlement would be our preference over a forced taking.
>
> [Exhibit P-30, Vol. E-1, Tab 45, p. 3729]

The clear message expressed to Mr. Partridge was if a negotiated settlement was not possible, expropriation would result. The Property was under the shadow of expropriation at this point.

[196] Survey markers had been placed on the Property on February 11, 2011. They showed where the portion of the Property the Province was looking to lease was

located. The survey markers actually showed a boundary which went right through the Claimants' work sheds. This is not what ultimately occurred.

[197] The photographic evidence shows the toe of the slope of the temporary bridge was very close to the work sheds. A drainage swale on the Property, designed to capture run-off, was right next to these sheds.

[198] On February 17, 2011, Mr. MacInnis sent a draft license agreement related to the portion of the Property the Province wanted to use. The term of the proposed license was from April 1, 2011 to December 31, 2012. A lump sum license payment of $36,000.00 was proposed. There was no amount related to relocation of the Claimants or their business during the construction period.

[199] Further discussions took place between Mr. MacInnis and the Claimants. While Mr. MacInnis only had a general understanding of the Claimants' business, he was satisfied relocation would be reasonable in the circumstances, in the context of his negotiations.

[200] Two locations were discussed in early April, 2011. In fact, the Province entered into an agreement with the owner of one of the properties, described as the McCarron property in the evidence. A payment of $5,000.00 was made to secure an option to lease the location for two years, at $3,200.00 per month, so it could be available for relocation purposes. In the end, neither property was suitable for the Claimants' business operations as a whole.

[201] During the early April, 2011 discussions, Mr. MacInnis indicated the Province could pay $100,000.00 for relocation to a suitable property, after the properties suggested by Mr. MacInnis were deemed unsuitable by the Claimants.

[202] The Board is satisfied this verbal discussion was not a formal offer. In any event, the Board finds Mr. Partridge did not formally accept the amount. He was looking for a written offer to finalize a comprehensive settlement. This said, Mr. Partridge was probably under the assumption an offer from the Province would not be less than the $36,000.00 license fee and the $100,000.000 relocation cost.

[203] It is also clear that the Claimants, with the assistance of their lawyer, Mr. Meehan, and their consultant, Mr. Feigin, were trying to reach a global resolution to all issues related to potential construction-related damages prior to any expropriation having occurred. In the end, no further offer was forthcoming.

[204] It is in this context that Mr. Partridge proceeded with the purchase of the Heatherton Property on May 8, 2011. He testified that at the time of the purchase he planned to move the Claimants' entire business to this location. He assumed, wrongly as it turns out, he would be getting $100,000.00 from the Province to relocate his shop.

[205] In order to assess whether this was a reasonable mitigation strategy at the time, the nature of the Claimants' business must be considered. The salient facts are as follows:

- The business activities almost exclusively related to restoring log homes;
- Much of the restoration work was done at the customer's log home location;
- The Property was used to store all the moveable equipment necessary to conduct the restorations;
- Logs were stored on the Property. These were delivered to the work yard on the Property where Mr. Partridge, sometimes with the assistance of employees, would prepare these logs for future use;

- Preparation work was focused on, but not limited exclusively to, corn blasting technology (similar to sand blasting in concept), which would create an aged look to new logs;
- The business was promoted by word of mouth from customers, along with a web page and limited advertising;
- The Claimants maintained a model display cabin, which attracted customers to the Property to see the type of available products. This attracted potential walk-in trade;
- The Claimants sold one completely new home package, but new home construction was not their area of business; and
- Much of the preparatory work was either conducted in the work yard, or in semi-cylindrical work sheds near Highway 104. There were seasonal variations in the type of preparation work conducted on-site.

[206] The Board finds that it was reasonable, in May 2011, for the Claimants to make arrangements to relocate their business, at least on a temporary basis. Given Mr. Partridge's past experience working on bridge construction, he was well aware what this type of work entailed. The Province's proposed work would potentially cause the following disruptions:

- The change in angle and elevation of the driveway, where it intersected with Highway 104, would make the delivery and moving logs more difficult than it already was at this location;
- The reduced space for storage of equipment and logs would render business activities more difficult;

- The work sheds would be much closer to Highway 104, increasing the danger of mishaps. The Board notes there were numerous vehicle parts found along the edge of the Highway 104. The Province contended this was a pre-existing situation. As well, the Province questioned whether a particular brake cover found in the Claimants' work sheds had actually come from a tractor-trailer travelling on the highway. The point, however, is that the temporary detour bridge would be closer to the workspace. Whether there actually was damage caused later is somewhat irrelevant. The concern was legitimate in May, 2011;
- The presence of the construction equipment, noise, fumes and dust caused by the construction would have a negative impact on work in the yard. It would not be conducive to any walk-in trade; and
- The model display home had to be moved.

[207] Given these factors, it was reasonable for the Claimants to seek temporary relocation. In fact, while gaining access to the Property in late October, the Province assisted in moving a part of the Claimants' business to the Heatherton location.

[208] The Province submitted Mr. Partridge's failure to advise the Province of the Heatherton Property purchase should be seen as a lack of good faith in negotiations. Mr. Rieksts argued negative inferences should be drawn about Mr. Partridge's intentions and credibility. Mr. Partridge testified he did not think it was any of the Province's business, in light of the discussions he had with Mr. MacInnis. Mr. MacInnis testified that he was aware of the purchase prior to ending his involvement in the matter. Mr. Meehan made reference to a "Pomquet" property purchase in correspondence to the Province. Pomquet is a community neighbouring Heatherton. There is no evidence Mr. Partridge purchased

any other property. It is therefore not entirely clear whether in fact the Province was unaware of the purchase.

[209] In any event, as negotiations broke down with respect to the relocation issue on May 25, 2011, the Heatherton Property purchase ultimately had no impact on the Province's position. No further offers were made, and the only firm offer on the table from the Province was the $36,000.00 license fee, for the use of the lands over which an easement was eventually expropriated.

[210] It would have been wise for Mr. Partridge to verify the Province's position in relation to the Heatherton Property. This said, in the absence of any further offers, if Mr. Partridge had not taken steps to pursue an alternative venue, he may well have left the Claimants open to a claim they did not properly mitigate damages, if they had suffered a business loss arising from the expropriation.

[211] While in the end Mr. Partridge did not move the Claimants' entire business operations to the Heatherton location, he was not formally advised the expropriation documents had been deposited until October 29, 2011, when Alva Construction required immediate access to the Property. He had received no amount to relocate from the Province. With assistance from the Province, he moved a part of his operations to Heatherton. He was simply faced with a different set of circumstances than contemplated in May, 2011, when he made the reasonable decision to purchase the Heatherton Property. He tried to carry on, as best as he could, from the Property, after negotiations seeking compensation for the move were unsuccessful.

[212] The Board is not convinced a permanent relocation of the Claimants' business would ultimately have been required. Had events proceeded in the ordinary

course, and the Claimants' business assets not been destroyed in the October 30, 2011 flood, the Board would have considered apportioning the costs of the purchase. As it turns out, the Heatherton Property did not end up being an asset related to a permanent relocation. It was sold at a loss.

[213] Insofar as the reasonableness of the amount claimed, it is comparable to what the Province considered during negotiations. Mr. Partridge's strategy was considerably less expensive than the potential arrangements related to the McCarron property. While the Board understands the Province's concerns about using information from negotiations in the context of litigation, the fact remains the documents in question were before the Board in the Joint Exhibit Book and were discussed at length in testimony.

[214] The Board finds the purchase of the Heatherton Property was a reasonable mitigation measure, the need for which arose because of the expropriation. It occurred during the shadow period discussed in more detail later in this decision. It is most unfortunate that this measure did not achieve the intended results because of the catastrophic flood which occurred on October 30, 2011. After this, the move was no longer feasible, as the Claimants' business faltered and eventually ceased operating altogether.

[215] The Board therefore finds the Claimants are entitled to the amount of $15,857.55 relating to the loss suffered with respect to the Heatherton Property, with interest at the applicable rate from October 29, 2011, when the Claimants loss the use of the expropriated easement, to the date of payment.

6.0 COMPENSATION FOR THE VALUE OF LANDS EXPROPRIATED

[216] The only expert appraisal report on this issue was prepared by John A. Ingram, AACI, P.App., MRICS, who was retained by the Province. Mr. Ingram was qualified as an expert in the field of property appraisal, capable of giving opinion evidence in all areas of real estate appraisal and property valuations, compensation for injurious affection, and related areas of compensation under the *Expropriation Act.*

[217] Mr. Ingram presented an opinion on the market value of the expropriated easement on the Property as of October 20, 2011. The Board notes the expropriation documents were filed in the Antigonish County Land Registration Office on October 3, 2011. A registered letter dated October 20, 2011, enclosing the expropriation documents, was addressed to Mr. Partridge. It was hand delivered on October 29, 2011. Mr. Partridge had understandably refused access to Alva Construction workers, except for one limited occasion, upon the advice of counsel, until he was served with the expropriation documents.

[218] Section. 25(2) of the *Expropriation Act* indicates the value of the land expropriated is determined as of the date the expropriation documents are deposited in the office of the Registrar of Deeds. There is no evidence the land value would have changed between October 3, 2011 and October 20, 2011.

[219] Mr. Ingram used a direct comparison approach to arrive at the value of the Property. He used vacant lands as comparable properties; despite the fact the Property was not vacant at the time of expropriation. As well, as discussed later, the easement lands had been used, to some extent, for the business purposes of the Claimants, prior to the expropriation.

[220] Mr. Ingram estimated the unit rate applicable to the lands acquired was $0.90 per square foot. This resulted in a market value of $7,915.00. Mr. Ingram then applied an easement factor of 50% to reflect the fact the Province did not acquire a fee simple interest in the expropriated lands. In Mr. Ingram's opinion, the resulting value of the easement interest was $3,957.00, which he rounded to $4,000.00

[221] In their closing submissions, the Claimants did not challenge the unit rate of $0.90, which Mr. Ingram applied to determine the value of the applicable portion of the Property. Rather, the Claimants' argued that in the circumstances of this case, because of the extensive use made of the easement lands, which essentially excluded the Claimants from the easement lands for a 14-month period, the Claimants should be entitled to 100% of the value of the subject lands. This would result in a figure of $8,000.00, when rounded.

[222] The Claimants submitted that the concept of overburdening a right-of-way applies to easement interests under the *Expropriation Act.* In *Oostdale Farm and John Oostvogels v. Joseph Lawrence Oostvogels,* 2016 NSSC 146, at p. 7, this concept was explained:

> [27] The grantee of a right of way cannot "overburden" the right of way. In other words, the grantee cannot use the right of way "excessively". In *Sunnybrae Springbook Farms Inc. v. Trent Mills (Municipality)*, 2010 ONSC 1123 (CanLII), [2010] O.J. No. 3715, aff'd 2011 ONCA 179 (CanLII), [2011] O.J. No. 965 at para. 93 [*Sunnybrae*], Lauwers J. explained, "Overburdening of a right of way occurs when it is used excessively or significantly beyond the rights and nature conveyed in the grant of easement."
>
> [28] Some examples of excessive use are:
>
> 1. The grantee unreasonably interferes with other users;
> 2. The grantee's use is inconsistent with the purpose of the right of way;
> 3. The grantee's use exceeds the permitted scope or mode of use; and
> 4. The right of way is being used to access property beyond the dominant tenement.

[223] The Province argues the concept of overburdening is not applicable. In any event, it says the easement in question was used for its intended purpose.

[224] The Board agrees with the Claimants that for the construction period when the temporary detour bridge was being installed until it was dismantled, the Claimants' use of the easement lands was almost entirely restricted. That said, this was for a 14-month period, and once the temporary detour bridge was removed, the Claimants could use the easement lands, subject to the Province's easement. Interestingly, the Claimants did not appear aware of the precise nature of an expropriated easement.

[225] Mr. Ingram indicated on direct examination that in arriving at the 50% figure, he was basically looking at the practices associated with easement acquisitions. He said:

> **A.** It ... it's ... I mean, basically it's looking at practices for easement acquisitions. So there ... there's ... the prices paid in easement acquisition situations can range from, you know, a hundred percent to 50 percent to 25 percent or what have you, depending on the circumstances.
>
> [Transcript ID #T1555, p. 258, August 17, 2018]

[226] The Board is satisfied that the concept of overburdening is not directly applicable, as the use of the easement lands to construct the temporary detour bridge is precisely what the expropriation of these lands was meant to accomplish. This said, the length of time the Province essentially had exclusive use of the lands is important.

[227] In the unique circumstances of this case, the Board is satisfied a 75% easement factor is more appropriate. This reflects the fact there was extensive use of the easement lands for a prolonged period of time. As no construction work had yet occurred on the Property at the time of his appraisal, this extensive use was not entirely appreciated by Mr. Ingram when he exercised his professional judgment.

[228] The Board therefore finds the value of the land expropriated is $6,000.00 as of the date of expropriation. Interest thereon at the applicable rate shall accrue from

October 29, 2011, when the Province took possession of the expropriated easement, until the date of payment.

7.0 INJURIOUS AFFECTION – LOSS OF USE AND ENJOYMENT – PERSONAL PAIN AND SUFFERING

[229] The Claimants said the work on the bridge replacement project had the following impacts on the use and enjoyment of their property:

- Excessive and continuous noise, both day and night, generated from the traffic rattling across the temporary detour bridge;
- The loss of a large and natural stand of trees and other vegetation along the old Highway 104, which had provided privacy and a noise buffer;
- Noise and vibrations caused by the pile driving and jackhammering work mostly associated with dismantling and replacing the old Highway 104 bridge;
- Loss of fruit trees during the construction of the temporary detour bridge;
- Excessive noise from the banging associated with dump-truck tail boards;
- The strong smell of diesel fumes emanating from the construction equipment, especially when they were starting up in the mornings;
- The inability to keep windows open in the summer, or spend any length of time outdoors, because of the noise, odours and dust;
- The inability to receive guests, and, in particular, their children and grandchildren; and
- Construction debris, including asbestos, and a thick film of dust, blowing onto the Property and the Claimants' vehicles.

[230] The Claimants further submit they are entitled to damages for pain and suffering relating to the following:

- Mr. Partridge's tinnitus and hearing loss, which he attributes to the noise caused by the bridge replacement project; and
- Mr. Partridge also suffered from other health problems, including headaches, memory loss, loss of sleep, noise bleeds and anxiety;

[231] Ms. DeWolfe suffered from sleep loss, headaches, and migraines.

[232] The Province denied any liability in relation to this part of the claim on the following basis:

- The *Edwards Rule* in that the actions giving rise to the claims were not performed on the easement lands taken by the Province;
- The actions taken by the Province would not give rise to actionable nuisance if not under statutory authority;
- Causation of the health issues had not been established;
- Non-pecuniary damages for pain and suffering were not compensable under the *Expropriation Act;* and
- A part of the claim related to a loss of a view or loss of prospect, which decided authorities have established are not compensable.

[233] The *Edwards Rule* is described in *Johnson v. Nova Scotia,* 2005 NSCA 99, at paras. [168]-[171]:

> Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, supra explains the limitation set out in that rule thus at p. 338:
>
> > **The Land Affected Must have Been Depreciated in Value by Activities Upon the Expropriated Land ("The Edwards Rule")**
> >
> > The "common law" rule is that in a partial taking situation the owner can claim compensation only for "pure injurious affection" (i.e.: depreciation in the value of the remaining property), which results, or may result, from the use of the land taken from the owner. The owner cannot recover compensation for deleterious effects which originate from the use of land acquired from other owners or already owned by the public authority.

[169] The *Edwards* rule is founded upon Privy Council decision in *Sisters of Charity of Rockingham v. The King*, 1922 CanLII 489 (UK JCPC), [1922] 2 A.C. 315, (1922), 67 D.L.R. 209. The Minister of Railways and Canals had expropriated two small promontories owned by the Sisters on the eastern side of an existing railway, on the margin of Bedford Basin, for the construction of a railway shunting yard. The Sisters claimed compensation on the ground that their property on the western side of the railway, which had not been taken, had been injuriously affected by the construction of that yard. The Privy Council noted at p. 216 that a claimant is not entitled to compensation arising from the anticipated construction of works upon lands taken from others. It then continued:

> The problem of applying the above principles in a case where the mischief complained of has arisen partly on lands taken from the claimants, and partly on other lands outside their property, can only be settled by a consideration of all the circumstances in a particular case. Clearly in this case the appellants are entitled to a less amount of compensation than if all the lands taken in the laying out of the shunting yard had belonged to them, but on the other hand, the fact that other lands are comprised in the scheme in addition to the lands taken from the appellants, does not deprive the appellants of their right to compensation, so long as their claim is not extended beyond mischief which arises from the apprehended legal user of the two promontories of a railway shunting yard. (Emphasis added)

[170] The English Court of Appeal applied the rule from the *Sisters of Charity* decision in *Edwards*, supra. There the claim pertained to traffic noise resulting from the construction of a truck road both within and without the boundaries of lands compulsorily acquired from the claimant. The decision limited compensation to the depreciation caused by the noise, vibration, smoke, etc. actually done on only the piece of land taken from the claimant.

[171] The rule in *Edwards* was subsumed in the definition of injurious affection in the *Act*, which I repeat here for convenience:

3(1) In this Act,

(h) "injurious affection" means

(i) where a statutory authority acquires part of the land of an owner

(A) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or by any combination of them, ... (Emphasis added)

[Emphasis added in original]

[234] It is clear the toe of the slope and embankment required for the eastern approach of the temporary replacement bridge almost abuts the Claimants' work sheds. It is within the expropriated easement, and outside the Highway 104 right-of-way. No expropriation would have been required if such were not the case. As well, while much of the travelled portion of the detour bridge is over the river, a part of the eastern approach and one guardrail to the eastern approach are, in all likelihood, within the expropriated

easement. This said, many of the items which the Claimants complained about did not occur entirely, or in some cases, substantially, on the expropriated easement.

[235] Section 30(1) and 26(c) of the *Expropriation Act* allows the owner of expropriated lands to claim damages for injurious affection. Where there has been a partial taking, as in this case, the definition of injurious affection in section 3(1)(h)(i)(B) sets out the parameters of a claim as follows:

> ... such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute.

[236] The meaning of this provision must be determined using applicable principles of statutory interpretation:

- The modern rule requires that "... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, and the intention of Parliament (see *Rizzo & Rizzo Shoes Ltd (Re),* [1998], S.C.R. 27, at para, 21);
- The object of the *Expropriation Act* is the full compensation of a landowner whose property has been taken (see *Dell Holdings)*. This is further confirmed by s. 2(1) of the *Expropriation Act;*
- Keeping in mind the mischief to be remedied, the Board should not limit the meaning of a provision by a narrow interpretation which would interfere with or prevent compensation (see *Dell Holdings* and *Central Supplies*); and
- Compensation pursuant to the *Expropriation Act* is a statutory remedy. It should not be awarded if such compensation is not provided for in the statute.

[237] The Province relied upon *Ben's Ltd v. Dartmouth (1978),* 14 LCR 35, where the Expropriation Compensation Board suggested the *Edwards Rule* would apply to

personal and business damages under s. 3(1)(h)(i)(B) of the *Expropriation Act.* The Board's discussion was clearly *obiter.* The Board's predecessor specifically did not rule on the issue. It did do an extensive analysis of the history of the legislative scheme associated with injurious affection to explain the context of the statutory limitations.

[238] In particular, the history behind what appear to be conceptually inconsistent limitations on the right to compensation, depending on whether there has been a partial taking, or no taking, was explained:

> ... It is difficult to understand these other conceptual differences in the two subclauses except in the context of the historical development of the law affecting the two situations. In this connection the Board has had reference to Mr. Eric C. E. Todd's review of the law which pre-dated the current statutory provisions in an article entitled "the Mystique of Injurious Affection in the Law of Expropriation", U.B.C *Law Rev.* 127 (1967) Centennial ed. It appears that in the evolution of each set of rules the judicial and legislative disposition to afford more equitable treatment of landowners has been attended, with different results, by the fear that the right to compensation might be too widely extended. In the case of partial takings, the right to compensation for injurious affection was extended to cover depreciation of the value of the remaining lands caused by the construction or use of the works, but that right was in turn confined to the deprecation of value attributed to that part of the works constructed or used on the lands actually taken: see *Sisters of Charity of Rockingham v. The King* (1922), 67 D.L.R. 209, [1922] 2 A.C. 315, [1922] 3 W.W.R. 33, and *Minister of Transport v. Edwards,* [1964] 1 All E.R. 483. The right to compensation for injurious affection where no land is taken evolved on somewhat different principles as a substitute for the common law action of nuisance which would have existed but for the statutory authority to construct the works. This right to compensation was, however, limited to the detrimental effects of the emplacement or construction of the works and compensation based on their use was exempted: see *Directors, etc., of Hammersmith and City R. Co. v. Brand et al.* (1868-9), L.R. 4 H.L. 171. It is quite apparent that subcls. 3(1)(h)(i)(A) and (ii)(A) of the Nova Scotia statute are intended, *inter alia,* to codify in the pre-existing law as expressed in the *Edwards* and in the *Brand* cases.
>
> . . .
>
> In the new statutory provisions cited above, the right to compensation for personal and business damages has been grated on the codified pre-existing law as expressed in the *Edwards* and *Brand* cases. However, welcome this development may be, the difficulties of applying the rules are compounded by the manner in which the change has been accomplished because the new statutes divide these new rights into the two familiar categories of a partial taking and the injurious exercise of statutory authority with no taking. The limitations which applied in the pre-existing law also appear to be extended to claims for personal and business damage with the result that where no land is taken, compensation may be awarded for personal and business damage in respect to the construction but *not* the use of the works. The language which deals with a partial taking is less clear because the word "thereon" is omitted in s. 3(1)(h)(i)(B), but it may be a fair inference (pending judicial interpretation to the contrary) that the Legislature intended the spatial limitations of the *Edwards* rule to apply to personal and business damages in the case of a partial taking. It is urged on behalf of the claimant that the *Edwards* rule is not

> incorporated in s. 3(1)(h)(i)(B), but for the reasons set out below, this Board has found it unnecessary to deal with the question in this case.
>
> [*Ben's Ltd. v. Dartmouth* (1978), 14 LCR 35, pp. 362-363]

[239] In *Johnson v. Nova Scotia,* 2005 NSCA 99, the Nova Scotia Court of Appeal stated that because the word "thereon" was used in s. 3(1)(h)(i)(A) of the *Expropriation Act,* the *Edwards Rule* was subsumed in that provision.

[240] In *Johnson,* in addressing a claim for additional transportation costs occasioned by the severance of a public dirt road by construction of the Cobequid Pass, the Nova Scotia Court of Appeal referred to the argument raised by the Province that the *Edwards Rule* applied to s. 3(1)(h)(i)(B) of the *Expropriation Act.*

[241] The Johnsons did not own the land on either side of the public dirt road. While the Court of Appeal overturned the Board's decision to allow the claim for transportation costs, the Court pointed out the Board had not identified which provision in the legislation it had used to determine compensation.

[242] As the Johnsons had argued that compensation for injurious affection was available even where no land is taken, the Court of Appeal addressed this argument and dispensed of the matter on the basis that the severance of the public road did not constitute actionable nuisance. The Nova Scotia Court of Appeal did not specifically address whether the *Edwards Rule* applied to s. 3(1)(h)(i)(B) of the *Expropriation Act.*

[243] In the absence of appellate direction to the contrary, the Board has continued to apply the rationale in *Ben's* to s. 3(1)(h)(i)(B). Consideration of the decisions in *Johnson, Dell,* and *Antrim* has not altered this approach (see, for example, *Re Aucoin,* 2018 NSUARB 188). The Board notes, however, that in *Re Aucoin,* given the factual findings, applying the *Edwards Rule* did not impact on the outcome.

[244] The *Sisters of Charity* case, the *Edwards* case, and *Todd's* description of "pure injurious affection" all relate to depreciation in land value. A reduction in land value implies long lasting effects which will impact the future market value of the lands. Personal damages under s. 3(1)(h)(i)(B) could be the result of more temporary impacts of construction and use. Arguably, the concern about extending the right to compensation too widely might not be as significant. The fact remains that, in a partial taking, because both construction and use can give rise to damages, the effects could be just as long-lasting as is the case when reduction in land value is in issue. It is therefore not apparent why spatial limitations should apply to one aspect of injurious affection (land value depreciation) but not to another (personal and business damages).

[245] While it is true that the word "thereon" does not appear in s. (3)(1)(h)(i)(B), it is implicit because this part of the definition, with the use of the conjunctive "and", is referring to the same construction and use of the works, as in the first part of the definition, which the legislative language has already established must take place on the acquired lands.

[246] This interpretation is consistent with the contextual approach, which integrates the history of why the provisions came to be. It provides consistency in relation to the concept of injurious affection where there is a partial taking.

[247] In any event, in the particular circumstances of this case, the *Edwards Rule* argument has little impact on the amount of compensation to which the Claimants are entitled under this part of the claim. This is because there are, in reality, two bases upon which they can claim compensation. This turns on the definition of the "works" for which the lands were expropriated.

[248] The project on the South River which forms the background to this claim involved the deconstruction and reconstruction of the old Highway 104 bridge, and the building of a temporary detour bridge while the bridge replacement construction was taking place.

[249] While the temporary detour bridge was not an end in and of itself, the Claimants' lands were expropriated to accommodate the detour bridge and detour bridge approaches. As the Claimants themselves point out, the detour bridge could have been constructed on the opposite side of the old Highway 104 bridge, albeit with more logistical issues and potentially higher costs.

[250] In these circumstances, there was a choice as to the location of the detour bridge. It is this choice of location which triggered the expropriation; not the deconstruction and reconstruction of the old Highway 104 bridge. Therefore, the Board finds the "works" to which s. 3(1)(h)(i)(B) of the *Expropriation Act* applies are the detour access approaches and detour bridge.

[251] The Claimants claimed injurious affection under s. 30 and s. 26(c) of the *Expropriation Act* from the removal and reconstruction of the old Highway 104 bridge, and the construction of the detour bridge (see paras. 18,41,42,43,44,45,46,51,52 and 54(g) of the Claimants' Statement of Claim). They did not limit their claim to s. 3(1)(h)(i)(B) in the pleadings and offered s. 3(1)(h)(ii)(B) as an alternative argument in written submissions responding to the Province's position. As well, the Province acknowledged in its pre-hearing submissions there were two bases for advancing the claim.

[252] Therefore, as no expropriation took place in relation to the dismantling and replacement of the old Highway 104 bridge, a claim for injurious affection related to the

construction, but not the use, of those works can be advanced pursuant to s. 3(1)(h)(ii)(B) of the *Expropriation Act.* This provision obviously does not contemplate that the construction take place on expropriated lands, since there is no expropriation. In effect, this is how the Court of Appeal approached the analysis in *Johnson*, where there had been a taking, but not in relation to the public dirt road which had been severed. It is also consistent with *Ben's,* where it was determined the two parts of the definition are not mutually exclusive.

[253] Because of the Board's later findings on what aspects of the construction and use might give rise to actionable nuisance, the result would ultimately be the same whether the *Edward's Rule* is applied or not.

[254] Under both s. 3(1)(h)(i)(B) and s. 3(1)(h)(ii)(B) of the *Expropriation Act*, the Board must address what constitutes actionable nuisance. The seminal case is *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13.

[255] In *Antrim,* a claim for injurious affection was alleged to have resulted from highway construction. Cromwell, J. A., provided a detailed analysis as to how the Board should consider what constitutes an actionable private nuisance in this context. He said:

> ...
>
> The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances.
>
> ...
>
> Retaining a substantial interference threshold underlines the important point that not every interference, no matter how minor or transitory, is an actionable nuisance; some interferences must be accepted as part of the normal give and take of life.
>
> ...
>
> a substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference.

...

Nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier: *Tock*, at pp. 1190-91. The point is not that there is a typology of actionable interferences; the point is rather that there is a threshold of seriousness that must be met before an interference is actionable.

...

The main question here is how reasonableness should be assessed when the activity causing the interference is carried out by a public authority for the greater public good. As in other private nuisance cases, the reasonableness of the interference must be assessed in light of all of the relevant circumstances. The focus of that balancing exercise, however, is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation.

In the traditional law of private nuisance, the courts assess, in broad terms, whether the interference is unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all of the circumstances...In relation to the gravity of the harm, the courts have considered factors such as the severity of the interference, the character of the neighbourhood and the sensitivity of the plaintiff.... The frequency and duration of an interference may also be relevant in some cases....Courts and tribunals are not bound to, or limited by, any specific list of factors. Rather, they should consider the substance of the balancing exercise in light of the factors relevant in the particular case.

The way in which the utility of the defendant's conduct should be taken into account in the reasonableness analysis is particularly important in this case and would benefit from some explanation.

The first point is that there is a distinction between the utility of the conduct, which focuses on its purpose, such as construction of a highway, and the nature of the defendant's conduct, which focuses on how that purpose is carried out. Generally, the focus in nuisance is on whether the *interference suffered by the claimant is unreasonable, not on whether the nature of the defendant's conduct is unreasonable.*

...

The nature of the defendant's conduct is not, however, an irrelevant consideration. Where the conduct is either malicious or careless, that will be a significant factor in the reasonableness analysis...where the defendant can establish that his or her conduct was reasonable, that can be a relevant consideration, particularly in cases where a claim is brought against a public authority. A finding of reasonable conduct will not, however, necessarily preclude a finding of liability.

...

The second point is that the utility of the defendant's conduct is especially significant in claims against public authorities. Even where a public authority is involved, however, the utility of its conduct is always considered in light of the other relevant factors in the reasonableness analysis; it is not, by itself, an answer to the reasonableness inquiry. Moreover, in the reasonableness analysis, the severity of the harm and the public utility of the impugned activity are not equally weighted considerations. If they were, an important public purpose would always override even very significant harm caused by carrying it out.

...

Generally speaking, the acts of a public authority will be of significant utility. If simply put in the balance with the private interest, public utility will generally outweigh even very significant interferences with the claimant's land. That sort of simple balancing of public

> utility against private harm undercuts the purpose of providing compensation for injurious affection. That purpose is to ensure that individual members of the public do not have to bear a disproportionate share of the cost of procuring the public benefit. This purpose is fulfilled, however, if the focus of the reasonableness analysis is kept on whether it is reasonable for the individual to bear the interference without compensation, not on whether it was reasonable for the statutory authority to undertake the work. In short, the question is whether the damage flowing from the interference should be properly viewed as a cost of "running the system" and therefore borne by the public generally, or as the type of interference that should properly be accepted by an individual as part of the cost of living in organized society…
>
> …
>
> Of course, not every substantial interference arising from a public work will be unreasonable. The reasonableness analysis should favour the public authority where the harm to property interests, considered in light of its severity, the nature of the neighbourhood, its duration, the sensitivity of the plaintiff and other relevant factors, is such that the harm cannot reasonably be viewed as more than the claimant's fair share of the costs associated with providing a public benefit. This outcome is particularly appropriate where the public authority has made all reasonable efforts to reduce the impact of its works on neighbouring properties.
>
> …
>
> …In cases where it is relevant however, it is helpful to consider that some sorts of temporary inconvenience are more obviously part of the normal "give and take" than are more prolonged interferences. While temporary interferences may certainly support a claim in nuisance in some circumstances, interferences that persist for a prolonged period of time will be more likely to attract a remedy…
>
> Another important idea is that the traditional consideration relating to the character of the neighbourhood may be highly relevant in the overall balancing. This point is particularly relevant in cases where a claim is brought against a public authority…
>
> …
>
> To sum up on this point, my view is that in considering the reasonableness of an interference that arises from an activity that furthers the public good, the question is whether, in light of all of the circumstances, it is unreasonable to expect the claimant to bear the interference without compensation.

[256] The following facts have been established in relation to the construction work:

- The Property is located in a rural setting, albeit next to the busy TransCanada Highway 104;
- The Claimants, and the witnesses testifying as part of the Claimants' case, said traffic noise had never been an issue at the Property. The Property is located in somewhat of a depression next to a steep embankment. There was vegetation near the highway, which the Claimants, and Greg Partridge and Jaclyn Clark say

acted as a noise buffer. The Board is not convinced the vegetation would provide a significant noise barrier, particularly during the late fall, winter, and early spring, when not in full leaf;

- The construction of the temporary detour bridge and approaches was very noisy, given the nature of the construction and the equipment required;
- The equipment used for the detour bridge construction emanated diesel fumes on a regular basis. With respect to the detour bridge, this was less intensive and for a shorter period of time than the activities associated with the permanent bridge structure. The most persuasive odours occurred at start-up in the morning;
- The dumping of gravel for infill purposes resulted in the loud clanging and banging of tailgates on a regular basis. As it was closer, this would have been more aggravating to the Claimants on the Property side of the detour bridge;
- Pile-driving relating to the eastern abutment of the temporary bridge, located on the Property side of the detour bridge, took place over two days;
- The construction of the temporary bridge and approaches started on September 16, 2011. Construction occurred until December 19, 2011, when it was opened to traffic;
- The temporary bridge was a Bailey bridge, which is comprised of a series of steel panels supported by steel trusses. The Claimants' testimony, supported by the audio on the videos introduced as evidence, establishes that there was considerable clanging and banging associated with vehicles going across the Bailey bridge at all hours of the day and night. The audio for the videos indicates this was most noticeable for the Property at the eastern approach. As well, Mr.

Partridge described screeching noises associated with large vehicles coming into contact with the guardrails. This would also have been more disturbing to the Claimants on the Property side of the detour bridge;

- The temporary detour bridge was in use from December 19, 2011, until October, 2012, when the new Highway 104 bridge was open to traffic;
- The demolition of the old Highway 104 bridge was done between January 4, 2012, and February 3, 2012;
- The construction of the new Highway 104 bridge began in January, 2012. It was completed in October, 2012;
- The construction of the new Highway 104 bridge included the use of heavy equipment. This construction was extremely noisy, especially when pile driving work and work involving an excavator with a large-scale breaker were used. An excavator with a breaker is used in what is basically a heavy-duty jack-hammering process;
- The pile driving lasted for a period of a few weeks, although not on a daily basis;
- The excavator with a breaker was used for approximately one month during the demolition of the old Highway 104 bridge;
- Diesel fumes emanated from the equipment used to construct the new Highway 104 bridge;
- Dirt and dust floated onto the Property, including asbestos, primarily from the deconstruction of the old Highway 104 bridge and the construction of the new Highway 104 bridge;

- As the new bridge was constructed in the same location as the old one, the highway traffic noise from the new bridge would not be materially different than that caused by traffic over the old bridge. In any event, since no land was expropriated from the Claimants for this part of the project, use of the new bridge does not give rise to a compensable claim;
- Construction activities on both the detour bridge and the Highway 104 replacement bridge project generally occurred between 7:00 A.M. and 5:00 P.M. As daytime hours increased, the work schedule was generally 6:30 A.M. to 6:30 P.M. Work was conducted seven days a week;
- The decibel levels, on occasion, exceeded the maximum allowable levels under the Antigonish County Noise By-law. This was more emphatic during the pile-driving and jack hammering work. While the Noise By-law exempted provincial undertakings, it was incorporated by reference in the Province's contract with Alva Construction. In this regard, while certain average decibel levels, as reported by Stantec Engineering on January 26, 2012, were below the 90-decibel threshold, the Noise By-law places the threshold at a maximum number, and not an average number. Some of the readings observed by Mr. Feigin were well above the 90-decimal degree;
- Greg Partridge and Jaclyn Clark curtailed their visits with their children to the Property while construction was ongoing, due to the noise, fumes, dust and construction activities; and
- The Claimants' outdoor activities on the Property were significantly curtailed during much of the construction period.

[257] Based on the foregoing, the Board has no difficulty in finding that the construction and use of the temporary bridge, and the construction associated with replacing the Highway 104 bridge, created a substantial interference with the Property. Given the extent of the impacts and the length of time they lasted, there is no reasonable basis for asserting this interference was trivial. The question remains whether these impacts were unreasonable.

[258] In *St. Pierre v. Ontario (Minister of Transportation),* [1987] 1 S.C.R. 906, at p. 916, McIntyre J., stated:

> Moreover, I am unable to say that there is anything unreasonable in the Minister's use of the land. The Minister is authorized--indeed he is charged with the duty--to construct highways. All highway construction will cause disruption. Sometimes it will damage property, sometimes it will enhance its value. To fix the Minister with liability for damages to every landowner whose property interest is damaged, by reason only of the construction of a highway on neighbouring lands, would place an intolerable burden on the public purse. Highways are necessary: they cause disruption. In the balancing process inherent in the law of nuisance, their utility for the public good far outweighs the disruption and injury which is visited upon some adjoining lands. The law of nuisance will not extend to allow for compensation in this case.

[259] *Antrim* clarified the circumstances when landowners might be compensated for construction work of this type in the face of the utility of the project in question and concerns about the impact of awarding compensation on the public purse.

[260] In this case, there is no dispute that the bridge replacement project was useful and necessary. The public good in having a safe bridge over a well-travelled major highway is self-evident.

[261] While the Claimants suggested the Province might have been able, to some extent, to reduce the impact of the construction on the Property, the Board is satisfied that the work was conducted using well-established construction protocols typical of a project of this type. It was not possible for the Province to complete the project without

generating a substantial amount of noise, dust, fumes and disruption which would inevitably have an impact on the Property. This factor weighs in the Province's favour.

[262] The Claimants are not people with delicate sensibilities. They are tough, hard-working people who are used to a certain level of noise which would have been associated with their business operations; especially when conducting preparatory work at the Property. This factor is essentially neutral.

[263] The Property is located in a rural area, not far from the community of Antigonish. It is next to a busy highway. While the pre-construction vegetation might have offered some noise protection, the Board is not convinced this would be substantial during those months when there was no foliage. The Property is very small and located very near both the detour bridge and the activities associated with the bridge replacement project. It is in a hollow. The Property was the only occupied lands which were significantly impacted by the bridge project. This factor weighs in favour of the Claimants.

[264] It took 14 months to construct the detour bridge, deconstruct and reconstruct the new bridge, and remove the detour bridge. While not a permanent situation, this was a prolonged period of time to be exposed to the types of noise, dust, fumes, and disruptions outlined in the evidence. This factor weighs in favour of the Claimants.

[265] The frequency of each individual component creating noise was not continuous. When taken together, and combined with the fumes, and dust, the interference would have been relatively constant during the 14-month period. This factor weighs in favour of the Claimants.

[266] The severity of the interference is an important consideration in this case. The most extensive noise was caused by the following:

- Jackhammering and pile driving over the course of several weeks, in the case of the replacement bridge, and two days with respect to the detour bridge;
- Tailgates clanging over several weeks while infill was being deposited. This would have been more intrusive on the Property side of the river;
- The noise associated with the use of the Bailey bridge over the course of almost one year. The Board finds that the noise as vehicles entered or departed the Bailey bridge on the Property side of the river, as well as the screeching associated with heavy vehicles rubbing against the guardrail on the Property side of the river, were the most significant interferences caused by noise from the Bailey bridge;
- Because of the location of the Property in somewhat of a hollow, the diesel fumes which were generated when all equipment was started in the mornings caused significant interference; and
- For the same reason, dust generated by this large project caused significant interference with the Property;

[267] It is the number and severity of the interferences, which, when combined with the duration of the project, and its unchanging location next to the Property, and the unique qualities of the Property, which lead the Board to conclude that the nature of the interference suffered by the Claimants was unreasonable. The interference in question was more than the Claimants "fair share of the costs associated with providing a public benefit".

[268] Having determined the actionable rule part of the *Antrim* test has been met, an issue was raised with respect to the types of damages available for injurious affection. The Board had invited the parties to make any submissions on two cases which had been referenced in their written submissions prior to decisions being issued by the Nova Scotia Court of Appeal.

[269] Counsel for the Province submitted that *Atlantic Mining NS Corp (D.D.V. Gold Limited) v Oakley,* 2019 NSCA 14, provided support for the proposition that non-pecuniary general damages for personal injuries were not compensable under the *Expropriation Act.* The Board notes this argument had been raised by the Province in general terms, in its original submissions. The Claimants disagreed.

[270] In *Atlantic Mining*, the Court noted:

> No Canadian court has described losses for disturbance to a homeowner as non-pecuniary in nature as the Board did in this case. Notwithstanding statutory differences, this makes sense in principle because the interests protected by expropriation legislation are proprietary, not personal. They relate to ownership and enjoyment of use of that ownership. Similarly, the compensation paid for that loss relates to ownership and enjoyment of property. The claimant comes to the Court as a property owner, not an accident victim. Assimilating a property owner's claim for compensation to that of a tort victim exceeds the statutory purposes, ownership interests, and remedial goals described in the *Expropriation Act*. Going beyond what the common law would award an accident victim for a loss transcends the common law in a way neither authorized nor contemplated by the statute. The Board's interpretation of losses as non-pecuniary and virtually unlimited is an unreasonable conclusion. Like *McLean*, this is a case where interpreting losses as pecuniary is the only reasonable outcome.
>
> [para. 63]

[271] The Province argues that the reasons in *Atlantic Mining,* which explain why non-pecuniary disturbance awards are not available under the *Expropriation Act,* are equally applicable to claims for injurious affection.

[272] The Province submits the following:

- *Atlantic Mining* affirms the ruling in *Dell Holdings* that the objective of expropriation legislation is to provide economic indemnification;

- Interests protected by expropriation are proprietary, not personal. They relate to ownership and enjoyment and use of that ownership;
- Compensation paid for loss relates to ownership and enjoyment of property. The Claimants seek remedies as property owners, not accident victims;
- Pain and suffering damages for personal injuries are non-pecuniary in nature. They do not indemnify for economic loss, but are intended to provide solace;
- In *Atlantic Mining,* the Court of Appeal cited *Patterson v. British Columbia* [1997] B.C.J. No. 462 to support the economic indemnification purpose of expropriation legislation. This case held non-pecuniary injurious affection awards were not available under the British Columbia statute;
- From a contextual standpoint, the use of the words "personal damages" are paired with business damages, which by their very nature, must be a type of pecuniary loss;
- The wording "personal damages" in expropriation matters predates modern expropriation legislation. In older caselaw, it meant interference with a personal right or inconvenience enjoyed as part of the use of lands;
- Personal damages relate to a loss caused by interference with an interest in land and not personal loss or inconvenience; and
- Damages generally compensate the owner for the monetary cost of abating or curing the nuisance impacts of expropriation.

[273] The Claimants say that *Atlantic Mining* does not limit the damages available to the Claimants for injurious affection. Their argument can be summarized as follows:

- Damages for diminished property value, which is clearly compensable pursuant to s. 3(1)(h)(i)(A) of the *Expropriation Act,* is a form of non-pecuniary general damage award;
- The definition of "damage" includes both a loss or injury to person or property;
- The use of the word "personal" must mean that injury or physical harm can include harm to one's body;
- *Todd* provides the following proposition:

> The actionable rule imposes on statutory authorities the same burden of liability to pay compensation for injurious affection under their enabling legislation as the burden imposed on private developers to pay damages at common law. Thus that rule has the attractiveness of creating consistency between the public and private sectors.
> ...
>
> ... The distinction made between damage to realty and personal damage is both artificial and unworkable and even if it was otherwise it is unjustifiable to allow compensation for the one kind of loss but to deny it for the other.
>
> [pp. 382-384]

- Coates and Waqué's *The New Law of Expropriation,* Vol. 2 (Toronto: Thomson Reuters, 2016), referencing the Nova Scotia statute, says:

> The fact that personal and business damages are limited to such damages 'as the statutory authority would be liable for if the construction or use were not under the authority of a statute,' directs one to the pre-existing coming law.
>
> [p. 28-8]

- *Antrim,* under similar Ontario legislation, confirms an expropriating authority will be liable for valid claims which an owner would have under private nuisance law;
- General non-pecuniary damages are available in private nuisance law;
- There is precedent before this Board, and in other jurisdictions, for awards of non-pecuniary damages;
- *Patterson* is distinguishable because the British Columbia legislation uses the terms "...personal and business losses". It does not incorporate private nuisance

law because it does not have the wording "... as the statutory authority would be liable for if the construction were not under the authority of a statute..."; and

- The Claimants agree personal damages must be grounded in an impact on the use and enjoyment of land.

[274] As stated in *Atlantic Mining,* context is everything. The Board is aware the wording, history and purpose of the Nova Scotia injurious affection provisions provide a somewhat different context than those related to disturbance awards.

[275] At common law, a property owner could bring an action for nuisance caused by construction work. However, if the work was constructed under statutory authority, in the absence of negligence, no action could be maintained. The purpose of the injurious affection provisions in the *Expropriation Act* was to remove the statutory authority defense available to an expropriating authority [see *Food City Ltd. v. New Glasgow (Town)*, 1980 CanLii 2632 (NS CA) at para. 12].

[276] Unlike disturbance claims, where there was no precedent for non-pecuniary awards, as the Claimants point out, this Board has, on occasion, awarded non-pecuniary personal damages awards for injurious affection, where these damages are compensable under the law of private nuisance. The Board notes these awards predate *Atlantic Mining.*

[277] *Adams v. Ontario (Minister of Transportation & Communications)*, 1980 Carswell Ont 825 (S.C.) is an example where, pursuant to a definition in the Ontario statute similar to that found in the *Expropriation Act*, the Ontario Supreme Court upheld an award for non-pecuniary damages related to noise.

[278] In providing the legal context for injurious affection in *Antrim*, Cromwell, J.A., said:

> ...
>
> The legal framework for the appeal is found in the law concerning injurious affection. Injurious affection occurs when the defendant's activities interfere with the claimant's use or enjoyment of land. Such interference may occur where a portion of an owner's land is expropriated with negative effects on the value of the remaining property. Alternatively, it may arise where, although no land is expropriated, the lawful activities of a statutory authority on one piece of land interfere with the use or enjoyment of another property...

[279] In Nova Scotia, the negative effects on the value of land are captured by ss. 3(1)(h)(i)(A) and (ii)(A) of the *Expropriation Act*. It is apparent personal damages for loss of use and enjoyment of the land would fall under ss. 3(1)(h)(i)(B) and (ii)(B). In *Antrim*, the Supreme Court of Canada went on to state, at paragraph 23, that nuisance:

> ... may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier...

[280] While *Antrim* involved business and land value losses which were pecuniary in nature, the language used certainly suggests general private nuisance law is preserved by the injurious affection provisions. What is actionable and what potential damages are compensable because of the actionable nuisance are two different things. The question remains what type of damages are envisaged by the *Expropriation Act.*

[281] The Province submits only damages for abating or curing the actionable nuisance can be awarded. The Board has made such awards in the past. The difficulty arises where the harm occurs and cannot be cured. In this case, the only reasonable way to cure the harms which the Board has determined were actionable would have been to relocate the Claimants. This was not done. In any event, relocation would provide no compensation for the loss and enjoyment of the Property, which is a key underpinning of the law of nuisance.

[282] The two competing rationales, which the Board must reconcile in determining the meaning of the word "personal damages" by employing a contextual analysis, are:

i) The authoritative and strongly worded reasons set out in *Atlantic Mining* which say the purpose of the *Expropriation Act* as a whole is to give full economic financial indemnity to the Claimants, not non-pecuniary tort awards. This while quoting with approval from *Patterson,* where the phrase "reasonable… personal losses" was held not to include non-pecuniary losses for injurious affection; and

ii) Cromwell J.'s analysis in *Antrim,* which followed *Patterson,* but was considering the Ontario legislation. In this context, the decision incorporates the concept of private nuisance law and discusses personal injury type harms which are recognized in nuisance law.

[283] The reconciliation comes from the specific purpose which the modern injurious affection provisions which follow the Ontario and Nova Scotia models are meant to address.

[284] Firstly, unlike costs, expenses and losses arising from a disturbance, no expropriation need take place at all for an owner to have a potential claim for injurious affection. It is therefore clear the injurious affection provisions are more expansive than disturbance damages.

[285] Secondly, the types of activities which give rise to injurious affection, particularly as they relate to a situation with no taking, are limited by express language. By contrast, the word "damages" has a more expansive meaning than the word "losses",

found in the injurious affection provisions of British Columbia legislation and the disturbance provisions of the *Expropriation Act*.

[286] Thirdly, the use of the words "...as the statutory authority would be liable for if the construction were not under the authority of a statute..." has been interpreted to mean that private nuisance law was incorporated in the *Expropriation Act*, and similar Ontario legislation.

[287] Fourthly, private nuisance law recognizes granting non-pecuniary damages for interference with the use and enjoyment of property. Personal bodily harm is specifically discussed in *Antrim*.

[288] In this context, injurious affection is meant to provide claimants with similar remedies as others who suffer nuisance, provided the claim is grounded in property ownership, and relates to the loss of use and enjoyment of that property, subject to the spatial limitations created by the *Edwards Rule* where there is a taking. In this sense, the proprietary aspect of the *Expropriation Act* discussed in *Atlantic Mining* is maintained.

[289] This approach would be consistent with the approach to statutory interpretation of expropriation legislation discussed in *Dell Holdings*. The Board has therefore decided non-pecuniary type awards for injurious affection grounded in a loss of use and enjoyment of property are available to the Claimants.

[290] The Board finds that insofar as the use and enjoyment of the Property are concerned, the following impacts were, in combination, so intrusive as to warrant damages:

- Clanging and banging of tail gates to the extent they took place on the expropriated lands with respect to the temporary detour bridge;

- Clanging and banging of tail gates associated with infilling for the new bridge reconstruction;
- Diesel fumes on start-up in the morning from the new Highway 104 replacement bridge job site;
- Diesel fumes on start-up in the morning, from vehicles on the expropriated easement, in relation to the detour bridge;
- Jackhammering and pile-driving with respect to the replacement bridge and the Property-side abutment to the detour bridge;
- The continuous noise from the use of the Property-side approach to the detour bridge, including guardrail screeching;
- The inability to entertain family and friends, or use and enjoy the outdoor area of the Property; and
- Inability to sleep, together with headaches, irritability and disturbance of ability to concentrate during the construction period.

[291] The award of tort-like personal injury damages, which last beyond disruption to the Property, is conceptually more problematic. Because of the Board's findings, which follow, related to causation, this issue need not be resolved in this case.

[292] Having reviewed the medical records provided, and considered the testimony of Dr. Steeves, the Board, applying the causation test in *Clements,* has determined the following with respect to Mr. Partridge:

- There is insufficient evidence to establish a casual connection between the work undertaken by the Province and Mr. Partridge's permanent hearing loss and tinnitus;

- Mr. Partridge worked in noise extensive industries throughout his working life;
- It appears Mr. Partridge did not always wear ear protection. The photograph in Exhibit P-44, Tab 3, Photo #4 shows Mr. Partridge engaged in log preparation without ear protection;
- While the medical records show a mild to moderate hearing loss, and tinnitus, there is no diagnosis or opinion which links these conditions to the bridge replacement project;
- Mr. Partridge has not established it is more likely than not the hearing loss and tinnitus were caused by the noise associated with the bridge replacement project;
- Mr. Partridge reported symptoms of sleeplessness, daily headaches, nervousness, nose bleeds, poor cognitive concentration, stress, irritability and depression;
- While the initial note from Dr. Steeve's is dated January 31, 2012, similar reports and diagnosis are expressed on February 20, 2013 and February 17, 2014;
- Dr. Steeve's chart notes generally describe similar issues related to Mr. Partridge's health;
- It is apparent that the noise associated with the bridge work was a major factor in Mr. Partridge's sleeplessness, headaches, anxiety, loss of concentration, stress and irritability during the construction phase;
- The symptoms which continued after the end of construction are more likely related to the stress of dealing with the uncertainty of the outstanding expropriation matter and the impacts of tinnitus, which the Board has determined is not compensable; and

- Medical issues associated with the length and uncertainty of expropriation litigation are not compensable as injurious affection. They are not tied to the disruption caused by the expropriation itself, but the legal process involved to assert claims to compensation.

[293] With respect to Ms. DeWolfe, a letter from Dr. Fuhrmann dated February 1, 2012 indicates Ms. DeWolfe reported symptoms of sadness, irritability and anxiousness associated with construction work undertaken by the Province. She was noticeably more anxious and fatigued than usual.

[294] The medical records provided also indicate Ms. DeWolfe had suffered from migraines. It is clear from a report dated April 9, 2014 from Dr. McDougall that Ms. DeWolfe had a long history of migraines, which became more frequent in the five years prior to 2014, and particularly in the two to three years prior to her visit.

[295] Dr. Fuhrmann indicates, in a letter to Dr. McDougall dated December 18, 2013, that in the past month she had five consecutive days of aura and headaches, apparently initiated by an extensive optometrist exam with lights in her eyes.

[296] Both Dr. Fuhrmann and Dr. McDougall indicate stress can be a triggering factor in the onset of migraines.

[297] Based on the foregoing, the Board has determined, applying the causation test in *Clements,* that the noise and disruption generated by the Province's work likely triggered some migraines during the construction period. This work did not initiate Ms. DeWolfe's migraines. As well, there were clearly other triggering factors such as stress from the expropriation itself, and the eye examination. The ongoing symptoms after construction ended could be, to some extent, attributed to the stress of the ongoing

expropriation litigation. As discussed above, this type of post-construction stress is not compensable.

[298] The Board therefore notes that all the aspects of actionable nuisance which it has found were established by the evidence relate to the negative impact of the Province's construction activities on the Claimants' use and enjoyment of the Property during the construction period itself. No award is contemplated for long-term health effects.

[299] Turning to the amount of damages, the Claimants have referred the Board to the following cases, which relate to the nuisance findings made by the Board:

- *Banfai v Formula Fun Centre Inc.*, [1984] O.J. No 3444 (Ont. H.C.) where an award of $10,000.00 ($23,833.00 today) was made for nuisance caused by the noise from an automobile-racing amusement park. The noise caused the plaintiffs to keep their windows closed and caused sleep loss, sore throats and headaches; and
- *Adams v Nova Scotia (Provincial Grain Commission)* (1990), 97 N.S.R. (2d) 411 (T.D.) where an award of $15,000.00 in general damages ($28,720.00 today) was made in relation to blowing of dust onto the plaintiffs' property;

[300] In *Adams v. Ontario Municipality of Transportation & Communications (supra),* an amount of $3,000.00 (approximately $8,700.00 today) was awarded for injurious affection due to noise.

[301] In *Re Visser*, 2013 NSUARB 180, a case cited by the Claimants, but not for the purpose of damage quantification, this Board awarded Mrs. Visser $5,000.00 relating to one year of exposure to extensive noise, spotlights, back-up lights, dust and vibrations.

[302] The other cases referenced by the Claimants either involved aspects of this portion of the claim which the Board has not accepted, or they were not sufficiently comparable to this fact situation.

[303] The cumulative effect of the nuisances created by the Province in this case are similar to *Visser,* although somewhat more pronounced. The Board finds that an award of $10,000.00 for each Claimant would be reasonable compensation for them having to bear more than their fair share of the societal burden associated with highway construction.

[304] Interest is payable at the applicable rate from October 29, 2011, when the Province took possession of the expropriated easement.

8.0 INJURIOUS AFFECTION – DIMINISHED VALUE OF REMAINING PROPERTY

[305] The Claimants say they are entitled to damages for injurious affection because the Property has been diminished in value as a result of the Province's bridge replacement project.

[306] Where a portion of the Property has been expropriated, s. 27 and 3(1)(h)(i)(A) of the *Expropriation Act,* when read in combination, allows an injurious affection claim for:

> ... the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works therein or any combination of them.

[307] The Province submits that the methodology used by the Nova Scotia Expropriation Compensation Board in *Food City Ltd v. Town of New Glasgow,* 27 L.C.R. 185 is the manner in which this type of injurious affection claim must be made out. At page 200, that tribunal stated:

> Section 3(1)(*h*)(ii), as stated, ante, p. 188 of this decision, indicates that injurious affection where no land is taken shall mean a reduction in the market value of the land of the owner. This board interprets this to mean that the land must be valued in the condition it was before the construction of the works and then valued in the condition it was in after the construction of the works. This is known as the before-and-after method of valuation and is discussed to great extent in E.C.E Todd, *The Law of Expropriation and Compensation in Canada* (1976), pp. 292-313. As previously noted, no claim for personal or business damage was made by the claimant as interpreted in s. 3(1)(*h*)(ii)(B). It is the opinion of this board that the most accurate approach in determining market value of a property is by the market data or comparable sales approach.

[308] While in *Food City* there was no taking, the "before-and-after method" is equally applicable to establish market value where there has been a partial taking.

[309] The Claimants have presented no expert appraisal report which: valued the lands immediately before the construction; itemized the changes which such an expert is of the opinion post-construction reduced the value; and, provided a post-construction valuation when these items are taken into account.

[310] The Claimants have instead presented evidence that the Property was assigned a market value of $405,771.00 as of 2009, as part of a home insurance appraisal commissioned by TD Insurance. An Antigonish realtor, Mr. Bill MacNeil, who inspected the Property, testified he listed the Property for sale for $329,000.00 in 2007.

[311] The Claimants provided records from Property Valuation Services Corporation (PVSC) which showed an increase in the assessed value of the Property from $154,900.00 as of 2006 to $225,000.00 as of 2011. The assessed values then decreased to $97,200.00 as of 2012. In 2017, the PVSC assessed value was $87,500.00.

[312] An appraisal was prepared for TD Canada Trust by Linda MacKay, an appraisal expert who was qualified to provide opinion evidence in this proceeding. She determined the Property had a market value of $42,000.00 as of June 4, 2015.

[313] The *Edwards Rule* applies to this aspect of the claim. The Board finds that if the Claimants can show a reduction in the Property's market value caused by the

construction or use associated with the temporary bridge project, or the use of the construction, but not the use, of the new Highway 104 bridge, they are entitled to compensation.

[314] The evidence establishes there has been a reduction in value of the Property which coincides with the 2011-2012 construction project. The problem with the Claimants' case is that almost all the factors which would account for the reduction are not related to the Province's construction or use associated with the temporary bridge project.

[315] Almost all the damages to the Property which have been raised by the Claimants are associated with flooding. To the extent it is alleged that certain damage was caused by vibration, the Board cannot determine whether this is in fact the case with any certainty, given the fact that the movement of foundations and walls was said to be associated with flooding. As well, it is not possible to see if these vibrations were the result of activities on the easement lands.

[316] Finally, while it is not necessary to dispose of the vibration issue, the Board agrees with the Province that no notice was provided by the Claimants sufficient to satisfy the requirement of s. 31(1) of the *Expropriation Act.*

[317] The Claimants say the Statement of Claim provides sufficient notice of the claim. The only reference to vibrations is in paragraph 43. This relates to use and enjoyment issues caused by noise and vibrations. It does not refer to any property damage caused by vibrations. Section 51 of the Statement of Claim says the house and property were damaged by flooding. There are insufficient particulars of the alleged

house damage with respect to vibrations to meet the requirements of s. 31(1) of the *Expropriation Act.*

[318] Other potential reasons for a reduction in market value relate to the fact the Property is now located between the new twin bridges and the Highway 104 replacement bridge. Since the Highway 104 replacement bridge was placed in the exact same location as the old one, it is really the addition of the twin bridges, which are not part of the works for which expropriation occurred, which is the relevant factor.

[319] It is true that Mr. Ingram discussed the loss of trees and shrubbery, which could offer a buffer for privacy and noise. He said this could impact market value negatively. However, while considered by Mr. MacNeil and Ms. MacKay, their reports do not indicate this is a major factor in the value reductions.

[320] The Board therefore concludes the Claimants have not met the burden of proof necessary to show the Property's market value was reduced by virtue of the acquisition of the easement or, construction or use associated with the bridge replacement project.

9.0 INJURIOUS AFFECTION – MISCELLANEOUS OTHER COSTS

[321] The Claimants say the construction work associated with the temporary bridge project, for which the expropriation was required, resulted in certain miscellaneous expenses. They submit the following expense can be claimed as damages for injurious affection:

- $9,361.00 to repair driveway sinkholes and build up the driveway to protect against future floods;
- $1,656.00 to repair further driveway sinkholes;

- $1,316.75 to bring in gravel to build up the South River riverbank;
- $40.25 for a tow truck expense;
- $600.00 labour for the above-noted work; and
- $1,548.63 incurred to replace a pallet of corn blasting material lost due to a flood.

[322] There is sufficient evidence to establish the quantum of the amounts claimed. The Board must determine whether the Province's construction caused the damages.

[323] The Claimants have failed to prove, on a balance of probabilities, that the construction work associated with the bridge replacement project caused flooding arising from the South River. Therefore, expenses related to bringing gravel to build up the riverbank are not compensable. As well, the cost of replacing the pallet of corn blasting material is not compensable. Both these expenses relate to flooding or potential flooding on the South River.

[324] The remaining expenses relate to flooding or saturation of the Claimants' driveway. The same "but for" test discussed in *Clements,* and used by the Board in determining the causation of flooding arising from the South River, is applicable to determine this issue.

[325] The evidence on the causation was largely provided by the Claimants, Mr. Feigin and Mr. MacPherson. The Board has sufficient evidence to make the following findings of fact:

- Prior to the start of construction on the bridge replacement, water on occasion pooled in the Property driveway. It came primarily from run-off emanating from the

South Side Harbour Road. This road is located right next to the Property and runs along a steep slope which is adjacent to the Property.

- Prior to the construction, the Claimants did not experience any significant issues with the use of their driveway. This included occasional use for large transport trailers carrying logs for the business;
- The run-off from the South Side Harbour Road continued during the construction period;
- When construction for the detour bridge began, the concrete culvert drainage system in place with respect to Highway 104 and the South Side Harbour Road could no longer be used. A new system of concrete culverts was installed. These culverts led to a drainage swale constructed by Alva Construction along the Property side of the detour bridge and approaches and next to the Claimants' work sheds. The drainage swale was designed to direct run-off into the South River;
- The placement of the culverts involved digging trenches; infilling with gravel; laying the culverts in the trenches over the gravel; and, infilling the remainder of the trench. The new culverts ran across the top of the Claimants' driveway;
- On occasion, there was clearly water running down from the top of the driveway after the installation of the new culvert system. Mr. Partridge testified this type of run-off was a new situation. Mr. Feigin observed that the culverts were not accepting all the run-off from the catchment area;
- There is evidence of depressions in the driveway, and of the Claimants' vehicles being struck in their driveway after the installation of the new culvert drainage system;

- The Claimants described these depressions as "sinkholes". Mr. MacPherson thought they were potholes. The precise wording is not important. Holes or ruts were created in the driveway because of water saturation;
- In reviewing photographs, Mr. MacPherson testified that part of the drainage swale appeared to have been somewhat filled during construction. This was remedied and stone was placed in the swale to protect it from erosion;
- In his examination of the work site after complaints were made about the new drainage system causing issues with the Claimants' driveway, Mr. MacPherson did a site visit. His observations led him to conclude no water was escaping from the new culvert system onto the driveway. He did not monitor the situation continuously;
- The northeast side of the South River, where Alva Construction had to construct an abutment for the detour bridge, was silting clay. This is in the area near the top of the driveway. Silting clay is low permeability ground;
- On or about November 14, 2011, the Claimants' vehicle got stuck in the middle of the driveway. Its wheel sank in the deep saturated soft spots This happened on other occasions; and
- The Province offered to fill in the area where the vehicle got stuck with gravel. This offer was rejected by Mr. Partridge. The Claimants proceeded to have the work done.

[326] The Board must determine, whether it is more likely than not that, "but for" the Province's work associated with the new culvert system, significant soft spots would not have appeared in the Claimants' driveway.

[327] The Board agrees with the Claimants that proving causation on the balance of probabilities does not mean they must present an expert hydrological analysis to succeed. This said, the burden of proof lies with the Claimants. In the Board's opinion, in the context of this case, causation of driveway soft spots is not as complex as flood causation.

[328] As previously discussed, the Board must apply the "but for" test in a robust, common sense manner. It is not enough for the Claimants to say that they had no similar problems in the past. The Board must assess whether the Province's work impacted the driveway.

[329] Mr. Partridge indicated that the run-off from the top of the hill, in the area where the new culvert system was placed, was new and the cause of the water saturation. Based on his personal observations, Mr. Feigin said there were drainage issues with the driveway, and the water flow from the culverts exacerbated the problem.

[330] Mr. Partridge also suggested another explanation for the saturation. He was of the view that because the work done to lay out the culverts involved trenching, which was filled with permeable gravel, it allowed water which would have flowed from various drainage sources to enter the ground and saturate the soil.

[331] Mr. Partridge is not an engineer. He does have considerable construction experience. This strays into opinion evidence. No expert opinion was provided to support this theory. The difficulty with this theory is that the soft spot requiring repairs is some distance from the trenching. As well, because of the silting clay soil, permeability should be relatively localized.

[332] The photographs in Exhibit P-30, Vol. F, Tab 28, pp. 5107 and 5108 depict the area where the Claimants' van became stuck in the driveway. The photographs of the van, and the driveway during this time and after the van was removed, appear to have been taken on November 14, 2011. The top photograph at p. 5107 appears to have been taken two days earlier.

[333] The top photograph shows water pooling in the left-hand part of the driveway, when looking up the hill. There are significant ruts which look different than the photographs at p. 5108, which were taken after the Claimants' vehicle was towed. The entire area appears saturated. In reviewing all the photographs, water appears to have come from both the South Side Harbour Road and the top of the driveway.

[334] Having reviewed the evidence, the Board is satisfied the most likely mechanism which created the deep soft spots in the Claimants' driveway is water overtopping the newly installed culverts and exacerbating an existing situation related to drainage from the South Side Harbour Road.

[335] As pointed out in *Clements*, the precise degree the Province's work contributed to this outcome need not be established. What must be established is that "but for" this work, the saturation would not have reached the point where vehicles sank while driving in the driveway. The Board is satisfied the evidence establishes this.

[336] As a consequence, the Board awards damages in the amount of $11,657.25 for injurious affection in relation to the driveway. Applicable interest is payable from October 29, 2011, when the Province took possession of the expropriated easement, until payment is made.

10.0 INTEREST

[337] Pursuant to s. 53(1) of the *Expropriation Act,* the owner of expropriated lands is entitled to interest in relation to the market value of the land taken and damages for injurious affection "... at the rate of six percent per year calculated from the date the owner ceases to reside on or make productive use of the lands."

[338] By virtue of s. 53(2) of the *Expropriation Act*, if the Board finds there was a delay in determining compensation caused by the Claimants, it has the discretion to disallow interest for all, or a part of, the time it would otherwise be payable. Alternatively, the Board can reduce the amount of interest payable. Conversely, s. 53(4) of the *Expropriation Act* allows the Board to increase the interest rate to a maximum of 12% if it finds delays were caused by the Province.

[339] The Claimants allege they are entitled to a 12% rate of interest for the following reasons.

- The Province did not give meaningful consideration, prior to and during construction, to the various concerns of the Claimants, thus delaying the ability of the Claimants to seek relief;
- The Province failed to notify the Claimants that they would be pursuing expropriation until the expropriation had already occurred and construction was about to begin, even though those involved were aware expropriation would be pursued in late May of 2011;
- The investigation into flood causation was a sham;
- "Document dump" disclosure took place after the expropriation litigation was commenced;

- The Province took unreasonable positions in the litigation;
- There was delay in providing written answers to interrogatories served upon Mr. Woodford, resulting in a January 2, 2015 motion before the Board;
- There was delay in providing answers to undertakings given by Mr. MacPherson and Mr. Sanders during discovery, which resulted in a formal motion dated April 13, 2017;
- The Province took an unreasonable position with respect to whether or not the detour bridge was on expropriation lands;
- The Province repeatedly objected to the relevance of pre-expropriation expenses and dealings;
- The Province took an unreasonable position with respect to the applicability of the limitation period set out in s. 31(1) of the *Expropriation Act* in relation to flood dates;
- The Province took an unreasonable position with respect to the applicability of s. 31(1) of the *Expropriation Act* with respect to vibration claims;
- The Province attempted to add witnesses to its witness list set out in Board directions and even during the hearing itself; and
- The Province attempted to introduce undisclosed documents during the proceeding.

[340] The Province submits it caused no unreasonable delays. In addition, it says the Claimants themselves caused delays, as follows:

- By bringing a motion for interim costs which was without merit;
- By refusing to consent to an amendment to the pleadings with respect to a limitation defence; refusing to provide financial disclosure with respect to previous

business enterprises operated on the Property; and, refusing to provide answers to interrogatories served on Mr. Duffet, which ultimately led to a motion filed on April 21, 2017;

- By failing to provide complete answers to undertakings in a timely manner;
- By presenting irrelevant material with respect to pre-expropriation dealings; and
- By presenting a claim for vibration damages when no notice in writing was provided to the Province.

[341] The Claimants said that while the Property was under the "shadow of expropriation", the Province's conduct was such as to attract increased interest due to delay.

[342] In *Central Supplies,* the Nova Scotia Court of Appeal confirmed that expropriation is a process. Damages caused by the expropriation process may be compensable, if they fall within the ambit of those which can be claimed under the *Expropriation Act,* even if they predate the deposit of the expropriation documents. The case therefore confirms the existence of the so-called shadow period in Nova Scotia expropriation law.

[343] In this case, the Property was under the shadow of expropriation from February 2011, until October 3, 2011, when the expropriation documents were deposited. While some of the damages awarded to the Claimants arose during this shadow period, the Board finds the conduct of the Province prior to the expropriation did not cause any material delay in arriving at compensation payable to the Claimants.

[344] There is actually no obligation set out in the *Expropriation Act* requiring the Province to negotiate with the Claimants at all prior to the expropriation. The Province

began negotiations with the Claimants in February, 2011. The expropriation documents were deposited on October 3, 2011. They were served on the Claimants on October 29, 2011. This was when formal access to the expropriated easement to the Property was required and obtained.

[345] The Claimants say the conduct of the negotiations was egregious. When assessed in an objective and dispassionate manner, the Board does not find this is so.

[346] The Province made a written offer for a license over the required lands in the amount of $36,000.00. This was not accepted by the Claimants. Mr. MacInnis continued to negotiate, trying to find suitable alternative locations to relocate the Claimants' business. These were not suitable to the Claimants. He was prepared to recommend a $100,000.00 payment to allow the Claimants to make their own arrangements. This verbal discussion was never reduced to writing. The results of the May 25, 2011 meeting between Mr. Meehan, Mr. Feigin, the Claimants and Mr. MacInnis indicate this would have probably been futile.

[347] In a briefing note dated May 25, 2011, Mr. MacInnis summarized the outcome of the meeting. The Claimants were proposing the following:

1) $336,233.72 related to relocating the business and the Claimants;
2) An estimated claim of $200,000.00 for business interruption; and
3) An unspecified amount for professional fees.

[348] Mr. MacInnis advised the parties at the meeting that expropriation was the likely outcome, given their proposal. Some of the items were outside the scope of what he would ordinarily be authorized to negotiate in the pre-expropriation phase. The

Claimants expressed a desire to continue negotiations with someone who had authority to make a final decision on compensation.

[349] On June 1, 2011, a decision was made by Roger Garby, P. Eng., who was Mr. MacInnis' supervisor, that the matter proceed to expropriation. While this was not directly communicated to the Claimants, Mr. Meehan was made aware of this development.

[350] Given the wide gap between what the Province considered reasonable, and what the Claimants were expecting, it is clear the Province decided further negotiations would likely be fruitless. Given the result of this proceeding, it is difficult to fault the Province for this assessment.

[351] From the May 25, 2011 meeting onwards, discussions with the Claimants' consultant focused on technical issues. Comprehensive settlement compensation was not discussed again. Neither party made any further formal offers or counteroffers. The Board finds the conduct from May 25, 2011 to the date of expropriation, does not give rise to facts supporting delay which would attract increased interest.

[352] Flooding occurred on the Property soon after the expropriation. The Claimants said the investigation conducted by the Province into this flooding caused delay in determining compensation.

[353] While the Board accepts the Province's investigation was cursory in nature, given the Province's active resistance to this aspect of the claim, over the last eight years, and the ultimate findings by this Board on that issue, the Board finds this investigation is not a cause of delay in determining compensation.

[354] With respect to the conduct of the litigation, a Notice of Hearing and Statement of Claim was filed on October 22, 2012. A review of the history of the proceedings from letters and materials filed with the Board disclosed the following:

- Time was initially required by both parties for disclosure, review of the evidence and to obtain expert reports. Given the nature of the claim, and the short limitation period, it is not surprising time was required to undertake further analysis;
- On November 26, 2013, Claimants' counsel indicated progress had been hindered for "the past number of months" for privileged reasons not attributable to the Province;
- A preliminary hearing was held on February 19, 2014, where various procedural issues were discussed. Time frames for the exchange of expert reports were established. A preliminary hearing was set for September 10, 2014 to establish hearing dates;
- At the September 10, 2014 preliminary hearing, it became obvious there were many procedural and evidentiary issues which might require a further preliminary hearing. No hearing dates were set. Some of these issues were resolved between counsel;
- On June 16, 2015, the Claimants brought an application for interim costs. The Board held it had no jurisdiction to award such costs in a decision dated November 30, 2015;
- A further preliminary hearing was held on May 20, 2016, where certain procedural issues related to the timing of disclosure were addressed. A new request for interim costs by the Claimants was also denied;

- A further preliminary hearing was held on March 29, 2017. The Board established a timeline to hear all known issues which had not been resolved and which were impeding setting the matter down for hearing. A hearing was scheduled for May 24, 2017 to address any such issues;
- By May 24, 2017, most of the discovery issues had been resolved. On June 28, 2017, the Board ruled on one discovery undertaking relating to Mr. MacPherson. The Board further allowed an amendment to the Province's pleadings to add a limitation defence. The Board further ordered certain financial disclosure on the part of the Claimants [see 2017 NSUARB 106]; and
- By Hearing Order dated October 26, 2017, the Board established a timeline for the hearing on the merits which commenced on February 5, 2018. The dates had been mutually agreed upon by counsel.

[355] The Board has reviewed the procedural history from the filing of the pleadings to the start of the hearing on the merits. While there were considerable delays, the Board does not attribute any delay to be the responsibility of one party, more so then the other party. The Board cannot say that any of the motions, or the opposition to motions, were so without merit as to attribute delay.

[356] Counsel for the Claimants argued the Province had proceeded with a document dump. Interestingly, the Province's unsigned affidavits disclosing documents were filed with the Board by the Claimants. Not all these documents ended up in the Joint Exhibit Book. Given the Board's approach to disclosure, the Board does not find that the itemized documents used in the Province's unsigned affidavit constitute a document dump. They were all at least potentially relevant.

[357] The Board has reviewed the transcripts relating to the conduct of the hearing. There were numerous objections to questions made by both parties. Some were successful; some were not. The Province requested additions to the witness list. Requests to admit documents during the hearing were made by both parties, where agreement on inclusion in the Joint Exhibit Book had not been reached. A few documents the Province sought to admit did not appear to have been disclosed. All these requests were ruled upon by the Board.

[358] In the final analysis, the length of the hearing was not primarily due to the number of objections, or the addition of witnesses, or the entry of documents. Rather, it was because the initial estimate of time was inadequate. At the conclusion of the time which had originally been scheduled, the Board discussed its available dates with counsel. This resulted in a proceeding with split hearing dates. The hearing extended over six months. It was followed by written submissions. This length of time is far from ideal. It is perhaps not conducive to timely decision-writing. This said, the Board does not attribute this delay to either party. The initial estimate was simply overly optimistic.

[359] Based on all the foregoing, the Board finds there is no reason to depart from the default provisions of s. 52(1) of the *Expropriation Act* with respect to interest. The 6% per annum rate is applicable.

11.0 DISTURBANCE DAMAGES - PROFESSIONAL FEES

[360] The Claimants say they are entitled to disturbance damages, pursuant to s. 26(b) of the *Expropriation Act.* These relate to professional fees they incurred responding to and dealing with expropriation issues. They were summarized as follows:

• Legal fees incurred when Mr. Meehan was negotiating with the Province	$2,494.35
• Grant Thornton accounting fees for providing assistance to Mr. Meehan	$845.45
• Engineering fees related to Mr. Feigin's advice and assistance	$77,277.17 (plus interest)
• Surveying fees to Mr. Aucoin	$4,000.00
• Ashtead Technology's sound testing equipment fees	$210.10

[361] Section 27(3) of the *Expropriation Act* says an owner must be in "…occupation of the land…" to be able to claim disturbance "…costs, expenses and losses arising out of or incidental to the owner's disturbance…".

[362] Time was spent exploring the Claimants' occupation of the expropriated lands. Pursuant to the common law principles related to the definition of occupation, as discussed in *Central Supplies,* the exact nature and situation of the lands, along with their particular circumstances, must be considered. The expropriated easement is a small parcel of land in the Claimants' work yard. It is adjacent to the work sheds. There is ample evidence that the Claimants occupied the expropriated easement for storage of logs; a display home; parking equipment; and, tending fruit trees. In fact, the Respondent's own expert, Mr. Ingram, had this to say concerning occupation:

> ... When bridge work is completed and the detour is removed, the area of the easement would continue to be usable for the pre-existing use as yard storage area.
>
> [Exhibit P-30, Vol. A, Tab 13, p.179]

[363] The Board finds that the Claimants were in occupation of the easement lands for both personal and business uses.

[364] Mr. Feigin's largest invoice related to work done prior to and after the deposit of the expropriation documents. *Central Supplies* confirms expropriation is a

process and not an event. Economic loss, which is not otherwise compensable under the *Expropriation Act*, if caused by the expropriation, and qualifies as a disturbance, is compensable. All of the claimed expenses are economic in nature.

[365] The parties disagreed as to what the term "disturbance" encompassed and what expenses could properly be claimed under the disturbance provision of the *Expropriation Act.*

[366] The Province submitted disturbance damages are only available where the owners are forced to vacate their lands because of the expropriation. Only costs, expenses and losses associated with such a relocation are compensable, according to the Province. It said none of the invoices for professional fees relate to relocation. Further, the Province argued no move was made necessary because of the expropriation.

[367] On this last point, the Board has already determined that at least part of the Claimants' business assets had to be moved to the Heatherton Property because of the expropriation. In its assessment the purchase of the Property was a reasonable mitigation measure.

[368] The Province says the Property was not under the threat of expropriation when most of the professional fees were incurred. The Board has determined the shadow period started February 18, 2011.

[369] Relying on *Re Oakley,* 2018 NSUARB 37*,* the Claimants initially submitted the Board had interpreted the disturbance damages concept as virtually limitless in terms of the types of expenses and losses which are compensable. The Board's decision in *Oakley* was overturned by the Nova Scotia Court of Appeal.

[370] The primary focus of the Court of Appeal's decision related to confirmation that disturbance losses were restricted to economic losses. This said, at para [63], the Court of Appeal expressed that the "… Board's interpretation of losses as non-pecuniary and virtually unlimited is an unreasonable conclusion".

[371] Reviewing the *Expropriation Act* as a whole, in light of the comments from the Court of Appeal, the Board is satisfied the legislature did not intend to create a virtually limitless class of items which could be claimed as disturbance damages.

[372] The Claimants went on to cite authority for the proposition that the types of professional fees invoiced were compensable as disturbance damages. Reference was made to *Todd*, at page 303:

> Legal, Appraisal and Professional Fees
>
> An owner is usually entitled to recover from the authority the reasonable costs incurred in obtaining legal advice and the assistance of appraisers, accountants, planners and other professionals in preparing a claim for compensation and reviewing offers of compensation made by the expropriating authority. Such reasonable costs are "the natural and reasonable consequences of the expropriation" or "reasonably incurred in asserting a claim for ... compensation."
>
> If the matter of compensation is ultimately determined or approved by an arbitral tribunal such costs may constitute an item to be dealt with by the tribunal under its jurisdiction as to the costs.

[373] The footnotes related to the proposition that such "…reasonable costs are the natural and reasonable consequences of the expropriation…" refers to s. 35 of the *Expropriation Act*. This is a 1992 edition, and s. 35 of the *Expropriation Act* was repealed in 1996.

[374] At the time, s. 35 said:

> 35(1) The cost of one appraisal and the legal and other costs reasonably incurred by the person entitled to compensation in asserting a claim for compensation prior to the institution of proceedings to determine compensation shall be paid by the statutory authority.

> (2) The cost of one appraisal, if no cost for the same is claimed under subsection (1), and legal and other costs reasonably incurred after the commencement of proceedings shall be paid as determined by Section 52.

[375] Prior to repeal, the relationship between s. 35 and s. 52, which relates to costs which can be claimed in the proceeding, was somewhat different. This is explained in a preliminary decision on interim costs in this matter (see 2015 NSUARB 254).

[376] While the general proposition in *Todd* is valid, and is in keeping with *Dell Holdings*, one must be careful in its application to the Nova Scotia statute. A determination must be made whether fees should be assessed as disturbance damages, or costs in the proceeding pursuant to s. 52 of the *Expropriation Act*. The tests to be applied are different. This will be discussed in more detail later in the Decision.

[377] *Todd* goes on to point out on the same page that the provisions with the wording "…the costs, expenses and losses arising out of or incidental to the owner's disturbance…" found in the Nova Scotia statute, and others, are "…merely statutory affirmations of the general… 'common law' principle that disturbance damage is only recoverable if it is 'direct and consequential upon the dispossession'."

[378] The Claimants cited further precedents, including a general reference to Appendix C, in *A Primer on Expropriation* (2009, Antoine F. Hacault) as including cases where disturbance damages were awarded for professional fees.

[379] In *Kennedy v Manitoba*, 2005 Carswell Man 258 (L.V.A.C.), the Commission awarded disturbance damages for fees charged by two engineers who were retained to provide advice on the impact of a dyke on the owner's home. The Province of Manitoba had expropriated a portion of the claimant's lands for the purpose of constructing the dyke in question.

[380] The Commission was satisfied these costs fell under the opening words of s. 28(1) of the *Expropriation Act*, CCSM, c. E190, which said:

> ...the authority shall pay to an owner in respect of disturbance, such reasonable costs, expenses and losses as arise out of or are incidental to the expropriation, including: ...

[381] Aside from *Kennedy,* the relevant cases set out in Appendix C to the *Primer* appear to be:

- *PANS Social and Recreation Club v Dartmouth (City)*, 52 NSR (2d) 92 (N.S.E.C.B.), where this Board's predecessor awarded disturbance damages for accounting fees related to finding alternate sites; financing for the construction of new premises; and the move itself;
- *Elser v. Winnipeg (City)* (1994), 54 L.C.R. 216 (L.V.A.C.) where legal, survey and other costs involved in purchasing a replacement property were awarded as disturbance damages;
- *Lee Brothers et al v. Ontario* (2004), 84 L.C.R. 49 (Ont. Mun. Bd.), where legal fees were allowed, although reduced. These fees were expended in relation to the relocation of a club by leasing new premises;
- *Kaplan v. Dept. of Government Services Manitoba* (1990), 43 L.C.R. 289 (L.V.A.C.) where disturbance damages were awarded for consulting and professional fees incurred during the relocation of a business; and
- *Bernard Homes Ltd. et al v. York Catholic District School Board* (Ontario) (2001), 75 L.C.R. 147 (Ont. M.B.) where throw-away costs for planning and legal fees incurred in seeking development approvals prior to expropriation were accepted as disturbance damages.

[382] In *Dell Holdings*, the Supreme Court of Canada, in addressing the meaning of disturbance under the Ontario legislation, adopted the following key considerations:

- The clear purpose of expropriating legislation is to provide fair indemnity to the expropriated owner for losses suffered as a result of the expropriation;
- The right to disturbance damages is conferred in broad, inclusive language;
- The legislature chose to illustrate, but not define, the term "disturbance"; and
- Disturbance damages must be the natural and reasonable consequences of the expropriation.

[383] *Dell Holdings* related to delay, during the shadow period, which caused a business loss. There was no physical dislocation to an alternate premises. The lands in question were slated for development. This is somewhat similar to the throw away costs in *Bernard Homes,* where no relocation took place, but development opportunities were lost.

[384] While in *Central Supplies* there was a form of relocation arising during the shadow period, the Nova Scotia Court of Appeal essentially confirmed that the *Dell Holdings* analysis for the interpretation of what constitutes disturbance damages is applicable to the Nova Scotia legislation.

[385] In particular, at page 31, the majority had this to say about the relationship between ss. 26(b), 27(3) and 29 of the *Expropriation Act*:

> Nova Scotia's ss. 26(b) and 27(3)(b)(ii) each say that the owner shall be compensated for the costs, expenses and losses "arising out of or incidental to the owner's disturbance". Nova Scotia's "or incidental to" is, if anything, broader than Ontario's formulation.
>
> - Nova Scotia's s. 26(b) provides that compensation shall be the reasonable costs, expenses and losses "determined as hereinafter set forth". The Province notes that "determined as hereinafter set forth" does not appear in Ontario's statute.
>
> Nova Scotia's "determined as hereinafter set forth" incorporates the formulae to quantify the losses set out in ss. 27(3) and 29. Section 29 compensates for "business loss

> resulting from the relocation", does not use the term "disturbance", and does not pertain to Central's claim. Section 27(3)(b)(ii) is wider and compensates for "the costs, expenses and losses arising out of or incidental to the owner's disturbance **including** ...". This is akin to Ontario's s. 18(1) that compensates for costs "including..."
>
> Both statutes use the "inclusive" formulation for disturbance losses. This is *Laidlaw's* second factor that Cory J. (para 27) cited in *Dell.*

[386] This passage does not support the Province's position that relocation is a pre-requisite where, as here, the amount claimed is not part of a business loss calculation.

[387] From a review of the foregoing, the following principles can be gleaned:

- Ordinarily, professional fees have been recovered for disturbance where they relate directly to dispossession and relocation. This is the only type of cost illustrated in the relevant provisions of the *Expropriation Act*;
- As *Dell Holdings* makes clear, disturbance is not restricted to physical relocation of the owner;
- *Kennedy* is an example where a disturbance award for professional fees was made without relocation. This said, there was an element of physical disruption, as the owner, on the advice of the engineers in question, raised the foundation of her house to prevent future damages;
- In *Batiot v. Nova Scotia,* 1990 CanLII 2348 (NSCA), the Court of Appeal held costs under the now repealed s. 35(1) of the *Expropriation Act* did not include pre-expropriation costs. As expropriation is a process, this does not necessarily mean the date of deposit of the expropriation documents;
- The cost provisions in s. 52 of the *Expropriation Act* relate to reasonable costs incurred by a claimant and which are required to assert a claim for compensation. As expropriation is a process, the Board has ruled in the past that these costs could potentially arise before the deposit of the expropriating documents; and

- As there are different tests applicable to disturbance and cost awards, it would be contrary to the scheme of the legislation to award disturbance damages for costs which should properly be sought under s. 52 of the *Expropriation Act.* Whether they are ultimately awarded under this provision is an open issue.

[388] Section 26(b) of the *Expropriation Act* does not define the term "disturbance". It says the "...reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance" are to be "...determined as hereinafter set forth..."

[389] Section 27(3)(b)(ii) of the *Expropriation Act* is another provision that discusses disturbance. It mirrors some of the language in s. 26(b). The only example provided is the costs, expenses and losses associated with "...moving to other premises ...".

[390] Section 27(3) of the *Expropriation Act* indicates an owner must be in "…occupation of the land…" to be able to claim disturbance "costs, expenses and losses arising out of or incidental to the owner's disturbance…".

[391] Section 27(8) of the *Expropriation Act* directs the Board, when considering disturbance awards, to consider how long, and under what circumstances an owner is allowed to continue occupying the land. As well, the Board must give consideration to any assistance provided by the expropriating authority in finding alternative premises.

[392] In *Oakley*, the Nova Scotia Court of Appeal commented that the leading expropriation text described disturbance damages as generally involving economic losses suffered by an owner by reason of having to vacate expropriated property (see para. 26).

[393] The word "including" in s. 27(3)(b)(ii) of the *Expropriation Act* means that "...moving to other premises..." is not the only example of disturbance damages. This said, the Board finds the claim must be grounded in an occupation, and an expense related to some type of disruption, or potential disruption, occasioned by the expropriation. This disruption need not be an actual relocation, but it is not related to emotional upset or disruption.

[394] In the Board's assessment, none of the invoices for the period after December 8, 2012 really relate to disturbance damages. As best the Board can determine, they relate to reviewing noise impacts after the construction of the temporary detour bridge; reviewing the Woodford reports and providing comments thereon; looking at flood causation issues; assessing road drainage issues; and, reviewing ice monitoring reports. At this stage, the expropriation litigation had commenced, and this work appears primarily aimed at countering or assessing the positions taken by the Province in this litigation. They are not the types of costs, expenses and losses envisaged by s. 27(3)(b)(ii) of the *Expropriation Act.* If recoverable at all, they would properly be advanced pursuant to the cost provisions in s. 52 of the *Expropriation Act.*

[395] The nature of the work done by Mr. Feigin from February 17, 2011 to December 8, 2012 can be ascertained, to some extent, from the emails, correspondence and meeting notes, along with his oral testimony. The only reports generated related to decibel level issues. Mr. Feigin concentrated on the following:

- Potential noise issues;
- Potential drainage issues;
- Potential septic issues;

- Driveway alignment issues;
- Alteration of the floodplain and water course issues; and
- Assistance in preparing a comprehensive settlement claim.

[396] Because of the proximity of the Property to this major construction and the unique qualities of the Property, it was reasonable for the Claimants to seek professional advice as to the potential noise impacts to see if accommodations should be sought. A report dated May 25, 2011 was generated by Mr. Feigin. While Mr. Partridge had knowledge about the noise impacts of bridge construction, he had no objective data on the subject. This item relates to potential physical disruption or relocation. It is a reasonable type of expense which arose out of and was incidental to the expropriation process.

[397] Mr. Feigin was not qualified as an expert in this proceeding. The May 25, 2011 report was not tendered as an expert's report, but to show the work Mr. Feigin had done in relation to noise. This said, this is not an assessment of costs under s. 52 of the *Expropriation Act*. The report was not prepared primarily to advance the compensation claim. It was prepared to assist in negotiations with the Province to see if physical disruption could be abated or relocation required. The Board is satisfied Mr. Feigin had the capacity to prepare the report. Given the bridge replacement project was not yet underway, his use of another site to assess potential noise impacts was reasonable in circumstances. This said, the report was not specific to the temporary bridge component of the project, which is the only part that involved an expropriation.

[398] Mr. Feigin also prepared a report dated November 9, 2012 which related to noise impacts. The purpose of the report was clearly to establish the impact of noise

emanating from the temporary Bailey bridge. Given construction was nearing completion, a fair reading of the report would indicate it was not prepared to attempt to alleviate potential noise impacts and disruptions, but to quantify them. It is the type of report which might be used in addressing a claim for compensation, although not actually used for this purpose in this proceeding. The preparation of this report would not be the type of expense which would be reasonable as disturbance damages. If recoverable at all, it would more properly be considered pursuant to s. 52 of the *Expropriation Act.*

[399] Given the low-lying nature of the Property, it was reasonable for the Claimants to retain Mr. Feigin to interact with the Province in relation to drainage issues, which could impact both the septic system, and the driveway itself. It was also reasonable to seek professional input in relation to driveway alignment issues. The access and egress point were not ideal to begin with, and potential re-alignment posed a real risk of exacerbating the problem. This related to potential physical disruption associated with the expropriated easement. It addressed whether business relocation would be required.

[400] Given the flood plain location, and the fact the Province did not undertake a hydrological assessment of its own for this particular project, it was reasonable for the Claimants to seek input on the topic of flood plain alterations from Mr. Feigin, which would be conveyed to Mr. MacInnis and Mr. MacPherson. This said, the degree of engineering work involved at this stage was limited. It primarily involved relaying observations about the flood plain from Mr. Feigin and Mr. Partridge.

[401] Mr. Feigin's interventions influenced the final bridge design plans, to some extent, in relation to the new culvert drainage system and associated drainage swale; the driveway alignment; and, the incorporation of a drainage swale (albeit a limited one) in

the flood plain on the western side of the South River. This work related to potential physical disruption of the Property. None of the work would have been required but for the expropriation process. It is the type of expense which falls under the definition of disturbance damages.

[402] With respect to the preparation of a comprehensive settlement agreement, Mr. Feigin was primarily responsible for generating the amounts which were proposed by Mr. Meehan. He said he used his project management experience in relation to multi-million-dollar projects in arriving at the figures. Arriving at dollar figures to propose a settlement is really work related to advancing a claim for compensation. If recoverable at all, it should be claimed pursuant to s. 52 of the *Expropriation Act.*

[403] While the Board has determined a portion of Mr. Feigin's pre-expropriation services related to matters which can properly be classified as disturbance damages, the issue of quantification is problematic.

[404] The Board has assessed the various invoices and documents relating to the claim for Mr. Feigin's professional fees in Exhibit P-44. There was no written retainer addressing services to be rendered, hourly rates, expenses, mileage, overhead, or interest payable on outstanding accounts. Context was provided in the documentary and oral evidence provided by Mr. Feigin.

[405] There is an invoice dated December 8, 2012, with a balance outstanding of $62,829.54 [see Exhibit P-44, Tab 10]. This invoice relates to the period of February 17, 2011 to December 8, 2012. It is said to be for "Engineering Services". There is no detailed itemized accounting indicating time spent for particular tasks. The same can be

said for the invoices issued on April 15, 2014; August 24, 2014; and, February 25, 2015 [see Exhibit P-44, Tabs 10-13].

[406] A final invoice is dated December 31, 2017. It is from this invoice which the claimed amount for injurious affection of $77,277.17, plus interest, is derived. It shows totals for hours spent and mileage for the entire period from 2011 to 2017. Total amounts for out-of-pocket expenses are included, without any detail. There is no detail as to what specific tasks were being done. There are general one- or two-word descriptions of the nature of the work.

[407] When a claim is made for $77,277.17 plus interest of $88,287.07, the Board would expect a detailed description of the work undertaken, the amount of time spent for each task, together with a detailed description of out-of-pocket expenses. It can then assess the reasonableness of the amounts claimed and their relationship to recoverable disturbance damages. Mr. Feigin indicated on the stand that although he kept daily logs of time spent, mileage travelled and expenditures for required equipment, he had a computer meltdown in 2012 and lost some data.

[408] In fact, no detailed records were provided for any of the invoices submitted in this proceeding. In oral testimony, Mr. Feigin described the work he did. There was a lack of specificity as to the time spent on each task. This made it difficult for the Board to assess the reasonableness of the accounts. The Province said the claim should be rejected on this basis. While the Board has had to use considerable discretionary judgment, it can make an assessment of what amount can reasonably be awarded for Mr. Feigin's professional fees.

[409] Mr. Feigin's fees from 2013 to 2017 totaled $13,856.21, plus HST. In this period, he generated four reports. His fees totaled $59,115.65, plus HST in 2011 and 2012. He generated two reports. He spent a considerable amount of time meeting with the Claimants, reviewing information from the Province, interacting with the Province, and formulating responses and approaches, for use by both the Claimants and Mr. Meehan. Exhibit P-44, Tab 13, indicated 319.6 hours working for the Claimants, and 65.5 hours in travel time during this time period.

[410] A reduction is required because in the Board's assessment, the majority of the work done by Mr. Feigin cannot be recovered through a disturbance award. When the face amount of the account is considered in light of the end result of the work product which can be reviewed through the email exchanges, documents and oral testimony, it is simply not a reasonable figure upon which to base an award. Perhaps if a detailed accounting had been provided, the Board would have been convinced otherwise. Such is not the case here.

[411] A partial explanation was provided by Mr. Feigin when he testified that he attempted to only engage the Province in relation to items advanced by the Claimants if there was a reasonable basis for doing so. It would appear Mr. Feigin was approached by the Claimants to advance theories which he could not support. While as between Mr. Feigin and the Claimants, billing such time is no doubt appropriate, it is not reasonable charge a third party for this time.

[412] In any event, the work product which is visible to the Board cannot justify an amount in excess of $13,000.00, plus HST. This is reasonable compensation for Mr. Feigin's professional fees associated with the Claimants' disturbance.

[413] The Board declines to award interest, alleged to be at the contractual rate. Firstly, no contract setting our Mr. Partridge's agreement to pay interest on outstanding accounts was available. Secondly, interest was actually waived by Mr. Feigin in relation to the account in question, because of the Claimants' financial circumstances. It was only renewed on the account at a later date. The Board notes a significant portion of Mr. Feigin's account remains outstanding. This is not because the Claimants were dissatisfied, but because they did not have the means to pay.

[414] The Board therefore awards the amount of $14,950.00, which includes HST, for disturbance damages in relation to Mr. Feigin's fees. No interest is payable on this amount under the *Expropriation Act.*

[415] The Claimants said they were entitled to recover the expense of Mr. Meehan's invoices in the amount of $2,494.35. Mr. Meehan was primarily involved in negotiations with respect to the Province's proposed license agreement. He also advanced many of the concerns raised by Mr. Feigin. Mr. Meehan also attempted to obtain a comprehensive settlement with the Province prior to expropriation.

[416] Mr. MacInnis indicated he would ordinarily advise owners they could seek legal advice, and that expropriation was a possibility. This likely occurred in the earliest meetings in February, 2011. While the Claimants perceived this as a threat that they would receive little or no compensation if they retained legal counsel and the matter proceeded to expropriation, this was obviously a misunderstanding of the message Mr. MacInnis was conveying.

[417] This said, as the Claimants were aware that expropriation was a possibility from their early meetings with Mr. MacInnis, the Property was under the shadow of

expropriation during the negotiating phase. The purpose of these negotiations was to see if the uncertainty created by expropriation could be avoided by the conclusion of a negotiated settlement. Relocation was clearly discussed as part of the negotiations.

[418] Without the threat of expropriation, the Claimants would have had no need to retain Mr. Meehan to negotiate on their behalf with respect to the license agreement and to attempt to mitigate the effects of any potential disruption to their business, including relocation, and the use and enjoyment of their residential home.

[419] While Mr. Meehan did put forward a comprehensive settlement proposal with a significant monetary component, the majority of his work related to attempting to avoid any disturbance that the expropriation might entail.

[420] It would be manifestly unfair for the Claimants to be out-of-pocket reasonable legal fees which are the natural and reasonable consequences of the expropriation process, where the fees were incurred in an attempt to alleviate, to the extent possible, any disruption occasioned by expropriation. As well, the legal work with respect to the Heatherton Property was in relation to compensable mitigation. The Claimants are entitled to recover $ 2,000.00, inclusive of HST for Mr. Meehan's fees. This is a reasonable apportionment for the disturbance component of his work. No interest is payable under the *Expropriation Act* for disturbance damages.

[421] Mr. Aucoin's surveying costs are not recoverable. Mr. Partridge was not satisfied with Mr. Aucoin's work and did not pay his entire account. Without in any way agreeing with Mr. Partridge's assessment, keeping in mind Mr. Aucoin was not called to testify, it would be unreasonable to order the Province to cover costs for services Mr. Partridge did not find were reasonable.

[422] The Claimants said they were entitled to $845.25 in relation to accounting services rendered by Grant Thornton. The Grant Thornton account is dated April 30, 2012. It contains no detailed breakdown of the hourly rate, tasks performed, or time spent on each task. The account narrative says:

> TO PROEESSIONAL SERVICES
>
> In connection with meetings and consultations regarding various matters including tax implications of expropriation
>
> In connection with discussions with Mr. Bill Meehan regarding expropriation
>
> [Exhibit, P-30, Vol. G, Tab 50, p. 5589]

[423] The exact nature of the advice sought and received is not clearly spelled out. It probably relates to the tax implications related to the business loss component of the claim. Possibly HST considerations were discussed. The Board does not know. In any event, this type of account is related to quantification of a claim and, if recoverable at all, should be considered under s. 52 of the *Expropriation Act.*

[424] The invoices from Ashtead Technology totaling $200.10 are dated September 27, 2012 and October 2, 2012. The Claimants submitted they related to noise level testing equipment used by Mr. Feigin to prepare a May 25, 2011 noise impact report. This is unlikely, given the dates on the invoices, with a stated contract start date of September 27, 2012. This equipment was leased to prepare the November 8, 2012 report. As the cost of that report is not compensable as disturbance damages, neither is this invoice. This amount cannot be recovered. If recoverable at all, it should be addressed under s. 52 of the *Expropriation Act.*

12.0 Tax Implications – Cost and Disbursements

12.1 Tax Implications

[425] The Claimants request that the Board explicitly retain jurisdiction to deal with any tax implications which may arise in respect to the payment of any claimed categories of compensation.

[426] It is not clear to the Board what, if any, tax consequences may arise in relation to its findings on damages. Consistent with its past practice, the Board will retain jurisdiction, as it did in the *Central Supplies* matter, to make any award necessary to compensate the Claimants for any tax consequences flowing from the expropriation and the payment of compensation arising for this decision.

12.2 Costs and Disbursements

[427] Section 52 of the *Expropriation Act* provides for the payment of costs and disbursements. Many factors come into play in determining costs.

[428] It has been the practice of the Board, in many expropriation cases, to provide the parties with an opportunity to come to an agreement on costs, failing which the Board has retained jurisdiction to address the issue.

[429] Given the lengthy nature of this proceeding, and the number of issues which require a determination, the Board will follow this past practice. The Board retains jurisdiction to determine costs and disbursements payable, if necessary, upon the motion of either party.

[430] The Board expects the parties will make diligent efforts, as soon as possible, to see if an agreement can be reached. It would expect the parties to return the matter to the Board if, in a reasonable time frame, an agreement cannot be reached.

13.0 CONCLUSION

[431] The Board has determined that the Claimants are entitled to the following compensation under the *Expropriation Act:*

- $15,857.55 with respect to mitigation damages associated with an attempted business move, with interest thereon at 6% per annum from October 29, 2011 until the date of payment;
- $6,000.00 as compensation for the value of the land expropriated, with interest thereon at 6% per annum from October 29, 2011 until the date of payment;
- $11,657.25 for injurious affection relating to driveway drainage issues, with interest thereon at 6% per annum from October 29, 2011 until the date of payment;
- $20,000.00 for injurious affection relating to loss of use and enjoyment of the Property, with interest thereon at 6% per annum from October 29, 2011 until the date of payment; and
- $16,950.00 for disturbance damages related to professional fees. No interest is payable for disturbance damages.

[432] The Board retains jurisdiction to address any tax implications arising from this Decision.

[433] The Board retains jurisdiction to determine the amount of costs and disbursements payable, if any, pursuant to s. 52 of the *Expropriation Act.*

[434] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 8th day of August, 2019.

Richard J. Melanson

Appendix "A"

2 (1) It is the intent and purpose of this Act that every person whose land is expropriated shall be compensated for such expropriation.

. . .

3 (1) In this Act,

. . .

(h) "injurious affection" means

(i) where a statutory authority acquires part of the land of an owner,

(A) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and

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

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

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

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

and for the purposes of subclause (i), part of the land of an owner shall be deemed to have been acquired where the owner from whom land is acquired retains land contiguous to that acquired or retains land of which the use is enhanced by unified ownership with that acquired;

(i) "land" includes any estate, term, easement, right or interest in, to, over or affecting land;

. . .

24 Where land is expropriated, the statutory authority shall pay the owner compensation as is determined in accordance with this Act.

25 (1) The rules set forth in this Part shall be applied in determining the value of land expropriated.

(2) The value of land expropriated shall be the value of that land at the time the expropriation documents are deposited at the office of the registrar of deeds.

26 The due compensation payable to the owner for lands expropriated shall be the aggregate of

(a) the market value of the land or a family home for a family home determined as hereinafter set forth;

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

(c) damages for injurious affection as hereinafter set forth; and

(d) the value to the owner of any special economic advantage to him arising out of or incidental to his actual occupation of the land, to the extent that no other provision is made therefor in due compensation.

. . .

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

(3) Where the owner of land expropriated was in occupation of the land at the time the expropriation document was deposited in the registry of deeds and, as a result of the expropriation, it has been necessary for him to give up occupation of the land, the value of the land expropriated is the greater of:

(a) the market value thereof determined as set forth in subsection (2); and

(b) the aggregate of

(i) the market value thereof determined on the basis that the use to which the land expropriated was being put at the time of its taking was its highest and best use, and

(ii) the costs, expenses and losses arising out of or incidental to the owner's disturbance including moving to other premises but if such cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set forth in subclause (i),

plus the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land, to the extent that no other provision is made by this clause for the inclusion thereof in determining the value of the land expropriated.

. . .

(5) Where only part of the land of an owner is taken and such part is of a size, shape or nature for which there is no general demand or market, the market value and the injurious affection caused by the taking may be determined by determining the market value of the whole of the owner's land and deducting therefrom the market value of the owner's land after the taking.

. . .

(8) For the purposes of subclause (ii) of clause (b) of subsection (3) consideration shall be given to the time and circumstances in which an owner was allowed to continue in occupation of the land after the expropriating authority became entitled to take physical possession or make use thereof, and to any assistance given by the expropriating authority to enable such owner to seek and obtain alternative premises.

. . .

29 (1) Where a business is located on the land expropriated, the statutory authority shall pay compensation for business loss resulting from the relocation of the

business made necessary by the expropriation and, unless the owner and the statutory authority otherwise agree, the business losses shall not be determined until the business has moved and been in operation for twelve months or until a three-year period has elapsed from the date of the expropriation, whichever occurs first.

(2) Where it is not feasible for the owner of a business to relocate, there shall be included in the compensation payable an amount for the loss of the business where the compensation for the land taken is based on the existing value of the land.

(3) For the purpose of determining the compensation for loss of goodwill, the value of the goodwill shall be determined in accordance with generally accepted accounting principles.

. . .

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

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

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

. . .

50 (1) A party is not entitled to adduce the evidence of an expert witness at the hearing unless the party has filed with the Board and served upon the other party or parties at least sixty days before the hearing begins a copy of the expert's report.

(1A) Where a report has been filed with the Board and served on the other party pursuant to subsection (1), the other party may file an expert's report in response at least thirty days before the hearing and is entitled to adduce the evidence in that report.
(2) Subject to subsections (1) and (1A), each party shall be entitled to call two expert witnesses, however the Board may grant leave for additional experts to be called.

. . .

Costs

52 (1) In this Section, "offer to settle" means a written offer of an amount in full compensation for land expropriated or for injurious affection caused to an owner, or for both, made by an expropriating authority to the owner at least fourteen days prior to the date of a hearing by the Board that is held to determine the amount of the compensation.

(2) Subject to subsection (5), an owner whose interest in land is expropriated or injuriously affected is entitled to be paid the reasonable costs necessarily incurred by the owner for the purpose of asserting a claim for compensation.

(3) Subject to subsection (5), where an expropriating authority and an owner agree on the amount of compensation, but do not agree on the amount of costs to be paid, the costs to be paid to the owner shall be determined by the Board.

(4) Where the compensation awarded to an owner by the Board is greater than the amount offered in the offer to settle, the expropriating authority shall pay to the owner costs as determined by the Board.

(5) Where the compensation awarded to an owner by the Board is equal to or less than the amount offered in the offer to settle, the owner is entitled to costs, as determined by the Board, to the date of service of the offer to settle but the owner shall bear the owner's own costs that are incurred after that date.

(6) An offer to settle shall not be disclosed to the Board before its determination of the compensation payable to the owner.

(7) The costs payable to the owner are

(a) those costs referred to in subsection (2), (3), (4) or (5);

or

(b) where the Governor in Council prescribes a schedule of costs, the amounts prescribed in the schedule and not the costs referred to in clause (a).

(8) In a determination of costs pursuant to subsection (2), (3), (4) or (5), the following shall be taken into account:

(a) the number and complexity of the issues;

(b) the conduct of any party that tended to shorten or unnecessarily lengthen the duration of the proceeding;

(c) any step in the proceeding that was improper, vexatious, prolix or unnecessary;

(d) the reasonableness and relevance of appraisal and other expert reports, including the cost of the reports;

(e) the skill, labour and responsibility involved;

(f) the amount of the award or settlement;

(g) any other matter relevant to the question of costs.

(9) The expropriating authority shall pay interest on an unpaid account for costs payable pursuant to this Section at the rate of six per cent per year or such rate as determined by the Governor in Council, from the date the account is served on the expropriating authority by the owner.

(10) Costs awarded pursuant to this Section are payable upon settlement or final adjudication of compensation to the owner. 1995-96, c. 19, s. 10.

53 (1) Subject to Sections 13 and 15, the owner of lands expropriated is entitled to be paid interest on the portion of the market value of his interest in the land and on the

portion of any allowance for injurious affection to which he is entitled, outstanding from time to time, at the rate of six per cent a year calculated from the date the owner ceases to reside on or make productive use of the lands.

(2) Subject to subsection (3), where the Board is of the opinion that any delay in determining the compensation is attributable in whole or in part to the owner, it may refuse to allow him interest for the whole or any part of the time for which he might otherwise be entitled to interest, or may allow interest at such rate less than six per cent a year as appears reasonable.

(3) The interest to which an owner is entitled under subsection (1) shall not be reduced for the reason only that the owner did not accept the offer made by the expropriating authority, notwithstanding that the compensation as finally determined is less than the offer.

(4) Where the Board is of the opinion that any delay in determining compensation is attributable in whole or in part to the expropriating authority, the Board may order the expropriating authority to pay to the owner interest under subsection (1) at a rate exceeding six per cent a year but not exceeding twelve per cent a year.