NOVA SCOTIA COURT OF APPEAL

Citation: *Partridge v. Nova Scotia (Attorney General)*, 2021 NSCA 60

Date: 20210804
Docket: CA 491706
Registry: Halifax

Between:

Kevin Partridge and Jane DeWolfe

Appellants

v.

The Attorney General for 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 and the Nova Scotia Utility and Review Board

Respondents

Judge: The Honourable Justice Peter M. S. Bryson

Appeal Heard: November 17, 2020, in Halifax, Nova Scotia

Legislation: *Utility and Review Board Act*, S.N.S. 1992, c. 11, s. 30(1); *Expropriation Act*, R.S.N.S 1989, c. 156, s. 3(1)(h)(ii)(B);

Cases Cited: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Tri-C Management Limited v. Nova Scotia (Attorney General)*, 2021 NSCA 26; *Housen v. Nikolaisen*, 2002 SCC 33; *Clements v. Clements*, 2012 SCC 32; *Fadelle v. Nova Scotia College of Pharmacists*, 2013 NSCA 26; *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22; *International Association of Fire Fighters, Local 268 v. Adekayode*, 2016 NSCA 6; *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13; *Curactive Organic Skin Care Ltd. v. Ontario*, 2011 ONSC 2041; *Peppler Estate v. Lee*, 2020 ABCA 282; *West v. Knowles*, 2021 ONCA 296; *Timlick v. Heywood*, 2017 MBCA 7; *Saskatchewan Government Insurance v. Schira*, 2020 SKCA 88; *Yarmouth (Town) v. Gateway Importers and Exporters Ltd.*, 2011 NSCA 17; *R. v. Abbey*, 2009 ONCA 624; *Re Visser*, 2013 NSUARB 180; *01109718*

Saskatchewan Ltd v. Agrikalium Potash Corporation, 2011 SKCA 82; *Murray v. Bitango* (1996), 184 A.R. 68 (Alta C.A.); *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32; *Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117; *R. v. Chehil*, 2013 SCC 49; *R. v. Shepherd*, 2009 SCC 35; *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14; *Woelk v. Halvorson*, [1980] 2 S.C.R. 430; *Adams v. Nova Scotia (Provincial Grain Commission)* (1990), 97 N.S.R. (2d) 411; *Deumo v. Fitzpatrick*, 39 C.E.L.R. (3d) 299 (S.C.J.); *Medomist Farms Ltd. v. Surrey (District)* (1990), 1 M.P.L.R. (2d) 46 (B.C.S.C.); *Banfai v. Formula Fun Centre Inc.* (1984), 51 O.R. (2d) 361; *Myre (Guardian ad litem of) v. Myre*, [1997] B.C.J. No. 272; *Gibbs v. Archibald*, 139 N.S.R. (2d) 169 (NS TD); *Levesque v. Rossignol* (1993), 134 N.B.R. (2d) 379;

Subject: Expropriation. Damages for Injurious Affection. Causation

Summary: The appellants claimed damages to their home and business arising from flooding allegedly caused by the Province's construction of a temporary replacement bridge in close proximity to the appellants' property. The Board awarded damages for injurious affection related to disturbance, but denied any award for flood damage. The Board found that the appellants suffered flood damage, but held that causation was not proved. On appeal the appellants sought increased disturbance damages and damages for flooding, arguing that the Board erred in its causation analysis and finding.

Result: Appeal allowed in part. Board erred in finding that the appellants failed to establish *prima facie* causation. Flooding damages remitted to Board for assessment. Appeal for disturbance damages dismissed. No error of law established.

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v.

The Attorney General for 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 and the Nova Scotia Utility and Review Board

Respondents

Judges:	Beveridge, Bryson and Beaton, JJ.A.
Appeal Heard:	November 17, 2020, in Halifax, Nova Scotia
Held:	Appeal allowed in part with costs of $12,000.00, per reasons for judgment of Bryson, J.A.; Beveridge and Beaton, JJ.A. concurring
Counsel:	Gavin Giles, Q.C., for the appellants Mark Rieksts, for the Attorney General of Nova Scotia Bruce Outhouse, Q.C. for the Nova Scotia Utility and Review Board (not participating)

Reasons for judgment:

Introduction

[1] The appellants, Kevin Partridge and Jane DeWolfe, argue the Nova Scotia Utility and Review Board erred when it decided that the Province's construction of a temporary replacement bridge on Highway 104 did not cause flood damage to their property.

[2] The appellants live at 5 South Harbour Lane, Lower South River, Nova Scotia. Mr. Partridge has title to the property. He and Ms. DeWolfe have lived there as a common law couple for more than thirty years. The property is on the east bank of the South River, downstream but near a bridge on Highway 104 which formerly crossed the river.

[3] In late 2011, a temporary bridge was constructed very close to the appellants' property to allow traffic to continue to use Highway 104, while a permanent replacement was being built downstream.

[4] The appellants say the Province's bridge replacement project blocked a floodplain channel which had previously taken rising waters in the South River into a floodplain and away from their property. The floodplain was on the west side of the river, opposite and slightly downstream from the appellants' property.

[5] The appellants claim the construction of the temporary bridge caused major flood damage to their property, the loss of their log home restoration business, reduction in value to their land, and various personal damages and costs. They sought compensation for injurious affection in accordance with the *Expropriation Act*, R.S.N.S. 1989, c. 156.

[6] The Province vigorously resisted the claim. A lengthy hearing ensued with twenty witnesses and a large number of documents, photographs and videos. The Board allowed the appellants' claims in part and made the following award:

> [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.

[7] Although the appellants enjoyed some success, they failed to convince the Board the flooding they experienced was caused by the Province's construction of the temporary bridge.

[8] Mr. Partridge and Ms. DeWolfe appeal principally because they say the Board erred in its assessment of causation. They allege the Board applied an incorrect standard of proof, applied the wrong causation test, misconstrued the evidence, and improperly gave weight to evidence that lacked probative value. They add that general damages for injurious affection are too low.

[9] The Province replies the Board made no legal errors and contend the appellants are essentially complaining of factual findings made by the Board which this Court is unable to review. Even so, the Province says the Board did not fail to properly assess the evidence.

[10] The appellants successfully convinced the Board that their property and buildings had been inundated with flooding. Damage to their buildings had never happened before the temporary bridge was built and never happened again after that bridge and its footings were removed. Despite the Province's denials, the Board concluded regarding this damage:

> [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.

[11] In light of this finding, the appellants wonder at the Board's later rejection of their evidence:

> [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.

[12] The appellants say the Board got it wrong and this Court should put it right.

[13] The Board's finding focuses on the appellants' explanation for the flooding. The larger question of whether the appellants had established *prima facie* causation did not depend on this finding.

[14] On the basis of the record, the appellants established a *prima facie* case of causation. For the reasons given below, the appeal should be allowed in this respect and remitted to the Board for an assessment of damages for injurious affection arising from the flooding which engulfed the structures on the property.

[15] The appellants list twelve issues in their factum, but discuss them under three broad categories: faulty conclusions as to the cause of flooding; assessment and application of circumstantial evidence; and, general damages. It will be convenient to restate the issues as follows:

1) What are the applicable standard of review and interpretive legal principles?

2) Did the Board err in law by applying incorrect principles of causation?

3) Did the Board err in law when concluding that the appellants had failed to prove causation?

4) Did the Board err in law in its assessment of damages?

Standard of Review and Legal Principles

[16] Appeals to this Court can only be made on questions of law. Section 30(1) of the *Utility and Review Board Act*, S.N.S. 1992, c. 11:

> 30 (1) An appeal lies to the Appeal Division of the Supreme Court from an order of the Board upon any question as to its jurisdiction or upon any question of law, upon filing with the Court a notice of appeal within thirty days after the issuance of the order.

[17] Section 26 of the *Act* precludes this Court from revisiting findings of fact by the Board:

> **Effect of finding**
>
> 26 The finding or determination of the Board upon a question of fact within its jurisdiction is binding and conclusive.

[18] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 the Court described standards of review in appeals from administrative decisions:

> [37] It should therefore be recognized that, ***where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision.*** This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would***, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness*** in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.
>
> [Emphasis added]

[19] *Vavilov* was most recently applied by this Court in an expropriation context: *Tri-C Management Limited v. Nova Scotia (Attorney General)*, 2021 NSCA 26 (Notice of Appeal filed June 7, 2021, [2021] S.C.C.A. No. 171).

[20] Questions of law are reviewed on a correctness standard; questions of fact on a "palpable and overriding error" standard. Inferences of fact are also reviewed on that standard (*Housen v. Nikolaisen*, 2002 SCC 33, at ¶23). Determination of causation is a factual issue (*Clements v. Clements*, 2012 SCC 32, at ¶8, 13). But the misapplication of a legal standard to a set of facts can amount to legal error (*Housen*, ¶33, 36). Drawing of inferences, weighing of evidence and assessment of the sufficiency of evidence are all questions of fact (*Fadelle v. Nova Scotia College of Pharmacists*, 2013 NSCA 26, at ¶16; *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22, at ¶44-45). It is an error of law to make a finding of fact which lacks an evidentiary foundation (*International Association of Fire Fighters, Local 268 v. Adekayode*, 2016 NSCA 6, at ¶42).

Did the Board err in applying principles of causation?

[21] The appellants sought damages to their home and business from flooding. This was a statutory claim for "injurious affection" which must have resulted from the Province's bridge construction:

> 3(1) In this Act, […]
>
> (h) "injurious affection" means […]
>
> (ii) where the statutory authority does not acquire part of the land of an owner, […]
>
> (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;

[22] The statute permits a claim in nuisance which would otherwise not be actionable because the construction was authorized by statute (see *Tri-C Management Limited* at ¶12, quoting *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13).

[23] Both parties acknowledge the primacy of the "but for" causation test and both rely on it. They cite *Clements* which says the negligence of the defendant is necessary to bring about the harm:

> [8] ***The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred***. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. ***This is a factual inquiry***. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.
>
> [Emphasis added]

[24] This is not a negligence case. Unlike negligence, nuisance does not require proof of fault. The "but for" test applies to the defendant's conduct whether negligent or not. Justice Perell put it this way in *Curactive Organic Skin Care Ltd. v. Ontario*, 2011 ONSC 2041 (aff'd 2012 ONCA 81):

> [29] The *Expropriations Act* provides compensation for "injurious affection," which is a nuisance claim in tort that would otherwise be barred by the common

> law defence of statutory authority because the alleged injury is an inevitable consequence of construction of a work authorized by statute and done without negligence. […]

[25] The appellants say the Board misapplied the "but for" test. This is discussed further under the third issue—causation. Alternatively, they argue a failure to apply the "material contribution" test, quoting *Clements*:

> [14] "But for" causation and liability on the basis of material contribution to risk are two different beasts. ***"But for" causation is a factual inquiry into what likely happened. The material contribution to risk test removes the requirement of "but for" causation and substitutes proof of material contribution to risk.*** As set out by Smith J.A. in *MacDonald v. Goertz*, 2009 BCCA 358, 275 B.C.A.C. 68, at para. 17:
>
> > . . . "material contribution" does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. In such cases, plaintiffs are permitted to "jump the evidentiary gap": see "Lords a'leaping evidentiary gaps" (2002), Torts Law Journal 276, and "Cause-in-Fact and the Scope of Liability for Consequences" (2003), 119 L.Q.R. 388, both by Professor Jane Stapleton. That is because to deny liability "would offend basic notions of fairness and justice": *Hanke v. Resurfice Corp.*, para. 25.
>
> [Emphasis added]

[26] The "but for" and "material contribution" tests are not interchangeable. The latter only applies where it is impossible to say that a defendant caused the injury or damage. *Clements* notes that the United Kingdom Supreme Court has only applied the "material contribution" test once to a single tortfeasor—and then with reluctance; no Canadian court has done so:

> [42] The only case to apply a material contribution to risk approach to a single tortfeasor is *Sienkiewicz*. A plaintiff suffering from mesothelioma had only been exposed to asbestos from a *single* negligent source and on the trial judge's findings, "but for" causation could not be inferred. The United Kingdom Supreme Court took the view that it was bound by precedent to apply a material contribution to risk approach in all mesothelioma cases. Several members of the court in *Sienkiewicz* noted the difficulty with such a result. Lady Hale observed that she found it hard to believe that a defendant "whose wrongful exposure might or might not have led to the disease would be liable in full for the consequences even if it was more likely than not that some other cause was to blame (let alone that it was not more likely than not that he was to blame)" (para. 167). In my view, nothing compels a similar result in Canada, and thus far, although Sopinka J.'s remarks in *Snell* (quoted above at para. 20) do not preclude it, ***courts in***

> ***Canada have not applied a material contribution to risk test in a case with a single tortfeasor***.
>
> [Emphasis added]

[27] Material contribution can be applied only exceptionally:

> [46] The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:
>
> > (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.
> >
> > (2) ***Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury***, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.
>
> [*Clements*; Emphasis added]

More recent cases are to similar effect: *Peppler Estate v. Lee*, 2020 ABCA 282 (leave to appeal dismissed); *West v. Knowles*, 2021 ONCA 296; *Timlick v. Heywood*, 2017 MBCA 7; *Saskatchewan Government Insurance v. Schira*, 2020 SKCA 88 (leave to appeal dismissed).

[28] The appellants have failed to explain how the "material contribution" test could apply in this case. This case is not "exceptional". There are not two possible tortfeasors with doubt about which caused the loss. It is not impossible to prove causation on a "but for" basis. As discussed further below, the Board found the appellants had not proved their flooding would not have occurred "but for" the Province's construction.

[29] The Board did not err in applying the "but for" causation test.

Did the Board err in finding the appellants failed to prove causation?

[30] The Board applied the "but for" test from *Clements* when concluding that the appellants had failed to prove 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.

[31] The appellants attribute serious floodings of their home and other structures between October 2011 and January 2014 to construction work on the replacement bridge. The flooding stopped after all infill related to that construction had been removed.

[32] Construction on the temporary bridge began on the west side of the South River in mid-September 2011. The earthworks and armour rock required to support the abutments of the temporary bridge extended into the area where the appellants say there was a drainage channel to the floodplain.

[33] On October 5, 2011, the appellants' property flooded while they were away. On October 30, 2011 a major flooding of the appellants' property occurred. Water penetrated their home, carried away logs associated with their log home renovation business and damaged most of their work equipment. The home lost power.

[34] The Province denied not only that it caused the flooding, but denied that the appellants sustained any flooding of their home at all. They baldly accused the appellants of lying.

[35] The Province tendered expert evidence from engineer Glen Woodford. The Board qualified him to give evidence:

> […] as an expert in the field of 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.

[36] Mr. Woodford opined that the replacement bridge and temporary bridge had "little or no effect on the water levels at the Partridge property and could not be the cause of the floodings at the times claimed". As will become apparent, Mr. Woodford's opinion changed.

[37] In the end, the Board rejected Mr. Woodford's opinion in his expert's report:

> [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***.
>
> […]
>
> [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.
>
> [Emphasis added]

[38] The Board dismissed the Province's arguments that the appellants were simply "making it up". The Board believed the appellants that their home had been flooded as they claimed and that this had not occurred prior to the construction of the temporary bridge.

[39] Notwithstanding the Board's positive credibility finding in favour of the appellants, it did not accept all their evidence. For example, the appellants explained that a "floodplain channel" obstructed by the Province's temporary bridge work operated like a "bathtub drain". When the water level in the South

River rose sufficiently high, the water would "shoot out through the flood plain channel into the back channel. It would then disperse into the wider flood plain".

[40] The appellants, their adult children, and a consulting engineer whom they had retained, Mr. Jeff Feigin, all confirmed that a channel or swale existed which took water to the back channel and onto the wider floodplain. The Board did not agree:

> [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.

[41] The appellants object to the Board's reliance on evidence of contours of the riverbank and bed. They attack the Board's reliance on the SNC Lavalin drawing from which the Board drew conclusions concerning relevant elevations:

> [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.

[42] The appellants express reservations about admissibility of the drawing and note that no witness explained the drawing. The appellants say the Board's conclusion that the swale to the back channel "rose in elevation" makes no sense because water "does not flow uphill".

[43] The Board dispensed with the first criticism by noting "… a similar drawing, containing the same information, was part of the Joint Exhibit Book …" (¶66). As for use of the drawing—the Board is not strictly constrained by the rules of

evidence, but can admit any information or document that "may assist" the Board (*Act*, s. 19; *Yarmouth (Town) v. Gateway Importers and Exporters Ltd.*, 2011 NSCA 17).

[44] In addition to the photographic and plan evidence, the Board referred to the evidence of Provincial witnesses Andrew MacPherson, Project Engineer, and Colin Maas, Construction Supervisor, who claimed they saw no drainage channel as described by the appellants. In the end, the Board concluded:

> [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.

[45] The appellants complaint that the Board misused or misinterpreted the evidence is really an impermissible evidentiary challenge. Even so, it was part of the Board's larger analysis concerning how water drained into the "floodplain".

[46] Considering the exhibit evidence and testimony of the appellants and their witnesses, the Board observed:

> [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.

[47] The appellants rightly argue that scientific evidence of causation is unnecessary. An inference can be drawn from circumstantial evidence:

> [10] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. See *Snell* and *Athey v. Leonati*, [1996] 3 S.C.R. 458. See also the discussion on this issue by the Australian courts: *Betts v. Whittingslowe* (1945), 71 C.L.R. 637 (H.C.), at p. 649; *Bennett v. Minister of Community Welfare* (1992), 176 C.L.R. 408 (H.C.), at pp. 415-16; *Flounders v. Millar*, [2007] NSWCA 238, 49 M.V.R. 53; *Roads and Traffic Authority v. Royal*, [2008] HCA 19, 245 A.L.R. 653, at paras. 137-44.
>
> [*Clements, supra*]

[48] The appellants say a common sense inference of causation should have been drawn. They fault the Board for disregarding all their *viva voce* evidence concerning the history of river flooding—which had never previously damaged their house—and the post-construction evidence of serious home flooding. This history, the flooding which followed construction, and its later remission should have allowed the Board to infer causation. The appellants complain the Board gave this "no consideration".

[49] The Board treated this argument as confusing coincidence and 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.***
>
> [Emphasis added]

[50] As will be discussed further below, the Board understates the events from which a *prima facie* case may be established.

[51] The Board summarized the appellants' theory of the case with respect to flooding in this way:

> [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".

[52] The appellants argue they established a *prima facie* case the Province caused their flooding and the Province led no evidence to contradict this, once the Woodford report was rejected. The Board understood the appellants' point and quoted from their rebuttal and closing 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.
>
> [¶163 of the Board's decision; the Board's emphasis]

[53] The Board went on to reject this causation argument:

> [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.
>
> [Emphasis added]

[54] Respectfully, the emphasized passage does not follow from what precedes it. The Board had already found that the river rose 2.9 metres, so as to flood the appellants' home. Presumably, if the river "overtopped" the "big island" across from the appellants' property when the river rose 2 metres, it would also do so at 2.9 metres.

[55] The appellants' property is on the tideline—the furthest point on the South River where the tide intersects the river. The appellants criticize the Board for adopting some speculation from the Province's expert, Mr. Woodford, 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" (¶178).

[56] Having rejected Mr. Woodford's causation opinion, the Board is faulted for referring to it. The Board can accept some, all or none of the evidence of any

witness, including an expert witness (*R. v. Abbey*, 2009 ONCA 624, leave to appeal dismissed [2010] S.C.C.A. No. 125). The Board did not reject all of Mr. Woodford's evidence, and in fact relied on some of it:

> [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.

[57] Next, the appellants protest that the Board applied too onerous a burden, beyond a balance of probabilities. In fact, the Board addressed that standard:

> [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***.
>
> […]
>
> [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.
>
> […]
>
> [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.
>
> […]
>
> [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.
>
> [Emphasis added]

[58] The Province invited the Board to draw a negative inference against the appellants because they did not file an expert's report on causation. Mindful that expert evidence is not necessarily required and aware that it could infer causation in all the circumstances, the Board declined to accept the Province's invitation.

The Board was prepared to infer that the appellants simply did not have the resources to pay for Mr. Feigin's professional opinion.

[59] The appellants urge the Court to draw an inference of causation as the Board did in the case of *Re Visser*, 2013 NSUARB 180. *Visser* was a claim for injurious affection arising from highway construction close to the Vissers' property. The Vissers experienced vibration and their well water became unsafe to use. Prior to construction, the Province had obtained an environmental assessment screen report which identified risks which the Board found became a reality for the Vissers. There is some parallel with this case because the appellants and Mr. Feigin met with Provincial representatives prior to construction and identified the potential flood risk to the appellants before it happened. There was also uncontradicted expert evidence that supports *prima facie* causation.

[60] The Board plainly rejected the appellants' theory of causation. But that does not dispose of the obligation to assess whether the evidence otherwise supported an inference of causation. In fact, the Board ignored clear and material evidence of *prima facie* causation.

[61] The Board's dismissal of causation based on its factual findings reduced those facts to coincidence (¶49 above). But the facts were more than a single correlation. The Board found the appellants' buildings had never flooded before the temporary bridge construction. The Board found that there were several damaging floods of those buildings after construction. The uncontradicted evidence was that this type of flooding stopped after the bridge and all the footings were removed. Having accepted the appellants' evidence and having rejected Mr. Woodford's opinion that flooding was never as high as the appellants claimed, there was a *prima facie* case to answer. That case was supported by the Province's own expert.

[62] In his initial report, Mr. Woodford noted that novel flooding events following the bridge construction did not support his opinion:

> This property reportedly did not suffer flood damage prior to the bridge work on Highway 104, and suffered flood damage nine times within a few years of the bridge construction. ***This evidence clearly does not support my conclusion that the bridge work did not cause the flooding.*** One explanation for this is that this property has flooded in the past but did not cause flood damage, and therefore was not noticed or reported. When describing the flooding, Mr. Partridge was asked if he could show me how high the river had gotten prior to any of the bridge

> construction. He said he did not notice, flooding was not a problem, so he paid no attention.
>
> [Emphasis added]

[63] Mr. Woodford issued an addendum to his report based on "new information" which satisfied him that the property had experienced flooding before the bridge work, so Mr. Woodford said he "… would disregard this paragraph".

[64] Mr. Woodford was confronted with this change in cross-examination in which a distinction was drawn between flooding of property and flooding infiltrating the Partridge home and causing damage. After quoting from the paragraph in his report noted above, Mr. Woodford was asked:

> Q. So, what you're stating there is that the absence of prior flood damage does not support your opinions and conclusions, right?
>
> A. Yes.
>
> Q. And, you recall answering written interrogatories regarding that aspect of your report. Correct?
>
> A. Yes.
>
> Q. And, you recall that I asked you the following question, ***"Do you agree that the evidence of no prior flood damage having occurred at the Partridge property supports the conclusion that the bridge work did cause the flooding?" You remember that?***
>
> A. ***Yes.***
>
> Q. ***And, your answer at the time was 'yes.' Correct?***
>
> A. ***Yes.***
>
> Q. ***And, that was a truthful answer that you gave at the time. Right?***
>
> A. ***Yes.***
>
> Q. And, it was an answer given by you to your credit, Mr. Woodford, objectively and without bias, honestly recognizing a limitation regarding your report and your opinions. Correct?
>
> A. Yes.
>
> Q. However, you later took measures to retract that statement. Correct?
>
> A. Yes.
>
> Q. In your Addendum report, Page 4, you say that, that entire paragraph from your original report that we just looked [*sic*] should be completely disregarded. Right?

A. Correct.

Q. And, that's based on the new evidence that you received from Mr. Daemen?

A. Correct.

Q. Of a wrack line elevated at 2.29 meters. Correct?

A. Yes.

Q. Because you say that constituted new evidence that before 2011, the Claimants' property at [*sic*] flooded?

A. Yes.

Q. ***Not flood damage but flooded. Correct?***

A. Yes, I think that elevation would have been noticeable flooding on the property.

Q. Sure, flooding as you define it being water extending on to areas not normally covered by water?

A. Correct.

Q. You don't identify which areas but just some areas within the legal boundaries not normally covered by water. Right?

A. Yes. Well, I say you can look at the drawing and see what elevation it would be the contours.

Q. But you didn't do that analysis in your report, did you?

A. No.

Q. ***No. And your admission that we just read from Page 15 of your original report and your response to the resulting written Interrogatory, those discussions weren't concerned with the flooding. Those exchanges related to flood damage. Correct?***

A. Correct.

Q. And, it was the lack of historical evidence of flood damage which was the basis for those admissions. Correct?

A. Well, I ---

Q. I can read them back to you if you'd like?

A. Sure, sure. So, flooding or flood damage to me, when the water was at -- the reason why I retracted this is because I was led to believe that there was no flood damage meaning no flooding onto the property, 2.4, 2.29, would have been far enough onto the property that it would have been noticed and I was told, 'never flooded, never noticed.' And so, the kind of base point that this property never flooded before, or there was no flood damage is kind of not true anymore. That's

why this statement is not appropriate anymore because I have evidence that it has flooded before.

Q. Flooded?

A. Yes.

Q. And, flood damage are different things. ***You define flooding as water extending noticeably onto areas of the property not normally covered by water. Correct?***

A. ***Yes, yes.***

Q. ***And, that is different obviously than water damaging the house or submerging a vehicle. Correct?***

A. ***Correct.***

Q. Yes. And, your statement in your original report was premised upon and it spoke to the lack of evidence of prior flood damage. Correct?

A. Correct.

Q. And, ***your answer to my Interrogatory was premised upon the lack of evidence of prior flood damage.*** Correct?

A. Correct.

Q. And even with this new information from Mr. Daemen, based upon which you tried to undo or retract your objective admission, the fact is you still have no evidence of historical pre-construction flood damage. Correct?

A. Correct. But, Mr. Partridge's statement about I [*sic*] never flooded before is completely untrue. And, it wasn't when I wrote this report.

Q. Yeah, I'm not concerned about flooding as you define it, we're concerned in these proceedings with flood damage and the fact is that even with the new information from Mr. Daemen based upon which you tried to retract your admission ***you still have no evidence of historical flood damage. Correct?***

A. ***Correct.***

[Emphasis added]

[65] Mr. Woodford not only testified that flood damage post-bridge construction was inconsistent with his opinion. He went further and admitted that flood damage post-construction "supports the conclusion that the bridge work did cause the flooding". This uncontradicted evidence from an expert witness qualified to opine on flood causation was ignored by the Board.

[66] Having rejected Mr. Woodford's opinion on causation in part because it did not account for a water level that the Board found occurred, it should have

followed that Mr. Woodford's concession of causation based on novelty of flooding post-construction also supported a *prima facie* case of causation.

[67] The Board found that the appellants had not met their burden of showing a *prima facie* case of causation. But the Board misapplied the burden to the facts which the Board found. The "correlation" between bridge construction and flooding was not an isolated coincidence, as the Board suggested, but part of a two-year pattern: first of non-flooding, then flooding post-construction followed by cessation of flooding coinciding with the bridge's construction and then its removal.

[68] Once Mr. Woodford's initial opinion on causation was rejected by the Board, there was no evidence impeding the appellants' *prima facie* case. The appellants met their burden and established a *prima facie* case. The Board's assessment also overlooked the important evidence of Mr. Woodford in cross-examination. The Board accepted the appellants' evidence of damaging flooding which coincided with the Woodford evidence that the temporary bridge construction work caused that flooding.

[69] The Board correctly identified the legal test of *prima facie* causation, but then failed to properly apply that test to the facts it had found. In these circumstances, this amounts to an extricable error of law: *Housen*, ¶33, 36; *01109718 Saskatchewan Ltd v. Agrikalium Potash Corporation*, 2011 SKCA 82, at ¶13-16; *Murray v. Bitango* (1996), 184 A.R. 68 (Alta C.A.) at ¶12, leave to appeal dismissed [1996] S.C.C.A. No. 370; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, at ¶44; *Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117, at ¶47.

[70] Whether factual findings meet the requisite standard of proof is a question of law, ("reasonable suspicion", *R. v. Chehil*, 2013 SCC 49 at ¶60.) In *R. v. Shepherd*, 2009 SCC 35, the Court put it this way:

> [20] While there can be no doubt that the existence of reasonable and probable grounds is grounded in the factual findings of the trial judge, the issue of whether the facts as found by the trial judge amount *at law* to reasonable and probable grounds is a question of law. As with any issue on appeal that requires the court to review the underlying factual foundation of a case, it may understandably seem at first blush as though the issue of reasonable and probable grounds is a question of fact. However, this Court has repeatedly affirmed that the application of a legal standard to the facts of the case is a question of law: see *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 18; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R.

> 381, at para. 23. In our view, the summary conviction appeal judge erred in failing to distinguish between the trial judge's findings of fact and his ultimate ruling that those facts were insufficient, *at law*, to constitute reasonable and probable grounds. Although the trial judge's factual findings are entitled to deference, the trial judge's ultimate ruling is subject to review for correctness.

[71] The Board erred in law by concluding that a *prima facie* case was not established.

General Damages

[72] This aspect of the appeal addresses only the nuisance and inconvenience of the Province's construction work for which the appellants were awarded $20,000.00. It does not relate to flooding.

[73] The appellants claim at common law would sound in nuisance. But a nuisance authorized by statute does not result in liability, if the nuisance is the inevitable result of the authorized activity (*Canadian Tort Law*, 11th ed, Toronto: LexisNexis 2018, at ¶12.66 and 12.67, citing English and Canadian authorities).

[74] As earlier described, nuisance is actionable as "injurious affection" because the statutory remedy replaces the common law cause of action (s. 3(1) of the *Expropriation Act*, ¶16 above).

[75] Nuisance is an interference with a claimant's use or enjoyment of land. The interference must be both substantial and unreasonable (*Antrim*, at ¶18-19).

[76] The Board was satisfied that the work conducted by the Province interfered with the appellants' use and enjoyment of their property:

> [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.

[77] In order to claim general damages for interference, the Board had to decide that the impact on the appellants was unreasonable. The Board found in their favour:

> [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".

[78] Nuisance damages may include nonpecuniary losses arising from the loss of use and enjoyment of the property—i.e., they flow from an impairment of a proprietary right. That is why excessive noise and noxious smells may be a compensable loss of use of one's property.

[79] The Board considered *Antrim* and *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14 (leave to appeal dismissed [2019] S.C.C.A No. 151) in awarding $10,000 damages to each of the appellants:

> [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.

[80] The Board discussed at some length the impact of the construction work on the appellants and took into account damages awarded for nuisance in other cases which it considered similar. In *Visser*, the Board awarded $5,000 to Mrs. Visser for exposure to extensive noise, dust, and vibration for over a period of a year. In this case, the Board considered the nuisance of greater impact and doubled that amount for each appellant.

[81] In an ordinary appeal involving a challenge to general damages, this Court applies a deferential standard of review. The Court will only interfere if there was no evidence upon which the original judge could have reached a particular conclusion or where the judge proceeded on a mistaken or wrong principle or the amount awarded was so inordinately low or so inordinately high that it must be an entirely erroneous estimate of damage (*Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at pp. 435-436).

[82] The appellants cite authorities which they say awarded greater damages for less serious losses than they experienced:

> (159) The Appellants submitted ample authorities to the Board wherein damages of greater magnitudes had been awarded in circumstances not as serious as these which the Appellants faced. *Adams v. Nova Scotia (Provincial Grain Commission)* (1990), 97 N.S.R. (2d) 411, $28,720; *Deumo v. Fitzpatrick*, 2008 CarswellOnt 4543, 39 C.E.L.R. (3d) 299 (S.C.J.), $153,168; *Medomist Farms Ltd. v. Surrey (District)* (1990), 1 M.P.L.R. (2d) 46 (B.C.S.C.), $28,720; *Banfai v. Formula Fun Centre Inc.*, 1984 CarswellOnt 701, [1984] O.J. No. 3444 (Ont. HC), $23,833; *Myre (Guardian ad litem of) v. Myre*, 1997 CarswellBC 848, [1997] B.C.J. No. 272, $19,028; *Gibbs v. Archibald*, 1995 CarswellNS 384, 139 N.S.R. (2d) 169 (NS,TD), $13,708.00; *Levesque v. Rossignol*, [1993] A.N.B. No. 187 (NBQB), $51,042. The Board gave only passing reference to these authorities in its award to each Appellant of $10,000 under this head of damages.

[83] These authorities do not sustain an argument that the Board erred in assessing general damages. The amounts described by the appellants in the foregoing summary are not confined to general damages and so appear higher than the actual general damage awards.

[84] *Adams* was a nuisance claim arising from excessive grain dust which infiltrated Ms. Adams' home and affected her use of the home and her health. She had to move out. Fifteen thousand dollars was awarded for nuisance.

[85] *Deumo* involved four years of excessively offensive wood stove smoke that rendered the plaintiffs' backyard uninhabitable and required them to keep their windows closed. The defendants' wood stove use persisted throughout the year. The defendants ignored requests of neighbours and the municipality to abate their nuisance. Eighty thousand in general damages was awarded, together with $20,000 in punitive damages. The nature and extent of the nuisance and the conduct of the defendants bears no resemblance to this case.

[86] In *Medomist* (aff'd 1991 CanLII 325 (BCCA)), the defendants flooded the plaintiffs' farmland on a number of occasions, destroying some crops. General damages of $15,000 were awarded.

[87] *Banfai* was an action by motel owners against an automobile racing amusement ride across the street. The screeching of engines and tires, together with exhaust fumes and smoke interfered with the use and enjoyment of the property by the plaintiffs and their guests. Each plaintiff was awarded $10,000 in general damages for their disturbance.

[88] *Myre* was a personal injury action by an infant plaintiff for hearing loss sustained during a motor vehicle accident. Non-pecuniary damages of $12,000 was awarded for minor hearing loss. The case has little precedent value for the appellants in this case.

[89] *Gibbs* was also a motor vehicle accident in which $8,500 was awarded for hearing impairment.

[90] *Levesque* was another motor vehicle accident in which the plaintiff suffered neck, back and head pain as well as dizziness. Ms. Levesque experienced mood changes, insomnia, concentration difficulties, headaches and muscle contractions a year post-accident. The judge awarded $30,000 in non-pecuniary damages.

[91] The appellants' complaint that the Board gave only "passing reference to their authorities" demonstrates no error considering the marginal relevance of some authorities, and the relative comparability of others.

[92] Respectfully, the Board's assessment of damages did not offend the principles described in *Woelk.*

Costs

[93] Citing *Central Supplies*, the Province argues that each party should bear its own costs. The appellants are content to leave costs in our discretion. In expropriation cases, costs are considered as an element of compensation and full indemnity has been awarded to successful appellants (*Central Supplies*, ¶238). In this case, the appellants have been partially successful. I would award costs of $12,000.00, inclusive of disbursements. Costs before the Board at the original hearing and on the assessment of damages arising from this decision are for the Board to assess.

Conclusion

[94] I would allow the appeal in part and remit the case to the Board for an assessment of damages arising from the flooding events which the Board accepted had occurred post-bridge construction. The appellants should have costs of $12,000.00, inclusive of disbursements.

Bryson, J.A.

Concurred in:

Beveridge, J.A.

Beaton, J.A.