ALBERTA LAND COMPENSATION BOARD
(the "Board")

Citation: Celtic Land Development Corp. and Celtic Homes Inc. v Edmonton (City), 2018 ABLCB 8

Date: 2018-08-02

File No. DC2014.0029
Order No. 552

In the matter of the *Expropriation Act* Chapter E-13, R.S.A., 2000 (the "*Act*");

And in the matter of an Application for Determination of Compensation:

BETWEEN:

Celtic Land Development Corp. and Celtic Homes Inc.

Claimants

- and -

The City of Edmonton

Respondent

BEFORE: E. Gordon Chapman, Presiding Member
Stephen Bergen, Member
Janice Kowch, Member
(the "Panel")

APPEARANCES:

For the Claimants: Donald P. Mallon, Q.C.
Paul Barrette

For the Respondent: Debi L. Piecowye
Gordon A. Buck
Steve J. Lutes

HEARING: Held in Edmonton, Alberta on January 23, 26, 31 and February 1-3, 6-10 and 13-16, 2017.

WRITTEN BRIEFS: Claimants, April 25, 2017
Respondent, May 9, 2017
Claimants' Rebuttal, May 16, 2017

ORDER

2018 ABLCB 8 (CanLII)

BACKGROUND

Summary

[1] Celtic Land Development Corp. was a tenant in a long-term lease of a repurposed hangar at the City Centre Airport when its leasehold interest was expropriated by the City of Edmonton (the "City"). Its related company, Celtic Homes Inc., operated a modular home manufacturing business out of that hangar. Collectively, the Claimants are referred to as "Celtic" or the "Claimants".

[2] After the expropriation, Celtic sold a portion of its equipment and purchased office and storage space for the remaining business assets (the "151 Street Property"). Celtic conducts some warranty work and office administration out of the 151 Street Property. As of the hearing, Celtic had not resumed manufacturing modular homes.

[3] The Panel is tasked with determining what compensation should be paid to Celtic under the *Act*. Multiple heads of compensation are at issue, including the market value of the hangar lease, and damages attributable to disturbance, including business losses, losses from certain equipment and materials sales, and executive time. The Panel has also been asked to determine whether the City should compensate Celtic by paying for a new facility or the cost of capital to finance same. The parties requested the Panel reserve its determination of costs and interest to a later date, if required.

[4] Celtic's position is that it should be compensated $21,950,608; the City's position is that Celtic's compensation should be limited to the $2,880,000 paid for its leasehold interest.

[5] The Panel finds that the total compensation should be $6,212,681, less the $2,880,000 Proposed Payment, payable to the two companies as follows:

Celtic Land Development Corp.

• Market value of Hangar 8	$4,330,500
• Less the Proposed Payment	$2,880,000
• **Total Payable to Celtic Land Development Corp.**	**$1,450,500**

Celtic Homes Inc.

• Damages for a replacement facility/cost of capital	$0
• Damages for equipment and material sold	$221,030
• Damages for TMS Units	$24,000
• Damages for pre-expropriation business losses	$977,651
• Damages for post-expropriation business losses	$686,000
• Damages for executive time	$54,000
• **Total Payable to Celtic Homes Inc.**	**$1,962,681**

After the Hearing

[6] After the hearing, Member Bergen was unable to continue adjudicating this application. Accordingly, the Panel proceeded with the remaining two members, which constitutes a quorum.

2018 ABLCB 8 (CanLII)

[7] In accordance with s. 20 of the *Interpretation Act*[1], Members Chapman and Kowch continued to adjudicate this matter notwithstanding their appointments expired on November 30, 2017, and January 11, 2018, respectively.

Preliminary Issue

[8] At the hearing, Celtic proposed to have its owners, Mr. McGeown and Mr. Whelehan, provide their testimony as a panel.

[9] The City objected on the basis that Mr. Whelehan was Celtic's only corporate representative. In the pre-hearing discovery, the City questioned Mr. Whelehan on the understanding that he spoke for Celtic, and had not questioned Mr. McGeown. The City did not object to Mr. McGeown being a witness, only that panelling the two owners was inappropriate.

[10] The City argued that panelling the witnesses would cause prejudice by hampering its ability to make use of rule 5.31 in the *Alberta Rules of Court* [*Rules of Court*] [2] which permits a cross-examining party to put the questioning transcripts before a witness who provides inconsistent answers when questioned at a hearing. The City further argued that panelling factual witnesses is distinguishable from panelling experts, which was permitted by a panel of the Land Compensation Board in the *Falkirk Enterprises Ltd. v. Calgary (City).*[3] Experts do not have questioning transcripts, so different considerations are at play.

[11] In response, Celtic reiterated that panelling Mr. Whelehan and Mr. McGeown was the most efficient way for the Panel to hear their evidence. The two men had been equal partners in Celtic for 20 years, and their evidence should reflect that partnership. Celtic argued that the *Expropriation Act Rules of Procedure and Practice* [*Expropriation Rules*][4] do not extend the application of the *Rules of Court* beyond disclosure of records and notices to admit facts. Further, panelling the witnesses did not prevent the City from reading in Mr. Whelehan's transcripts or impeaching the witnesses.

Preliminary Matter Decision

[12] The Panel determined that Mr. Whelehan and Mr. McGeown could provide their evidence in a panel. The two men had been close business partners for decades; hearing their evidence together appeared to the Panel to be the most natural presentation. The Panel determined that a party should be able to present its case in the manner it deems appropriate, except to the extent that the other side is prejudiced. The Panel was not convinced that the City would suffer any prejudice as a result of panelling the witnesses as any contradictions in the prehearing transcripts could still be put to Mr. Whelehan.

[13] After receiving the preliminary decision, the Panel heard a Notice of Motion filed by the City applying to have the Panel's decision proceed as a stated case to the Court of Appeal. After a day of argument, Celtic agreed to have Mr. Whelehan and Mr. McGeown present evidence individually, the Notice of Motion was withdrawn, and the merit hearing proceeded.

[1] *Interpretation Act*, RSA 2000, c I-8, s 20. All legislative references are contained in Appendix A.
[2] *Alberta Rules of Court*, Alta Reg 124/2010, r 5.31.
[3] *Falkirk Enterprises Ltd. v. Calgary (City),* 2012 CanLII 60869 (AB LCB).
[4] *Expropriation Act Rules of Procedure and Practice*, Alta Reg 187/2001.

2018 ABLCB 8 (CanLII)

Facts

Background

[14] Since the 1920s, the City of Edmonton has owned a 535 acre parcel of land in central Edmonton legally described as Lot 2, Block 6A, Plan 9220135 (“Airport Lands” or "City Centre Airport"). An airport, in some form or another, operated from the Airport Lands from 1927 until 2013.

[15] The use of the Airport Lands as an airport has been the subject of much debate in Edmonton since the 1990s and the construction of the Edmonton International Airport, south of the City (“EIA”). Referenda were held in 1992 and 1995 over the City Centre Airport, resulting in the transfer of all scheduled passenger service to the EIA. As a result, while the Airport Lands continued to be used for aviation purposes, many airport buildings were repurposed for industrial and commercial purposes.

Celtic and Hangar 8

[16] Celtic is composed of two highly-interrelated companies operating a commercial business constructing and installing custom built modular homes. Celtic is co-owned by Christopher Whelehan and Sean McGeown.

[17] Celtic’s manufacturing facility was located on the Airport Lands, in a repurposed hangar building located on an approximately 2.85 acre site, called Leasehold Area 24. The main hangar was built in 1942 of steel construction, with large doors on either side of the building permitting large materials to move through the hangar. The hangar is flanked by two additions, both two stories, containing an additional 16,960 square feet (“sq. ft.”) for a total of 43,957 sq. ft. Leasehold Area 24 and its improvements are collectively referred to as “Hangar 8”.

Relevant Leasehold History

[18] In 1996, the City of Edmonton leased the Airport Lands, including Hangar 8, to the Edmonton Regional Airports Authority (“ERAA”) until 2052 (“Head Lease”). In 1998, 678115 Alberta Ltd., subsequently known as Aircore Industries Ltd. (“Aircore”), leased Hangar 8 from the ERAA (“Lease”). The initial term of the Lease was 15 years, with two 15-year options to renew.

[19] In 2008, Celtic acquired Hangar 8 from Aircore through a transaction that included an assignment of the Lease and a Sales Agreement. The Sales Agreement contained the purported sale of the hangar building from Aircore to Celtic for $900,000, despite a provision in the Lease requiring the tenant to relinquish possession of the “Leased Premises together with any building situate on the Leased Premises in “as is” condition.” In addition, Celtic agreed to assume the obligations of certain leases entered into by Aircore, including:

- Leases with Robert Speidel and the related 1380192 Alberta Ltd. (collectively referred to as the “Speidel Leases”). The Speidel Leases were for ten years, contained two five-year options to renew and covered 1710 sq. ft. of main floor space, 2160 sq. ft. of second floor space and .45 acres of yard space; no rent was payable beyond a proportional share of taxes and utilities; and
- A lease with the Board of Governors of the Northern Alberta Institute of Technology (“NAIT Parking Lease”). The NAIT Parking Lease was for a portion of the north part of Leasehold Area 24 and included monthly rent.

2018 ABLCB 8 (CanLII)

2008 to 2013

[20] In early 2008, City Council requested information from its administration about alternative uses for the Airport Lands. On July 8, 2009, after public consultations, Edmonton City Council passed a motion detailing a two-phase closure of the City Centre Airport ("2009 Motion"), and the subsequent development of the Airport Lands into an "ecologically-advanced, transit-oriented, medium- to high-density, mixed-use development (business and residential)" ("Blatchford Redevelopment").

[21] In June 2010, Celtic renewed the Lease until March 31, 2028.

[22] In August 2010, the ERAA surrendered the portion of the Head Lease that included Hangar 8 to the City, and the City became Celtic's direct landlord.

[23] On May 16, 2012, City Council passed Bylaw 16033, approving the City Centre Area Redevelopment Plan ("ARP"), which repurposed the entire Airport Lands. The ARP anticipated construction would begin in 2013/2014 and take 25-30 years.

[24] On October 5, 2012, the City executed and served a Notice of Intention to Expropriate ("NOITE") on Celtic. This NOITE was eventually abandoned, and another NOITE was served in February 2013.

[25] On March 8, 2013, Celtic expressed its intent to exercise the second lease renewal, seeking to extend the Lease to 2043.

An Expropriation Timeline

[26] The following is a chronology of the expropriations:

The Original Expropriation

- September 4, 2012: City notifies Celtic Homes of intention to proceed with expropriation.
- October 5, 2012: NOITE executed and received by Celtic.
- February 4, 2013: City informs Celtic Homes of procedural difficulties with the expropriation, but expresses a continuing intention to expropriate.
- February 27, 2013: City abandons the original expropriation.

The Expropriation

- February 27, 2013: The City executes and delivers a new NOITE.
- July 25, 2013: The Certificate of Approval is filed at Land Titles, transferring Celtic's interest to the City ("Effective Date").
- August 6, 2013: City executes a Notice of Expropriation and a Notice of Possession, requiring Celtic to give up possession on or before November 15, 2013.
- October 11, 2013: The City paid $2,880,000 to Celtic in accordance with s. 31 of the *Act* ("Proposed Payment"). The Proposed Payment was based upon Brian Gettel's October 10, 2013, "Compensation Analysis" Report.
- November 15, 2013: The parties execute a Right of Entry agreement, allowing Celtic to access Hangar 8 to store, disassemble and remove equipment until December 14, 2013.
- December 14, 2013: Celtic relinquishes possession of Hangar 8.

2018 ABLCB 8 (CanLII)

Celtic's Response to the Expropriation

[27] Celtic used a portion of the Proposed Payment to purchase and renovate the 151 Street Property, a building in north Edmonton containing approximately 1,600 sq. ft. of storage space and some additional office space. The 151 Street Property could not house Celtic's manufacturing operations, and accordingly, Celtic sold pieces of its large equipment, materials, and some surplus units ("TMS Units") to third parties.

[28] At the hearing, Celtic provided documentation regarding multiple properties that it had considered purchasing to relocate its manufacturing operations. Although Celtic attempted to find a replacement facility, as at the hearing in February 2017, Celtic had not re-established its manufacturing operations.

Summary of Celtic's position

[29] Celtic is claiming $21,950,608 in compensation from the City, described in Celtic's post-hearing legal brief[5] as follows:

Market Value of Celtic's interest of $7,000,000 less the $2,880,000 Proposed Payment	$4,120,000
Replacement facility – Economic Reinstatement	$9,507,500
Past business losses	$4,680,000
Future Business loss	$720,000
Loss on TMS Units sold	$635,000
Replacement cost of equipment and material	$2,188,108
Owners' Time	$100,000
TOTAL	$21,950,608

[30] Celtic's expert, Dallas Maynard, based his market valuation upon the Lease continuing for the duration of the Head Lease, or even longer, at a below-market rental rate. Celtic is also claiming as disturbance damages the cost of a replacement facility or, in the alternative, the cost of capital to finance same.

[31] Celtic is also requesting the Panel award compensation for losses it incurred when selling TMS Units, equipment and materials. Celtic argues that the expropriation necessitated the sale of these items at a substantial discount, due to the short time frame Celtic had to vacate Hangar 8.

[32] Celtic's claim for pre-expropriation business losses includes one particularly lucrative contract Mr. Whelehan was sure Celtic would have secured but for the expropriation. Celtic's future business loss claim is based upon the assumption that Celtic's manufacturing business would relocate on December 1, 2017, and be back to pre-expropriation operations by January 31, 2021.

[33] Celtic is also claiming disturbance damages for executive time spent dealing with the expropriation and subsequent hearing process.

[34] Given the interrelatedness of the companies, counsel for Celtic advised that a distribution of the compensation between the two companies is not required. Should the Panel choose to, the logical distribution is market value to Celtic Land Development Corp. and the remaining compensation to Celtic

[5] The specifics of Celtic's claim changed throughout the hearing. The Panel considers the last claim summary, provided in Celtic's legal brief, to be the most accurate representation of its claim.

2018 ABLCB 8 (CanLII)

Homes Inc.

Celtic's Witnesses

[35] In support of the claim, Celtic provided the following witnesses:

- Christopher Whelehan – Celtic's co-owner, Mr. Whelehan gave evidence as Celtic's corporate representative.

- Sean McGeown – Celtic's co-owner.

- Tom Cockle – Mr. Cockle is a project manager responsible for steel building systems for Flynn Bros. Projects Inc. Mr. Cockle estimates that the cost to build a similar manufacturing facility is $7,900,000 plus GST.

- Dallas Maynard – Mr. Maynard is an appraiser, who has been accredited for approximately 30 years. In Mr. Maynard's opinion, the market value of the Lease is $7,000,000, with Celtic experiencing an additional $9,332.000 in disturbance damages. Mr. Maynard was qualified as an expert in valuing real property, but not in valuing disturbance damages.

- Johnathan Whitmore – Mr. Whitmore is a Chartered Professional Accountant with SVS Group LLP, Celtic's accounting firm.

- Crystal Hawryluk – Ms. Hawryluk is a Chartered Professional Accountant and Chartered Business Valuator with 13 years of experience. Ms. Hawryluk's final opinion is that Celtic's past business losses range from $2,510,000 to $4,680,000 and that future losses are between $700,000 and $720,000. Ms. Hawryluk was qualified as an expert in business valuation and quantification of business losses.

- Cathryn Chopko Beck – Ms. Chopko Beck is registered planner, landscape architect and urban strategist with IBI Group. Ms. Chopko Beck gave evidence regarding Celtic's development of land it owns in Morinville. Ms. Chopko Beck was qualified as a land use planning expert and an expert in landscape architecture.

- Ajay Menezes – Mr. Menezes is a commercial underwriter and President of Sumex Capital. Mr. Menezes provided a Mortgage Financing Review for Celtic, stating that prime lenders would not provide financing to Celtic to establish a replacement facility given Celtic's current lack of cash flow. The Panel did not qualify Mr. Menezes as an expert.

Summary of the City's position

[36] The City's position is that the Proposed Payment of $2,880,000 constitutes full compensation to Celtic. The market value of the Lease should be calculated to 2028 only, as the rent becomes a market rate during the second renewal term.

[37] The City asserts that there are no compensable disturbance damages. Celtic should not be eligible for a replacement facility as this would amount to equivalent reinstatement, an inappropriate remedy in the circumstances. Further, any compensation to replace equipment and materials sold would be redundant given Celtic's failure to relocate.

[38] The City argues that Celtic should not receive compensation pursuant to s. 53 or s. 54 of the *Act*. S. 53 does not apply because Celtic did not relocate. Further, since Celtic has failed to relocate when it

2018 ABLCB 8 (CanLII)

was feasible to do so, s. 54 does not apply either. The City acknowledges that Celtic is entitled to some business losses prior to losing possession of Hangar 8, but argues that the amounts claimed by Celtic are too high.

[39] The City also argues that Celtic has failed to prove its claim for executive compensation, and at most may be entitled to $15,000.

[40] In the alternative, the City claims that any additional damages are the result of the Claimants' failure to mitigate or are not a reasonable consequence of the expropriation.

2018 ABLCB 8 (CanLII)

The City's Witnesses

[41] In support of its position, the City led the following witnesses:

- Brian Gettel – Mr. Gettel has been an accredited appraiser since 1981. Mr. Gettel was qualified to give expert evidence relating to the appraisal of land and buildings. In Mr. Gettel's opinion, the market value of the Lease is $2,880,000.

- Mark Hall – Mr. Hall is a registered planner and project manager, and the executive director of the Blatchford Redevelopment. Mr. Hall gave evidence on behalf of the City regarding its organizational structure, planning processes and policies, and land-owning roles and responsibilities. Specifically, Mr. Hall gave evidence regarding the history of the Airport Lands and the Blatchford Redevelopment.

- Barbara Morton – Ms. Morton is a Chartered Professional Accountant and has been a Chartered Business Valuator since 2001. Ms. Morton was qualified as an expert in business valuation, loss quantification and financial accounting and analysis. Ms. Morton provided a critique of Ms. Hawryluk's report. She did not provide her own conclusion respecting Celtic's business losses.

ISSUES

1. What is the market value of the interest in land expropriated?
    a. What are the lease terms to be valued?
    b. What is the market value of Celtic's leasehold interest?
2. Is Celtic entitled to disturbance damages?
    a. Is Celtic entitled to disturbance damages for business losses?
        i. Is Celtic entitled to pre-expropriation business losses?
        ii. Is Celtic entitled to post-expropriation business losses?
            A. Did Celtic relocate pursuant to s. 53?
            B. If s. 53 does not apply, does s. 54?
            C. If neither s. 53 nor s. 54 apply, is Celtic entitled to post-expropriation business loss damages under s. 42?
            D. If Celtic is entitled to post-expropriation business loss under s. 42, how are those losses to be calculated?
    b. Is Celtic entitled to a replacement facility or, in the alternative, the cost of capital to support relocating to a replacement facility?
    c. Is Celtic entitled to compensation for the equipment and materials sold? If so, what?
    d. Is Celtic entitled to compensation for the TMS units? If so, what?
    e. Is Celtic entitled to compensation for executive time?

2018 ABLCB 8 (CanLII)

FINDINGS AND ANALYSIS

1. What is the market value of the interest in land expropriated?

Summary

[42] In order to determine the Lease's market value, the Panel must determine how long the Lease would continue at a below-market rental rate. Celtic argues that the Lease would continue at a below-market rate for the entire duration of the Lease, or beyond. The City argues that the rates would continue to 2028 only, at which time the Lease rate would become market value.

[43] The Panel finds that the Lease rate would have continued at the agreed-upon below-market rates until March 31, 2028, the duration of the first option to renew. However, the rental rate after 2028 was to be determined by the parties' agreement or arbitration. There is no indication that this would result in anything other than market value.

[44] The Panel was provided with three different approaches to value the Lease. Once adjusted, the three approaches led to values of $4,013,668 (income approach), $4,102,556 (cost approach) and $4,559,000 (direct comparison approach). The Panel placed little weight on the income approach because Hangar 8 is not what would typically be considered an income producing property. While the direct comparison approach considered other airport buildings, the Panel took into consideration that there were a limited number of true comparables. Finally, while the cost approach was more reliable, the Panel was concerned that the wide range of possible depreciation resulted in a figure that was on the low side.

[45] The Panel is satisfied that the cost valuation ($4,102,556) and the direct comparison valuation ($4,559,000) are indicative of the range Celtic might have realized if the Lease had been sold. Given the limitations of both approaches, the Panel finds that the market value of the Lease is $4,330,500.

Analysis

a. What are the lease terms to be valued?

[46] The market value of a lease is determined by deducting the current rental rate from the market rental rate, and multiplying the difference by the remaining term.[6] The lower the lease rate is than market the greater the market value of the lease; where a tenant is paying market rent, the leasehold interest will have no market value. Long term leases with below market rents will have more value than short terms ones.

[47] Previous decisions have held that options to renew must be scrutinized to determine whether the renewal period will be market rent or some other rate.[7]

[48] The Lease had two options to renew. The first option, exercised by Celtic in 2010, provided that the below-market rental rates continued to apply until 2028. The Lease's second option to renew extended the Lease 15 years ("Second Renewal Term") and stated that rent was to be determined by agreement between the parties or through arbitration. If the determination of rent proceeded to arbitration, the arbitrator would consider, "the rent then currently being paid for lands of a like kind and condition and in comparable locations."

[49] The Claimants' expert, Mr. Maynard, has based his valuation on the assumption that the Lease would continue at a below-market rate throughout the Second Renewal Term and that likely the

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[6] *Statecraft Furniture Ltd. v. Calgary (City)*, [1984] 30 LCR 137 at 9.
[7] *Ibid.*

arrangement would extend beyond the Lease to the termination of the Head Lease in 2052. The City's expert, Mr. Gettel, has based his valuation on the assumption that the rate for the Second Renewal Term would have been market value. Accordingly, the market value of the Lease is limited to 2028.

[50] The Panel finds it unlikely that the parties would have extended the Lease terms to 2052. Built in 1942, it is unrealistic to assume that the same arrangement would continue given that Hangar 8 would be over 100 years old.

[51] Even though the Lease could have been in effect until 2043, the Second Renewal Term does not add to the market value of Celtic's leasehold interest. It appears unlikely that the parties would agree to rental rates established 30 years prior. The likelihood is further diminished by the fact that Celtic and the City are not the original parties to the Lease; the Lease was an agreement between ERAA and Aircore.

[52] The Panel accepts the evidence of the City's representative, Mr. Hall, that the City's primary aim is to achieve market value when renting its leasehold properties. Celtic and the City of Edmonton are sophisticated and self-interested parties who would be expected to negotiate a market rent. Failing so, the parties would expect an arbitrator to do so.

[53] Celtic argues that, since Hangar 8 is unique, there are no lands "of a like kind and condition and in comparable conditions." Accordingly, the only rate that the arbitrator could apply is Hangar 8's previous lease rate. It is speculative to assume that there will be no comparables in 2043. While Hangar 8 had been retrofitted to Celtic's manufacturing business, the building itself was not so dissimilar from others to have absolutely no comparables for an arbitrator to consider.

[54] Since the Second Renewal Term has no market value, the market value of the Lease is contained in the unexpired portion of the First Renewal Term, from the Effective Date to March 31, 2028.

b. What is the market value of Celtic's leasehold interest?

[55] Both Mr. Maynard and Mr. Gettel valued Celtic's expropriated interest. Mr. Maynard relied upon the direct comparison and income approach, while Mr. Gettel also provided an analysis of the cost approach. Mr. Maynard's values ranged from $5,500,000 to $7,300,000. Mr. Gettel's analysis ranged from $2,815,000 to $3,020,000.

Highest and Best Use

[56] Both appraisers agreed that Hangar 8's highest and best use is as an industrial manufacturing facility.

Hangar 8's 2012 Assessment

[57] Hangar 8's assessment of $1,871,000 does not support a lower valuation in the circumstances. Assessments are conducted on a mass appraisal basis using typical figures, rather than actuals. The Panel finds it more likely that an assessment based upon statistical modelling would be more inaccurate than a site-specific valuation after reference to two expert opinions.

Direct Comparison Approach

[58] The direct comparison valuation method considers comparable sales to determine market value. The key is determining which sales are actually comparable, and what adjustments, if any, should be made to account for the remaining differences.

[59] Both appraisers provided comparable properties for the Panel to consider. Mr. Maynard provided

2018 ABLCB 8 (CanLII)

six comparables: four leasehold sales at the City Centre Airport and two fee simple industrial properties in Edmonton's northwest (one sale and one listing). After adjusting for differences, the comparables resulted in a range of $4,348,500 to $5,525,000. In Mr. Maynard's opinion, Hangar 8's market value is $5,500,000.

[60] Mr. Gettel presented five leasehold sales comparables in support of his opinion that Hangar 8's market value is $2,880,000. In his opinion, the comparables support a range of $45.00 to $50.00/sq. ft., to which a leasehold advantage of $24.00/sq. ft. should be added.

[61] Below is a summary of the comparables (including Hangar 8 for reference).

Index No. & Name	Purchase Price	Transaction Date	Year Built	Building area (sq. ft.)	Lot size (acres)	Comments
SUBJECT - Hangar 8	**N/A**	**N/A**	**1942**	**43,957**	**2.84**	**Site coverage: 38%, metal frame construction, manufacturing and office space.**
The Common Comparables (*Comparables in both reports*)						
Maynard #1 Gettel #1 "Hangar 39"	$4,800,000 ($44.15/sq. ft.)	July 1, 2010	1974	108,715	6.63	Site coverage: 37.6%, metal frame construction. Two storey, including office space, shop, and cafeteria. Includes security booth and paint booth.
Maynard #2 Gettel #2 "Hangar 16"	$4,500,000 ($96.02/sq. ft.)	September 1, 2010	1990	46,866	2.90	Site coverage: 37%, steel frame construction. Two storey with hangar, office and shop space.
Maynard #3 Gettel #5 "Building 40"	$3,545,000 ($71.00/sq. ft.)	Approx. December 2012	1975	49,925	2.69	Site coverage: 31%, concrete block and metal frame construction. 2 Hangars and office space.
Maynard #4 Gettel #4 "Hangar 15"	$1,350,000 ($32.67/sq. ft.)	December 2010	1971	41,326	3.36	Site coverage: 24%, steel frame construction. Two storey with hangar and office space.
The Additional Comparables (*Sales not contained in both reports*)						
Maynard #5 WBM Building	$16,833,579 ($118.06/sq. ft.)	May 2012	1987	142,583	7.91	Site coverage: 41%, metal frame construction, primarily warehouse/manufacturing.
Maynard #6 Greyhound Building	Listing price $7,000,000 (90.80/sq. ft.)	N/A	1981	77,089	4.18	Site coverage: 42%, steel frame construction, bus storage, service area and wash bays.
Gettel #3 "SPAR - EIA"	$700,000 ($25.23/sq. ft.)	December 2010		27,746		Metal construction, hangar, fabrication and office space.

The Additional Comparables

[62] The additional comparables are not of great assistance in valuing the Lease for the following reasons.

[63] Mr. Maynard's #5, a fee simple sale and #6, a fee simple listing (already an unreliable indicator

2018 ABLCB 8 (CanLII)

of market value[8]), are heavy industrial buildings, and are not located at the Airport Lands. Location and building type are both key components to the market value of a property; their differences from Hangar 8 are too substantial to accommodate. These differences are also exacerbated by the fact that both transactions relate to fee simple interests. While the value of long term leases may start to approximate a property's fee simple value, issues surrounding financing limitations and determining the residual value of the reversionary interest would have to include a justified adjustment.

2018 ABLCB 8 (CanLII)

[64] Mr. Gettel's #3 is not comparable. This sale was in a very different market than Hangar 8 as it was zoned agricultural, compared to Hangar 8's industrial and aviation zoning; a difference too significant to adjust for. Further, evidence was lacking respecting the comparable's site coverage and year of construction. In addition, #3 was a much smaller facility with 15-19 foot ceilings. Hangar 8's ceiling height is important; Celtic's manufacturing business requires a clear span and 30-foot ceiling clearance.

The Common Comparables

[65] Three of the four Common Comparables are of use in valuing the Lease. The Panel gives Comparable #4 (Hangar 15) little weight as it occurred between related parties, the ERAA and the City of Edmonton. The remaining comparables, Hangars 39 and 16 and Building 40 ("Remaining Comparables") are discussed in detail, below.

[66] Of the Remaining Comparables, the Panel gives Hangar 39 less weight because it is the least similar. It is a large building, with almost twice the main floor hangar space and 2 ½ times the total area of Hangar 8. The building's size and functionally obsolete cafeteria would have a negative impact upon its market value.

[67] While Hangar 16 is the most similar in overall configuration, a large downward adjustment is necessary to account for its modernity. It is a steel frame building composed of both office space and a hangar with large bay doors and a 37-foot ceiling height. However, Hangar 16 is 48 years newer than Hangar 8 and was described by both experts as being much more modern.

[68] The leasehold sale of Building 40 is of some assistance in valuing Hangar 8. Building 40 is a recent sale (2012), of a building with a similar configuration and proximity to Hangar 8. However, Building 40 has a low ceiling clearance (19-21 feet) and the Panel is cognizant in its analysis that Building 40 could not support Celtic's manufacturing business.

Sale of Hangar 8 to Celtic

[69] Neither Mr. Gettel nor Mr. Maynard used Celtic's purchase of Hangar 8 as a comparable in their reports. However, during and after the hearing, the City argued that Hangar 8's sale would be the best comparable. Mr. Gettel stated that the sale, plus $500,000 for the Speidel Lease, $800,000 for building-related improvements and his calculated leasehold advantage would result in a valuation approaching $3,000,000, a figure "in the same ball park" as his reported valuation.

[70] Mr. Maynard conceded that this was a valid sale, but outside the three-year time frame he used to value Hangar 8.

[71] The Panel is not convinced that Hangar 8's sale to Celtic is reliable for valuation purposes. Firstly, this purported purchase was part of a larger leasehold assignment transaction in which Celtic agreed to be subject to numerous leases, indicating that the price likely included outside considerations. Secondly, the Panel accepts the City's argument during the proceedings that this sale was invalid because it violated the terms of the Lease, requiring Celtic give up possession of "any building situate on the

[8] *Patson Industrials Ltd. v. City of Calgary*, 24 LCR 181 (AB LCB) at para 16.

Leased Premises in “as is” condition.” The uncertainty surrounding the sale makes it unreliable.

Adjustments to the Remaining Comparables

Adjusting for the Time of Sale

[72] The parties agree that date upon which Celtic’s interest should be valued is the Effective Date of July 25, 2013. Accordingly, the Remaining Comparables should be adjusted to this date.

[73] Time adjustments to the comparables should address the impact of the 2008 global financial crisis and subsequent recovery upon the Edmonton market. Mr. Maynard did not address the change in economic conditions in his report, accordingly the Panel accepts the evidence of Mr. Gettel that the industrial market had improved approximately 10% between mid to late 2010 and late 2013.

[74] In order to adjust for a depressed market Mr. Gettel adjusted Hangar 39, which sold July 1, 2010, upwards 10%. In the Panel’s view Hangar 16 should be adjusted 10% as well, as its sale occurred September 1, 2010, at the beginning of the recovery and upward movement of the market.

[75] An additional adjustment of something less than 10% is required to bring Building 40 into the same market conditions as the Effective Date. Building 40 sold in December 2012. If the improvement in market conditions described by Mr. Gettel began in August 2010, and the total market swing was 10%, the Panel finds it reasonable to attribute a proportional share of that 10% to Building 40’s sale. Assuming the recovery was linear, this translates to a 3% adjustment.

Adjusting for Zoning Differences

[76] The Remaining Comparables’ zoning must be adjusted for in order to be comparable to Hangar 8. Unlike Gettel’s #3 comparable, zoned agricultural, the Remaining Comparables have similar zoning that require minor adjustments in comparison.

[77] The Panel accepts Mr. Maynard’s 20% upward adjustment to the comparables to account for Hangar 8’s superior zoning. Hangar 8’s zoning, MA2, permitted general industrial and aviation uses. The Remaining Comparables are zoned either MA or MA1, both restricted to aviation uses. Celtic’s manufacturing business would not have been permitted under either MA or MA1, indicating the distinction between them and MA2 is significant.

[78] The City argued that differences in zoning did not impact Hangar 8’s market value because zoning was not enforced. While zoning at the City Centre Airport was restrictive on paper, in the words of Mr. Gettel, “[t]he City was very flexible in terms of granting variances.”[9] Many other non-aviation businesses operated at the City Centre Airport.

[79] Even though the City didn’t enforce the zoning, market value takes into account that the City could. It is unlikely that a prospective purchaser would conclude a sale for a particular purpose which is not permitted on the land. The Panel agrees with Mr. Maynard that a 20% adjustment is appropriate to account for the fact that industrial manufacturing of the kind carried on in Hangar 8 was a permitted use under MA2 zoning.

Adjusting for Location

[80] Unlike the Common Comparables, Hangar 8 is close to NAIT. Both experts indicated that proximity to NAIT could be beneficial, though they disagreed as to the extent of that benefit. Mr.

[9] Transcript, Vol 10, at 1156: lines 3-4.

2018 ABLCB 8 (CanLII)

Maynard proposed a 10% adjustment as it could be converted to a self-storage facility. Mr. Gettel denied that this adjustment was appropriate, but conceded that proximity to NAIT created a small opportunity for parking revenue.

[81] The Panel accepts the evidence of both appraisers that Hangar 8's highest and best use is as an industrial manufacturing facility. Proximity to NAIT might possibly be of benefit for self-storage but this is not a self-storage facility, nor has self-storage been identified as Hangar 8's highest and best use. The Panel is not satisfied that proximity to NAIT is of significant benefit to industrial manufacturing. In fact, there was some evidence from Mr. Gettel of traffic congestion in the area that could be exacerbated by any expansion of NAIT or Celtic's business.

[82] Proximity to NAIT does improve parking revenue. Celtic has demonstrably exploited this potential, at least to a degree. While parking may not generate any significant revenue, the Panel finds that it adds appreciable value nonetheless. In the Panel's view this warrants a 2% adjustment.

2018 ABLCB 8 (CanLII)

Adjusting for the Age and Quality of Improvements

[83] The experts diverged significantly in their opinions on how to account for differences in age and quality in the comparables. On the one hand, Hangar 8 was built in 1942 and was decades older than the Remaining Comparables; on the other hand, Hangar 8 was in good condition, with no deferred maintenance.

[84] Both experts agreed that Hangar 16 was superior to Hangar 8 in both age and quality. Mr. Maynard accounted for this through a $500,000, or approximately 11%, adjustment. Mr. Gettel's calculations include a 48.5% adjustment. Given the significance of the superiority of Hangar 16 – it was built in the 90s – a 48.5% adjustment is more appropriate.

[85] While Building 40 is 24 years newer, there is little evidence supporting Mr. Gettel's 33% adjustment and statement that it is in 'superior condition'. This adjustment also fails to account for Building 40's limited utility; Celtic could not operate with Building 40's low ceiling height. Mr. Maynard adjusted Building 40 downward $200,000, or about 5.5% of its sale price. However, Mr. Maynard also adjusted Hangar 39, of similar age to Building 40, 10.4%. The Panel accepts that the value of Building 40 should be discounted by 10%, bringing the adjustment in line with the adjustment to Hangar 39.

The Storage Area

[86] Mr. Gettel deducted Hangar 8's second floor storage area on the basis that the area is low cost to construct and has minimal value once depreciated. The Panel does not consider this sort of a cost-based deduction appropriate for the direct comparison method. Little evidence was presented to suggest that the other comparables did not also have similar "amenities". Mr. Gettel included Hangar 15's underutilized mezzanine space in arriving at its per sq. ft. value. In the Panel's view, the underutilized storage space must also be included in the overall area of Hangar 8.

Leasehold Advantage

[87] For reasons discussed below, the Panel accepts Mr. Gettel's calculation of the leasehold advantage for Hangar 8 using a 7.5% rate. Accordingly, the leasehold advantage is $970,000.

Summary of Adjustments

[88] The adjustments to the two most common comparables are summed up below:

Building 40	
Sale Price /sq. ft.	$71.00
Adjustment for economic conditions	3%
Adjustment for zoning	20%
Increase for NAIT parking	2%
Decrease for age	(10%)
Leasehold Advantage /sq. ft.	$22.07[10]
Total adjusted value /sq. ft.	**$103.72 /sf**
Hangar 8 Valuation (x 43,957 sq. ft.)	**$4,559,220**

Hangar 16	
Sale Price /sq. ft.	$98.02
Adjustment for economic conditions	10%
Adjustment for zoning	20%
Increase for NAIT parking	2%
Decrease for age	(48.5%)
Leasehold Advantage /sq. ft.	$22.07
Total adjusted value /sq. ft.	**$103.92 /sf**
Hangar 8 Valuation (x 43,957 sq. ft.)	**$4,568,011**

[89] As Hangar 8 is ultimately more similar to Building 40, the Panel finds that the direct comparison approach results in a valuation of $4,559,000.

Income Approach

[90] The Income Approach calculates the value of a property based upon its value as an income producing property. To establish a property's value, one calculates the Net Operating Income ("NOI") and divides by the appropriate capitalization rate ("Cap Rate"). The experts' income approach analysis diverged significantly: Mr. Maynard valued Hangar 8 at $7,300,000, while Mr. Gettel determined market value was $2,815,000.

[91] The parties disagree on the calculation of income, the determination of expenses as well as the appropriate Cap Rate to be applied.

[92] Of the three approaches, the Panel considers the income approach to be the least reliable in the circumstances. The income approach determines the market value of properties that are intended to generate income from tenants. Hangar 8 is not a typical income producing property; the hangar building is a fairly unique structure, occupied by one paying tenant pursuant to what could have been a 45-year lease. Notwithstanding, the Panel considered the parties' evidence, below.

Determining the Annual Gross Potential Income

[93] A summary of the Panel's findings relating to the annual gross potential income is contained in the table, below.

The Annual Net Rent

[94] The Panel accepts the evidence of both Appraisers that the appropriate rental rate for Hangar 8's

[10] $970,000 divided by actual sq. ft. of Hangar 8 – 43,957

2018 ABLCB 8 (CanLII)

office space is $12.00/sq. ft. This rate, however, is inappropriate for Hangar 8's non-office space. Hangar 8 is comprised of significantly differing space; it is unreasonable to assume that hangar or manufacturing space would rent for the same rate as finished office space.

[95] With respect to Hangar 8's 33,662 sq. ft. of main floor space, the Panel finds that a rental rate of $9.00/sq. ft. is appropriate. This is slightly higher than Mr. Gettel's rate of $7.50/sq. ft., and based upon Hangar 16's rental rate. Hangar 16 was included by both appraisers and is similar to Hangar 8 in many ways, except age. While newer, neither party substantiated how Hangar 16's modernity would appreciably improve its rental rate.

[96] The Panel accepts that the space occupied by Speidel should be valued, regardless of how much Mr. Speidel was paying, as the determination is of gross *potential* income.

[97] The Panel does not accept Mr. Gettel's contention that Hangar 8's remaining 4,220 sq. ft., comprised of additional storage and a ventilated paint booth, has no market value. One of the other converted hangars has a paint booth; this is not a unique attribute. The Panel accepts that the space cannot be valued the same as office or main floor area, and finds it would attract a value of $5.00/sq. ft.

2018 ABLCB 8 (CanLII)

Space	Rate	Total
Office main/2nd floor – 4,365 sq. ft.	$12.00	$52,380
Balance of main floor space – 35,372 sq. ft.	$9.00	$318,348
Storage and paint booth – 4,220 sq. ft.	$5.00	$21,100
Total Rental Income	**($8.91/sq. ft. overall)**	**$391,828**

[98] The overall rate, $8.91/sq. ft., is within the range of larger footprint industrial leases referenced by Mr. Maynard.

Parking Income

[99] Celtic had a parking arrangement with NAIT at the time of the expropriation, terminable on 30 days' notice. Both experts agree that Hangar 8 could achieve more parking income.

[100] The Panel accepts Mr. Gettel's evidence that the same parking area could reasonably be said to be capable of generating $36,000 in gross revenue annually, for the balance of the lease term. Mr. Gettel agreed that Celtic might have realized this level of parking income by incurring an additional operating expense of $20,000.

[101] The Panel does not accept that Hangar 8 could operate in accordance with its deemed highest and best use with an additional 1.3 acres used for parking, as proposed by Mr. Maynard. Dedicating another 1.3 acres to additional parking would increase the site coverage to 63.8% and impede Celtic's operations.

Determining Operating Expenses

[102] The parties discussed five different components to determining Hangar 8's operating costs. Both parties agreed upon a 3% vacancy rate. They differed on the structural and maintenance allowance, land

rent rate, non-recoverable costs and insurance. The Panel's conclusion on each heading is summarized in the table at paragraph 107, below.

Structural Repairs and Maintenance

[103] The Panel prefers Mr. Gettel's more common methodology and estimation. Mr. Gettel calculated structural repairs at 2% and applied this figure to the effective gross income. Mr. Maynard deducted 3% from the gross income.

Lease Rent Rate

[104] The Lease contained seven different escalating rates throughout the 15-year term, ranging from an annual rent of $13,750 for the first year, to $41,823.20 for the last 5 years. Accordingly, neither Mr. Gettel's calculation, which used the lowest rate, and Mr. Maynard's, which used the highest, are appropriate. The most accurate rate is the average of the escalating lease rates over the 15-year term: $34,547.32.

Non-Recoverable Costs and Insurance

[105] Mr. Gettel determined that Hangar 8 incurred operating costs of $187,224, including property taxes, insurance, utilities, repairs and maintenance and management costs. However, because the lease rates used were net lease rates, Mr. Gettel determined that all but $5,013 of those costs were recoverable. No explanation was provided to explain to what this $5,013 cost related.

[106] Unlike Mr. Gettel's report, Mr. Maynard's report included a non-recoverable operating expense of $12,000 for insurance. Mr. Gettel did not have a corresponding amount. Given Mr. Maynard's greater familiarity with this particular cost, the Panel accepts that the insurance cost is more appropriately $12,000, and adjusts the operating costs upward by $6,987 to reach the $12,000.

The Net Operating Income

[107] The above analysis is summarized in the following table:

POTENTIAL GROSS INCOME	
Annual "net lease" income	$391,828.00
Gross Parking Income	$36,000.00
Recoverable Costs	$182,193.00
POTENTIAL GROSS INCOME	$610,021.00
Less Vacancy and Collection Loss (3%)	($18,300.63)
GROSS EFFECTIVE INCOME	**$591,720.37**
OPERATING EXPENSES	
Structural Repairs & Maintenance (2%)	$11,834.41
Operating Costs (adjusted for insurance)	$194,211.00
Parking Attendant	$20,000.00
Average Annual Land Lease	$34,547.32
TOTAL OPERATING EXPENSES	$260,592.73
NET OPERATING INCOME	$331,127.64

2018 ABLCB 8 (CanLII)

Determining the Capitalization Rate

[108] In order to determine Hangar 8's value, the Net Operating Income ("NOI") of $331,127.64 must be divided by the appropriate Cap Rate. The Cap Rate is determined by looking at comparable sales and calculating the ratio between the NOI and the sale price. This ratio is then applied to Hangar 8 to determine its value. Mr. Gettel and Mr. Maynard disagreed respecting what capitalization ought to apply – 8 or 8.5%.

2018 ABLCB 8 (CanLII)

[109] In the circumstances, the Panel finds that the appropriate Cap Rate is 8.25%. Neither expert has provided the Panel with a particularly salient argument for their rate; however both are within the general range established. Mr. Maynard selected a cap rate of 8% based on comparables which the Panel finds of little relevance. Mr. Gettel used a cap rate of 8.5%, although he testified that he would have used 9.5% if there were a normal income stream but he had instead recognized an upside based on the Speidel Leases and parking income potential.

[110] Two of the most relevant comparables in terms of structure, purpose, and location have Cap Rates of 11.13% (Hangar 39) and 8.73% (Hangar 16) before being time adjusted. Using Mr. Gettel's proposed time adjustments results in a Cap Rate of 9.63% for Hangar 39 and 7.23% for Hangar 16. Hangar 8's Cap Rate should fall in the middle; Hangar 39 is significantly larger with an element of functional obsolescence and Hangar 16 is newer and in better condition.

[111] The market value of the Lease based upon the income approach is calculated as follows: $331,127.64 divided by a Cap Rate of 8.25% = $4,013,668.

Cost Approach

[112] Mr. Gettel's cost calculation combined Hangar 8's leasehold advantage with the depreciated value of the improvements. Mr. Maynard did not calculate a traditional cost approach valuation.

Leasehold Advantage

[113] The leasehold advantage is the difference between the market rent and actual rent for the duration of the remaining lease term. To determine market rent, Mr. Gettel multiplied the market value of Leasehold Area 24 by a yield factor to determine its annual rental rate.

[114] The Panel accepts the uncontroverted evidence that the market value of Leasehold Area 24 is $630,000/acre, or $1,789,200.

[115] Notwithstanding Mr. Maynard's critique, and without Mr. Maynard's own cost analysis, the Panel accepts Mr. Gettel's use of a 7.5% rate to determine the leasehold advantage. Mr. Gettel said he felt most comfortable at 7.5%, a rate well within the range of airport, gas bar and multi-tenant warehouse comparables used.

[116] Based on his choice of 7.5% for the rate of return, Mr. Gettel calculated the first annual return as $134,190 which he adjusted for inflation every 5 years by 10% (2% per year) through to 2028. He then deducted the actual contract rent in that year from the presumed market rate, and multiplied by a discount factor to account for the present value of a future income stream. The total yielded a leasehold advantage of $970,000.

Value of Improvements

[117] The next question is the appropriate value for the improvements. Both Celtic and the City addressed the actual value of improvements in some detail.

[118] Celtic claimed that the new cost for a similar facility is $7,900,000, based upon a budget proposal made by Tom Cockle, the senior estimator for Flynn Bros. ("Flynn Estimate"). Mr. Cockle was accepted as an expert in estimation, design and project management. The Flynn Estimate was based on specifications provided by Celtic and input obtained from sub-trades and suppliers.

[119] Mr. Gettel determined the cost of a replacement building is $6,469,965. He arrived at this figure by determining immediate cost estimates from local contractors and comparing the results to Marshall & Swift figures. Mr. Gettel agreed that the Flynn Estimate was "far more detailed", using a process that was "much more refined".[11] He said he would back out the cost of site improvements, but that Mr. Cockle's numbers were otherwise fair.

[120] The experts disagreed over the cost of replacement site preparation. Hangar 8 was built for airplanes; much of Leasehold Area 24 is pavement overtop a thick layer of concrete, able to withstand very heavy loads, far beyond Celtic's requirements. The Flynn Estimate includes $15.00/sq. ft. to prepare a 2.5 acre site for a similar combination of gravel, concrete and paving ($1,633,500). Mr. Gettel found this treatment unnecessary, rather, a 'state of the art' industrial yard, with 19" of compacted gravel, at $6.50 / sq. ft. would be sufficient for Celtic's manufacturing business.

[121] The Panel finds that the cost of functional site preparation should be $580,880, or $6.50/sq. ft., multiplied by the "yard" area of 89,366 sq. ft. (2.84 acres less the current building footprint of 34,344 sq. ft.). This adds to the Gettel valuation, and decreases the Flynn Estimate by $1,052,620.

[122] Mr. Gettel had little difficulty overall with the Flynn Estimate for the replacement structure, accepting that it had some "pluses and minuses" compared to Hangar 8. Mr. Gettel acknowledged the Marshall & Swift Manual was "finicky" in respect of categorizing structures and classifying condition.[12] Mr. Cockle is the expert in estimating and the Panel accepts Mr. Cockle's estimate overall, except that it will reduce the overall quote by $1,052,620 and thereby adjust the Flynn Estimate to $6,847,380.

[123] During the hearing, Mr. Maynard claimed that an additional $1,327,500 of upgrades should be added to the Flynn Estimate to accurately replicate Hangar 8's functionality. On cross-examination, he acknowledged that this figure should be reduced as follows: $26,000 for washrooms, and $86,500 for servicing the building - duplicate charges - and $155,000 in floor heating - a betterment. In addition, the $267,000 allocated to moving and set up should be deducted. Moving expenses should not be included in the capital cost of a new structure. Therefore, an additional $793,000 ($1,327,500 less the listed deductions) should be added to the Flynn Estimate, bringing the adjusted Flynn Estimate to $7,640,380.

Depreciation

[124] A depreciation factor must now be applied to this new building value in order to make it comparable to Hangar 8. Depreciation is a function of the effective age of the building and its lifespan. The Panel finds that the Marshall & Swift figure of 59% to be most appropriate in the circumstances.

[125] Mr. Maynard was of the view that the expected lifespan of Hangar 8 was 60 years and that it had an effective age of 20 years. He therefore depreciated it by 20/60 or 33%. Mr. Gettel assumed an effective age of 40 years and a life span of 50 years an applied a 70% depreciation. He arrived at the 70% by comparing the Marshall & Swift rate of 59% with the simple ratio of effective age v. lifespan of 80%.

[126] The wide range of depreciation – 33% to 80% – that could be applied to Hangar 8 highlights the subjective nature of depreciation calculations. Neither expert provided particularly compelling opinion evidence regarding Hangar 8's effective age and lifespan, nor is it easy to quantify. While Hangar 8 was

[11] Transcript, Vol 12, at 1432: line 9 and at 1437: line 26.
[12] Transcript, Vol 12, at 1460: line 22.

2018 ABLCB 8 (CanLII)

in good condition, the Panel cannot ignore that it was 71 years old on the Effective Date.

[127] Neither the low of 33% or the high of 80% appear to reflect Hangar 8's age and condition. In the circumstances, the Panel finds it most appropriate to apply the Marshall & Swift manual value of 59%. The depreciation figures appear to the Panel to be more credible than the rule of thumb simple ratio used by Mr. Maynard and considered by Mr. Gettel.

[128] $7,640,380 depreciated by 59% is $3,132,556. The overall cost method valuation is $4,102,556 once the market advantage of the lease, $970,000, is included.

2018 ABLCB 8 (CanLII)

Conclusion Respecting Market Value

[129] The Panel finds that the market value of the Lease on the Effective Date was $4,330,500. The direct comparison approach and the cost approach appear to be the most reliable approaches to determine a range in which Hangar 8 could expect to realize. The income approach is less reliable in accurately addressing Hangar 8's particular characteristics: in particular its age, airport location and zoning. To the Panel, the remaining valuations $4,102,556 (cost approach) and $4,559,000 (direct comparison approach), should be given equal weight, to account for each of their limitations. The number of comparables limits the direct comparison approach, whereas the wide range of depreciation that could be applied limits the accuracy of the cost approach. Accordingly, the Panel is satisfied that the market value of the Lease falls between these two, at $4,330,500.

2. Is Celtic entitled to disturbance damages?

[130] S. 42(2)(b) of the *Act* entitles an owner to "damages attributable to disturbance." These damages consist of the economic losses caused by an expropriation and having to relinquish possession of the expropriated property. A determination of disturbances damages must be made in light of the purpose of the Act to "provide full and fair compensation to the person whose land is expropriated."[13]

[131] What constitutes disturbances damages under s. 42(2) – the 'general damages section' – is further informed by ss. 50-54, which set out specific circumstances in which specific damages are compensable to specific owners.[14] In particular, ss. 50 and 51 combine to apply to tenants, stating that tenants occupying expropriated lands are entitled to "reasonable costs and expenses as are the natural and reasonable consequences of the expropriation." In order to determine what damages are appropriate, s. 51(1) of the *Act* states that regard must be had to,

> *(a) the length of the term,*
> *(b) the portion of the term remaining,*
> *(c) any rights to renew the tenancy or the reasonable prospects of renewal,*
> *(d) in the case of a business, the nature of the business, and*
> (e) *the extent of the tenant's investment in the land.*

[132] Where an owner is a business, it may claim business losses caused by the expropriation. Specifically, ss. 53 and 54 entitle businesses located on expropriated land to specific damages where a business has relocated, or where it is not feasible to do so. If neither section applies, recourse may still be available under s. 42(1)(b).[15]

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[13] *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.,* [1997] 1 SCR 32 at para 33 [*Dell Holdings*].
[14] *Amdue Holdings Ltd. v. Calgary (City)*, 1980 ABCA 143 at para 27 [*Amdue*]; *Yang's Management Inc. v. Calgary (City),* 2012 CanLII 6456 (AB LCB) at paras 43, 62-63 [*Yang's*].
[15] *Amdue, supra* note 14 at para 27.

[133] Celtic submits that it is entitled to disturbance damages for:

- Business losses incurred prior to the expropriation,
- Business losses incurred after the expropriation, on the basis of Celtic relocating its manufacturing operations by December 2017,
- The cost of replacing Hangar 8, or the cost of capital for Celtic to finance same,
- The cost of equipment and materials that were sold as part of the process of vacating Hangar 8,
- The cost of TMS units sold immediately prior to the expropriation, and
- The time incurred by Celtic's executives in dealing with the expropriation.

2018 ABLCB 8 (CanLII)

[134] The City largely denies Celtic's claim for disturbance damages based on the following factors:

- While Celtic may be entitled to pre-expropriation business losses, Celtic's calculation of same should be reduced,
- Since Celtic did not relocate, but could have, any claim for business losses pursuant to ss. 53 and 54 should be denied,
- Celtic is not entitled to a replacement facility or the cost to finance a replacement facility,
- Celtic is not entitled to replacement equipment and materials as claimed,
- Celtic is not entitled to damages for the sale of the TMS Units, and
- Celtic is not entitled to damages for executive time, or alternatively, its entitlement should be for no more than $15,000.

[135] A large portion of Celtic's claim, including business losses, requires a consideration of what damages were caused by the expropriation and whether Celtic took reasonable steps to mitigate the extent of these damages. The Panel will address Celtic's claim for business losses first.

a. Is Celtic entitled to disturbance damages for business losses?

Introduction and General Review of Evidence Submitted

[136] Prior to analysing Celtic's specific business loss claims, the Panel finds it necessary to comment on the business loss evidence generally, as some of its findings apply to both the pre- and post-expropriation business loss claims.

[137] Ms. Hawryluk of BDO Canada LLP ("BDO") acted on behalf of Celtic in presenting her opinion respecting business losses. The City retained Ms. Morton of Ernst & Young LLP ("EY") to critique Ms. Hawryluk's opinion. This resulted in a series of reports, itemized below, where Ms. Hawryluk refined her opinion and calculations based upon comments and criticisms from Ms. Morton. Ms. Morton did not provide her own estimate of losses.

[138] The following reports were submitted:

- BDO Report – Quantification of Damages, dated May 30, 2014;
- EY Report – Expert's Rebuttal Report – Review of the 30 May 2014 BDO Report, dated November 7, 2016;
- BDO Report – Quantification of Damages (updated), dated November 7, 2016;
- EY Report – Expert's Rebuttal Report (updated) – Review of the 7 November 2016 loss quantification report of BDO (updated), dated December 5, 2016;
- BDO Report – Response to Limited Critique Report (EY December 5, 2016), dated December 5, 2016;

- BDO Report – Revised Loss Calculations Based on Comments Contained in the EY Rebuttal Report dated December 5, 2016, dated January 19, 2017;
- EY Report – Expert's Rebuttal Report (second update) – Review of the 19 January 2017 loss quantification of BDO (revised) ("EY Final Report");
- BDO Final Report – Updated Schedules entered as Exhibit 19 and Exhibit 24.

[139] Although the Panel considered all of the reports, it will focus its analysis on the BDO Reports of November 7, 2016, and January 19, 2017, along with the Updated Schedules (collectively the "BDO Final Report") and the EY Final Report, as they contained the parties' positions advanced in the hearing.

2018 ABLCB 8 (CanLII)

[140] The Panel's analysis of Celtic's business losses claims begin with the BDO Final Report. The Panel will consider EY's general critique of the BDO Final Report and then consider the calculations and critiques specific to each of the pre-expropriation and post-expropriation claims.

Good Will

[141] Ms. Morton critiqued the BDO Final Report for failing to include a calculation of Celtic's good will. A good will calculation would be made on an after-tax basis.

[142] Celtic submitted it did not provide a good will calculation because it did not make a claim under s. 54 of the *Act*. Therefore, the calculation of good will was not necessary for its claim.

Scope Limitation

[143] The EY Final Report criticizes the BDO Final Report's failure to include a scope limitation on significant financial information not reviewed. The Panel agrees that Ms. Hawryluk does not appear to have reviewed the financial statements for the four fiscal years from January 31, 2003, through January 31, 2006, but also notes that the EY Final Report does not reference any impact due to the omission. The periods analysed by BDO enabled the Panel to appreciate the "ramp-up" of the business when it started (financial statements from inception on April 24, 1998, through January 31, 2002) as well as the recent history of the business (financial statements from January 31, 2007, through January 31, 2013). The Panel finds that the omission did not impact the calculations and arguments advanced.

The Gettel Report

[144] The BDO Report does not reference the Gettel Report, which contains a significantly different appraisal opinion. The Panel considered this comment carefully and, after reviewing the BDO Report again finds that the appraised value of the interest expropriated (from either appraiser) does not impact the calculations of business losses as performed by BDO. These losses were based on extrapolation and analysis of the businesses' performance, not the appraised value of the property.

The Proposed Payment

[145] The EY Final Report states that BDO's loss conclusion is overstated due to Ms. Hawryluk's failure to subtract the $2,880,000 Proposed Payment from the loss calculations. The Panel is not persuaded that this is a 'failure'. The loss calculations are based on the businesses' performance and estimates of future performance. The Panel finds that the Proposed Payment does not impact these calculations as it is not a normal transaction that the business would experience in its day-to-day operations.

Reasonability Test

[146] The EY Final Report notes that BDO does not provide a reasonability test or a comparison of

BDO's lost profits conclusion to the historical Earnings Before Interest, Taxes, Depreciation and Amortization ("EBITDA") or the indicated value of the good will of the company. The Panel notes that Celtic specifically did not do a good will calculation for this matter as it maintained that it was not shutting down operations. The Panel further notes the EBITDA analysis provided by EY is illustrative and contains the following statement:

> *Notwithstanding our comments in this section and the related illustrated analysis contained in our schedules hereto, we have not performed a valuation of the Claimants and we also recognize that the illustrated conclusions which we deduce based the [sic] BDO Reports may be significantly different than any eventual valuation which would be performed by BDO in this matter.*[16]

2018 ABLCB 8 (CanLII)

[147] After considering all of the above, although the Panel would have preferred that BDO had provided a reasonability test, it is not prepared to adjust any amounts claimed based on EY's illustrative examples.

The Contribution Margin

[148] The EY Final Report states that the contribution margin is overstated due to BDO's elimination of repairs and maintenance expenses which occur regularly and provides a sensitivity analysis to illustrate the impact of various contribution margins to the claimed losses.

[149] The Panel finds that BDO did remove what Celtic identified as abnormal repairs and maintenance in the amount of $455,309 for the years 2011 and 2012. However, there seems to be no indication of any repairs and maintenance costs that occur regularly in the reports.

[150] The Panel finds it unreasonable that no repairs and maintenance costs were incurred. Incorporating these costs would result in a reduction of BDO's calculated contribution margin. There is not enough information to distinguish between the normal, ongoing repairs and maintenance costs from the abnormal costs to determine the actual reduction. Accordingly, the Panel accepts that a 2% reduction to the contribution margin is appropriate. The impact of this will be to reduce the business losses claimed, both past and future by 2%.

[151] The Panel is not persuaded by the City's argument that management fees, particularly those of Mr. McGeown, could be considered a cost of Celtic's sales and thereby reduce the contribution margin by 1%. Management fees are a fixed cost, not a variable cost.

[152] Having determined that the EY general critiques result in a 2% reduction in the business losses claimed, the Panel will now move to consider the specific business loss claims.

i. Is Celtic entitled to pre-expropriation business losses?

[153] Prior to determining Celtic's claim for pre-expropriation business losses, it is important to clarify the period with which the Panel is concerned. BDO's Final Report for "past business losses" encompasses a period beginning February 1, 2012, and ending January 31, 2017, the date of the hearing. This is problematic as any distinction made under the *Act* will be based upon the date of the expropriation not the hearing. BDO's Final Report has the effect of combining pre- and post-expropriation claims under the claim "past business losses".

[154] To address this issue, the Panel's calculations separate Celtic's claim for "past business losses"

16 Exhibit 10, Tab 10.

into losses claimed between February 1, 2012, and December 14, 2013, the date Celtic vacated Hangar 8 ("Pre-expropriation Loss Claim"), and those losses claimed December 15, 2013 onward ("Post-expropriation Loss Claim").

[155] Celtic's Pre-expropriation Loss Claim extends back to February 1, 2012, slightly less than two years prior to Celtic vacating Hangar 8. The City acknowledges that Celtic's business was impacted between the filing of the Certificate of Approval on July 25, 2013, but denies that the expropriation caused any damages before that date.

2018 ABLCB 8 (CanLII)

[156] The leading case regarding pre-expropriation damages is *Dell Holdings*, where the Supreme Court of Canada stated, "[t]he approach to damages flowing from expropriation should not be a temporal one; rather it should be based upon causation. It is not uncommon that damages which occurred before the expropriation can in fact be caused by that very expropriation."[17]

[157] The City argues that *Dell Holdings* is distinguishable in the circumstances, as the Original Expropriation, commenced in October 2012, was abandoned February 27, 2013. Since s. 24(3) of the *Act* contains a compensation provision specific to abandoned expropriations, any claim Celtic has during this period must be pursuant to s. 24(2), rather than s. 42. S. 24(3) states,

> *If an expropriation has been abandoned, the expropriating authority shall pay to the owner any actual loss sustained by the owner and the reasonable legal, appraisal and other costs incurred by the owner up to the time of abandonment, as a consequence of the initiation of the expropriation proceedings.*

[158] The Panel is not persuaded by the City's argument. First, the Panel finds that the Original Expropriation and the Expropriation are both part of the same expropriation process. The abandonment and subsequent expropriation occurred on the same day. While not identical, both expropriations were intended for the same purpose: the Blatchford Redevelopment. Second, the City's proposed interpretation of the role of s. 24(3) in the expropriation scheme is contrary to the purpose of the *Act* to fully compensate owners, as it has the effect of erasing damages incurred during the abandonment period, notwithstanding they could be caused by the ultimate expropriation.

[159] While *Dell Holdings* states that the ultimate determination of damages is causal, not temporal, it is helpful in determining causation to look at the history of the expropriation. In *Mount Lawn Industries Ltd. v. Edmonton (City)*, the Board reviewed the case law and determined that "in order to justify a finding that early negotiations are part of the expropriation process, there must be some evidence or certainty that expropriation is to follow."[18] The Panel considered *Bersenas v. Ontario (Minister of Transportation & Communications),*[19] where damages were compensable notwithstanding they occurred after the expropriating authority told the landowner that vacant possession was required but prior to formal expropriation. The Panel also considered the Manitoba Court of Appeal's decision in *J.Y. Investments v. Manitoba (Department of Highways),*[20] where the Court found that a telephone conversation did not provide enough certainty.

[160] The City argues that Celtic's expropriation was not certain in 2012. In support, the City argues that prior to Council passing the ARP in May 2012, development would not have been possible. The expropriation was uncertain even after the NOITE was issued February 27, 2013, as there was significant public controversy surrounding the expropriation, objections and an inquiry. Even at this stage, Mr. Hall

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[17] *Dell Holdings*, *supra* note 13 at para 38.
[18] *Mount Lawn Industries Ltd. v. Edmonton (City)*(1999), 69 LCR 50 (AB LCB)
[19] *Bersenas v. Ontario (Minister of Transportation & Communications)* (1984), 31 LCR 97 (ON LCB).
[20] *J.Y. Investments Ltd. v. Manitoba (Department of Highways (No 2))*(1986), 35 LCR 12 (MBCA).

described it as a "potential expropriation."[21]

[161] The Panel finds that the expropriation process extends back to at least February 1, 2012. By 2012, the City had already taken major steps towards redeveloping the Airport Lands, including, after a "very large consultation and quite an extensive body of research," Council passing the 2009 Motion detailing the City Centre Airport's two-phase closure.[22] Furthermore, a reading of the 2009 Motion indicates that the City had a very specific plan for the Airport Lands, one that was unlikely to include Celtic's manufacturing business. A portion of the 2009 Motion states:

> *Development of Airport Lands*
> *That the City Manager immediately begin to undertake the following activities:*
> *…*
> - *Position the City of Edmonton as developer of the airport lands, with Administration to immediately begin to set out long-term visioning plans for the airport lands in their entirety, including plans for community consultation, and for an international design competition for an ecologically-advanced, transit-oriented, medium- to high-density, mixed-use development (business and residential). Provide process plan to Council by November 2009.*

[162] The 2009 Motion further requires a communications strategy to inform the public of Council's decision, and directs the City Manager to further negotiate with the ERAA to entrench Phase II. It is clear the City Manager acted on this 2009 Motion, as the relevant portion of the Head Lease was surrendered and the City became Celtic's direct landlord in 2010. Mr. Hall indicated that the City had three alternatives to acquire the properties so it could redevelop the Airport Lands: 1) Let the Lease run out; 2) Negotiate; or 3) Expropriate. Given the Lease's term to 2043, letting the Lease run out was not a realistic option.

[163] Finally, the Panel is unconvinced that the existence of an inquiry and objections are enough on their own to call into question the likelihood of an expropriation, given the *Act* does not bind an expropriating authority to the findings of an inquiry report.

[164] In summary, the Panel has established that the expropriation process extended back at least to February 1, 2012, the start of Celtic's Pre-expropriation Loss Claim.

Pre-expropriation Loss Claim – the Starting Point

[165] In her BDO Final Report, Ms. Hawryluk presents two potential scenarios governing past business losses:

- Scenario A – Past Loss of Income – Without Cavo Development $2,510,000
- Scenario B – Past Loss of Income – With Cavo Development $4,680,000

[166] In 2012, Celtic was in discussions with Summit Circle Developments ("Summit") to build a three-phase commercial condominium development in Yellowknife ("Cavo Contract"). Ultimately, Celtic did not obtain the Cavo Contract. The two scenarios calculated in the BDO Final Report differ based upon whether the Cavo Contract is incorporated into the business losses.

[167] For the reasons discussed below, the Panel finds that Celtic's failure to acquire the Cavo Contract

[21] Transcript, Vol 13, at 1608: lines 15-17.
[22] Transcript, Vol 13, at 1537: lines 17-19.

2018 ABLCB 8 (CanLII)

is not a result of the expropriation and therefore Scenario A is the most appropriate starting point in calculating Celtic's past business losses. When adjusted to include only those losses claimed for prior to December 14, 2013, the amount of Celtic's Pre-expropriation Loss Claim is as follows:

February 1, 2012 – January 31, 2013	$489,425
February 1, 2013 – December 14, 2013 (pro-rated)	$508,178
Total	$997,603

2018 ABLCB 8 (CanLII)

Causation

[168] Notwithstanding that Celtic's Pre-expropriation Loss Claim falls within what the Panel considers to be in the shadow of the expropriation, Celtic must still prove that the losses incurred in this time frame are caused by the expropriation, not an external, unrelated factor.

[169] The Panel is satisfied that Celtic's business suffered a loss during this period as a result of the expropriation, with the exception of the Cavo Contract, discussed below. Units take time to build, and Celtic had been advised in early 2013 to stop taking on new work, in order to minimize the number of unfinished projects at the time of the expropriation. The Panel accepts Celtic's evidence that, in 2012, customers were hesitant to deal with Celtic in light of the very public expropriation and Blatchford Redevelopment. The Panel further finds that it was difficult, if not impossible, for Celtic to mitigate these damages during this time.

The Cavo Contract

[170] Celtic had been preparing drawings for Summit for approximately 18 months prior to the City initiating the expropriation in late 2012. Celtic had met with Summit several times, and Summit had used Celtic's drawings to obtain permits in Yellowknife. According to Mr. Whelehan, "…based on our relationship with him, I thought it was dead certain we were going to do the project. They confirmed that we were the guys they had chosen to do the project. That's as far as it went."[23]

[171] Celtic argues that it would have obtained the Cavo Contract but for the expropriation. The project was three years long; after meeting with the City in January 2013 Celtic understood that it should not take on any additional work as it would not be completed before the expropriation.

[172] The City submits that Celtic is overstating its chances of obtaining the Cavo Contract. The quote prepared contained a significant mathematical error, indicating it was merely preliminary. Further, notes taken by Celtic's accountant and acknowledged by Mr. Whelehan, stated: "Probably 50% reasonable expectation of getting Phase I, II and III."[24]

[173] The Panel is not convinced that Celtic would have obtained the Cavo Contract if the expropriation did not proceed. While Celtic may have been a contender, the evidence does not show that Celtic would have obtained the Cavo Contract. The parties had yet to enter into serious discussions regarding the essential contractual terms. The quote was preliminary and incomplete. There was no contract. To say Celtic would have obtained the Cavo Contract is speculation only.

Other Contracts

[174] The Claimants' past business loss claim is based upon the average number of units Celtic had constructed in 2011 and 2012, years unaffected by the expropriation. This average is then multiplied by a growth factor (based upon CMHC Alberta housing starts growth statistics) to determine how many units

[23] Transcript, Vol 3, at 218: lines 13-16.
[24] Transcript, Vol 4, at408: lines 3-5.

Celtic would have built but for the expropriation. Since the loss calculations are based upon Celtic's average production, rather than an accounting of individual contracts, the Panel need not determine whether potential contracts with Compassionate Counselling, Ellis, Hawthorne, Omoyayi, Schaff, Tetz and the Department of National Defence were lost as a result of the expropriation.

Summary of eligible pre-expropriation business losses

[175] The Panel accepts Celtic's claim for pre-expropriation business losses, subject to the 2% reduced contribution margin and the Cavo Contract. Accordingly, Celtic is entitled to $977,651 in pre-expropriation business losses.

ii. Is Celtic entitled to post-expropriation business losses?

[176] Celtic is claiming business losses incurred after the expropriation. The difficulty in determining what losses, if any, Celtic has suffered largely stems from the fact that Celtic had not resumed manufacturing operations at the time of the hearing.

[177] In order to determine what compensation, if any, Celtic is entitled to for post-expropriation business losses, the Panel must determine which section of the *Act* applies. Celtic submits that it has relocated to the 151 Street Property and therefore the Panel should award damages pursuant to s. 53. Alternatively, Celtic argues that it is entitled to business losses pursuant to s. 42(1)(b) and that subsequent sections of the *Act* do not limit its application.

[178] The City submits that it was feasible for Celtic to relocate and it has not done so for reasons unrelated to the expropriation. Accordingly, Celtic is not entitled to any business losses claimed to have occurred after relinquishing possession of Hangar 8 (December 14, 2013) because neither s. 53 nor s. 54 apply. In the alternative, the City disputes how Celtic has calculated the damages that it is requesting.

A. Did Celtic relocate pursuant to s. 53?

[179] The *Act* entitles expropriated owners/businesses to compensation for the losses suffered where the business is required to relocate because of the expropriation. S. 53 states,

> *When a business is located on the land expropriated, the expropriating authority shall pay compensation for business loss resulting from the relocation of the business because of the expropriation…*

[180] Celtic submits that it relocated to the 151 Street Property and is thus entitled to post-expropriation business losses incurred as a result of that relocation. The City disagrees that Celtic has relocated given that it has not recommenced operations.

[181] The Panel generally agrees with the holding in *Blatchford Feeds Ltd. v. Toronto (City) Board of Education*[25] that relocation implies the business operate in the same manner in a new location. However, the Panel does not accept that the term 'relocation' requires that the new operations be identical. It is logical that a company may have to alter its operations to reasonably accommodate the new circumstances in which it finds itself. This in and of itself should not preclude recovery. However, when new operations no longer resemble old ones, one cannot say that the business has relocated in any meaningful way.

[182] In the circumstances, the Panel finds that Celtic's operations at the 151 Street Property are so different that it cannot be said that Celtic's manufacturing business relocated within the meaning and

[25] *Blatchford Feeds Ltd. v. Toronto (City) Board of Education (1974)*, 6 LCR 355 (ON LCB).

2018 ABLCB 8 (CanLII)

intent of s. 53 of the *Act*.

[183] Prior to giving up possession of Hangar 8, Celtic operated out of a large clear-span structure, manufacturing ‘boxes’ or modular units capable of being configured into small and large residential structures. It employed many staff, including labourers, who would construct the units using very large specialty cranes, trusses and saws.

[184] Celtic cannot operate a manufacturing facility out of the 151 Street Property. Celtic has not constructed a unit since relinquishing possession of Hangar 8. Most of Celtic’s staff are gone. Most of the equipment specific to modular home building has been disposed of, and Celtic’s manufacturing operations have stopped.

[185] The Panel is not persuaded by Celtic’s argument that the office administration and “minimal operations such as warranty work on previous homes” is sufficient to constitute a relocation of Celtic’s manufacturing business. Prior to leaving Hangar 8, Celtic was in the business of manufacturing modular units; conducting warranty work is not current operations so much as providing the contractually obligated follow-up service for the units constructed prior to leaving Hangar 8.

[186] Therefore, the Panel finds that Celtic did not relocate within the meaning of s. 53 and that section does not apply in this case.

B. If s. 53 does not apply, does s. 54?

[187] The *Act* also specifically contemplates what losses are compensable when an expropriated owner/business cannot relocate its business as a result of the expropriation. S. 54 states,

> *The Board may, on the application of the expropriating authority or an owner, include in determining compensation an amount not exceeding the value of the good will of a business when the land is valued on the basis of its existing use and, in the opinion of the Board, it is not feasible for the owner to relocate.*

[188] The Panel accepts both parties’ positions and evidence that it was feasible for Celtic to relocate even though it did not do so. Further, neither party applied for a termination allowance under s. 54 or provided a financial evaluation of the value of the good will for this business. Therefore, the Panel finds that s. 54 does not apply in this case.

C. If neither s. 53 nor s. 54 apply, is Celtic entitled to post-expropriation business loss damages under s. 42?

[189] Celtic submits that even if s. 53 does not apply, it is entitled to disturbance damages for post-expropriation business losses. Throughout the hearing, Celtic’s owners, Mr. Whelehan and Mr. McGeown reiterated their intention to re-establish Celtic’s manufacturing operations once in a financial position to do so. Further, Celtic submitted that its inability to recommence operations is the direct result of the expropriation, caused by the short notice it received to vacate Hangar 8, the insufficient Proposed Payment, and the City’s unwillingness to provide relocation assistance.

[190] The City argues that Celtic had an obligation to mitigate its damages by relocating its operations and chose not to do so for reasons unrelated to the expropriation. Celtic’s decisions during the expropriation process were unreasonable, placing limitations on its ability to relocate and thus causing damages not attributable to the expropriation. Mere intention to relocate is not sufficient; Celtic had an obligation to act reasonably, and its failure to do so caused any post-expropriation losses suffered.

2018 ABLCB 8 (CanLII)

The Law

[191] The Panel's determination that ss. 53 and 54 do not apply does not necessarily prevent Celtic from receiving disturbance damages for post-expropriation business losses. If the claims meet the specific statutory requirements, compensation for business losses may be payable under s. 50 of the *Act*, where the damages are "reasonable costs and expenses" and the "the natural and reasonable consequences of the expropriation." Wider still, is the general disturbance damages under s. 42(2)(b) of the *Act* for damages that are "attributable to disturbance." For instance, in *Yang's Management Inc. v. Calgary*, [26] an expropriated restaurant that closed instead of relocating was entitled to disturbance damages pursuant to s. 42(2)(b), even though ss. 53 and 54 did not apply:

> *...Section 53 does not say, nor does the Panel find it should be interpreted as meaning, that the Act only provides for compensation for business losses to be payable if the business relocates. As set out below, other provisions of the Act provide for such compensation to be payable if relocation does not occur.*[27]

[192] Importantly, both ss. 42(2)(b) and 50 require Celtic to establish that the losses it has incurred have been caused by or are the natural and reasonable consequence of the expropriation. However, underlying the principle of mitigation is that the expropriating authority cannot be held liable for damages that the claimant could have avoided by taking reasonable steps. As such, mitigation and causation are interrelated. The consideration is always whether the claimants conduct was reasonable, having regard to all of the facts and circumstances following the expropriation and consequently, to what extent were the business losses caused by the expropriation versus the failure of the claimant to mitigate those losses.

[193] The Supreme Court of Canada explained mitigation in *Janiak v. Ippolito*,[28] where the Court stated, "it is clear that the so-called "duty to mitigate" derives from the general proposition that a plaintiff cannot recover from the defendant damages which he himself could have avoided by the taking of reasonable steps."[29] Unavoidable losses are those that would have been incurred even if a claimant had taken all reasonable steps to mitigate damages.

[194] Therefore, the Panel assessed the circumstances of this particular case to determine the extent to which the Celtic's post-expropriation business losses were caused by the expropriation and the extent to which these losses were caused by Celtic's failure to take reasonable steps to avoid these losses.

Application to the Facts

[195] Celtic's principals assert that they intend to relocate Celtic's modular home manufacturing business; Celtic's failure to re-establish operations is directly related to the expropriation and the delay inherent in the compensation process. Celtic could not find a suitable replacement property, impeded by a small Proposed Payment and the City's failure to assist it with finding a replacement facility. Further, Celtic's decision to sell off its equipment is reasonable in light of the short period of time it had to vacate Hangar 8.

[196] The City argues that Celtic was required to take reasonable steps to relocate its manufacturing business and did not do so. The City states that it did not assist Celtic in finding an alternate location, as it was not asked. Celtic's later search was not serious, with unreasonable and self-imposed limitations that left few, considerably more expensive, properties available. In addition, Celtic's sale, rather than storage,

[26] *Yang's, supra* note 14.
[27] *Ibid* at para 56.
[28] *Janiak v. Ippolito*, [1985] 1 SCR 146 [*Janiak*].
[29] *Ibid* at para 36.

2018 ABLCB 8 (CanLII)

of essential equipment was unreasonable.

[197] The Panel accepts that 'but for' the expropriation Celtic would have continued manufacturing modular homes out of Hangar 8. Prior to moving from Hangar 8, Celtic was in full operation, with a large staff and the benefit of a long-term lease with below-market rents. The Panel accepts the testimony of Mr. Whelehan and Mr. McGeown as credible in this regard. Mr. Whelehan stated that prior to the expropriation they knew they had a long-term lease and what the lease rate was. They had a long-term plan, had invested time and money, and the equipment was pretty much paid for. Mr. McGeown stated Celtic had built a reputation and would have liked to continue the business. There was no indication that Celtic's business would do anything but continue.

[198] For the reasons discussed below, the Panel is also satisfied, however, that Celtic failed to mitigate its damages by taking reasonable steps to relocate its manufacturing operations. After receiving the Proposed Payment and disposing of its manufacturing equipment, the Panel finds that Celtic did not make any reasonable effort to relocate.

2018 ABLCB 8 (CanLII)

The Search for a Suitable Replacement Facility

[199] The Panel finds that Celtic failed to conduct a reasonable search for a replacement facility. Celtic imposed limitations on itself for the search that were unrelated to the expropriation. These limitations prevented Celtic from being able to relocate. Further, none of the opportunities presented by Celtic were realistic, or pursued to the extent that they became realistic opportunities.

[200] The Panel accepts that finding a replacement facility was a difficult, though not impossible, task. The specific facility requirements of Celtic's manufacturing business – a large, clear span building with 30 foot clearance and large doors on either side - limited the suitable properties available. Further, Celtic was on the hunt for a replacement facility on its own. However, the facility requirements were not so unique that it was impossible for Celtic to find a suitable replacement, given the number and variety of market value comparables and alternate properties presented in evidence.

The Morinville Lands

[201] In 2004, Celtic purchased undeveloped lands on the outskirts of Morinville ("Morinville Lands") with the intention to move operations from north Edmonton. In 2008, Celtic instead assumed the Lease and moved to Hangar 8. Celtic then customized Hangar 8 to suit its operations.

[202] The City argues that Celtic's failure to pursue relocation to the Morinville Lands constitutes a significant lack of mitigation. Celtic submits that it has reasonably pursued the Morinville Lands for possible relocation of its manufacturing operation and determined that this option was no longer viable for Celtic's manufacturing operations.

[203] Between 2011 and 2012, the Morinville Lands were rezoned for commercial development. The Panel accepts Celtic's evidence that, once rezoned, the Morinville Lands were no longer suitable for a modular manufacturing facility. The Morinville Lands were along a commercial corridor forming the entrance to the Town of Morinville. Various land-use planning documents contain requirements that largely preclude the construction of a facility for Celtic's manufacturing. Even if it could be built on the lands as part of the discretionary uses, as argued by the City, the required design standards would likely render the building uneconomical for a modular home manufacturing facility.

Land Purchase Options Explored

[204] According to Mr. Whelehan, as early as 2012, he determined that there would be no clear span structures available for lease and he started to consider purchasing land and having a custom facility built.

One option considered was land located in Acheson, west of Edmonton. Celtic obtained a quote from Flynn Bros. in relation to those lands in 2012, updated in 2014. At the hearing, Mr. Cockle stated that these early estimates were quick estimates, often made in the span of a few hours. At the hearing, Mr. Whelehan could not recall the specific details of the Acheson lands and the Panel was not provided with cogent reasons for why this option was not pursued any further.

[205] Celtic provided several pamphlets and brochures as evidence of its search for a new property. However, the Panel finds that few of these were seriously considered or visited. In all circumstances, Celtic either found the lands unsuitable or stated they were unable to purchase the properties due to financing issues. Several of the properties presented as evidence of its search were properties well beyond what would be required for its manufacturing business. For example, Celtic provided evidence of lands for sale in Vegreville in December 2013 that it did not consider because the listed price was $17,900,000. Another example is the Rampart Industrial 3 Lands, at $1,000,000 per acre, which Mr. Whelehan stated were uneconomical for Celtic's operations, regardless of whether it had sufficient funds to purchase. Further, the Panel finds that the number of properties Celtic entered into evidence exceeded the properties that Celtic actually considered.

2018 ABLCB 8 (CanLII)

[206] In January 2013, Celtic offered to purchase 38.5 acres of land in north Edmonton for $1,542,000 but the sale fell through because the land was zoned agricultural and unsuitable for Celtic's needs. The offer was revocable at Celtic's sole discretion.

[207] Another potential option was the purchase of Noble Industries, a camp builder located in Duffield, west of Stony Plain. Initially, Noble sent word to Celtic in March 2015 that it was available for purchase for $10,600,000, with a $6,000,000 down payment. Celtic did not act on this stating it did not have the capital to do so.

[208] On January 22, 2017, the eve of the hearing, Celtic made an offer to purchase the assets of Noble Industrial Ltd., including its lands and buildings, for $7,000,000, with a $50,000 deposit. According to Mr. Whelehan, the $7,000,000 was not supported by any investigation. Further, the offer was subject to numerous conditions that indicate that no due diligence or other standard pre-purchase steps, such as a preliminary business evaluation, had been taken beyond drafting the two-page offer to purchase.

[209] Celtic provided no further information relating to the success of this offer.

[210] The Panel is not convinced that the Noble Offer constituted a real opportunity that was reasonably pursued by Celtic. Celtic's offer is evidence of a potential deal in its very infancy. This is further supported by the lack of communication between Celtic and Noble prior to Celtic presenting its offer.

Leasehold Options Explored

[211] Of more significance to the Panel is the lack of evidence regarding replacement leasehold options explored by Celtic. After all, its interest in Hanger 8 was a leasehold interest. As noted above, at some point Mr. Whelehan concluded that there were no suitable clear span facilities available for lease. However, he did not provide the Panel with the basis for this conclusion.

[212] Celtic's expert, Mr. Maynard, did review Edmonton for leases prior to February 2013 and determined that all of the leases for suitable replacements were for too short a term, or were too expensive. However, Mr. Maynard did not provide specifics regarding the potential lease options considered. Mr. Whelehan also stated that they did not look for leases after 2013, because they could not get a lease with a similar term or rental rate as the Lease. Given the Lease's below-market rent, the Panel accepts that that is likely true. However, it would still be reasonable to review leasehold options, particularly in light of a $2,880,000 Proposed Payment that would make up for the $970,000 economic

advantage Celtic had in the Lease. The Panel finds there was no evidence of any meaningful search for lease options after February 2013, 10 months prior to Celtic leaving Hangar 8.

[213] The Panel also considered the self-imposed geographical limitations to Celtic's search for lease options. Celtic focused its search in the north and west areas of the City of Edmonton. There is evidence of at least one south side leasehold property not considered that appeared to fit Celtic's primary needs. Mr. Whelehan considered southern properties to be unsuitable because of the location of its staff and its market. However, staff commute was not an issue when Celtic considered land purchase options in communities outside of Edmonton, such as Morinville, Acheson, Duffield or Vegreville. The Panel finds this was an unreasonable self-imposed limitation in considering lease options.

2018 ABLCB 8 (CanLII)

The Proposed Payment

[214] Celtic asserts that its inability to finance the purchase of replacement lands is a result of the expropriation. The Proposed Payment of $2,880,000 was insufficient to purchase replacement lands. The Panel cannot accept this argument in light of Celtic's use of the Proposed Payment in the circumstances. Instead of using this money to offset the potential rental increase for a replacement lease, Celtic, after paying its line of credit and staff, paid dividends to its shareholders, and then purchased and improved a building that was unsuitable to re-establish its modular home manufacturing operations in any form.

The Sale of Essential Equipment

[215] After receiving the Notice of Possession in August 2013, Celtic sold off much of the equipment it required to continue its manufacturing business. These sales do not support Celtic's assertion that it was making reasonable efforts to relocate.

[216] Much of the equipment was sold in private, below-market transactions to Celtic's contacts. In one instance, a Bobcat was partly 'sold' in exchange for work completed up to a year prior to the expropriation. Celtic also sold a large amount of equipment and materials to Habitat for Humanity ("Habitat") for less than market value and partly in exchange for a tax receipt.

[217] In total, Celtic received $663,090 for the equipment it sold. Celtic then, despite alleging that financial issues prevented its relocation, donated an additional $135,000 of the sales proceeds to Habitat.

Summary

[218] In summary, the Panel finds that 'but for' the expropriation, Celtic would still be manufacturing modular homes out of Hangar 8 and earning some profit. The Panel also finds that a reasonable person would have made more effort to relocate. While Celtic did take some initial steps to find a replacement facility, Celtic did not reasonably pursue realistic purchase options, and in particular, did not reasonably pursue lease options. The Proposed Payment was not used to relocate, but to purchase a location unsuitable for Celtic's manufacturing operations. Meanwhile, Celtic sold off essential equipment at a significant loss. Therefore, the Panel finds that Celtic's failure to mitigate contributed to its post-expropriation business losses.

[219] The Panel moves on to determine whether, notwithstanding Celtic's failure to mitigate, there were unavoidable losses that would have nonetheless been incurred had Celtic acted reasonably.

D. If Celtic is entitled to post-expropriation business loss under s. 42, how are those losses to be calculated?

[220] Of all the cases presented by counsel, only two have similar facts in that an expropriated business could have relocated, but did not do so and failed to mitigate damages. In both instances, notwithstanding the failure to mitigate, the claimants were still entitled to a form of compensation. However, the damages were not business losses, but for the market value of the business.

2018 ABLCB 8 (CanLII)

[221] In *Amdue,* a construction company stopped operating instead of relocating. The Court of Appeal found that in circumstances where the claimant could relocate but does not do so, the claimant is still entitled to damages. In that case the court determined the damages should be calculated as though the business were sold:

> *What damages is the tenant company entitled to? Can an owner of a business simply decide to close it down and then claim damages for all losses he has suffered? Any person who claims damages must use reasonable efforts to mitigate his loss. I am of the opinion that where it is feasible to relocate a business the owner must either relocate it or, if he does not wish to do so, he must put it up for sale. If he cannot sell the business, then his damages for disturbance are the losses he has suffered on expropriation. However, assuming he could have sold his business but does not attempt to do so, he is still entitled to damages. It is apparent that any purchaser in deciding what he would pay for the business would deduct from the purchase price the costs of moving from the expropriated property to the new location and also the business losses or lower profits he would estimate would be incurred by the move. The purchase price would be reduced by these two items.*[30] [emphasis added]

[222] In *Yang's*, the Board followed the holding in *Amdue*, and awarded disturbance damages for the market value of the business. In *Yang's*, the Board determined the market value of the business by determining the value of its assets.

[223] It is clear to the Panel that both *Yang's* and *Amdue* stand for the proposition that an expropriated owner/business is entitled to compensation for disturbance damages where it has not relocated but could have done so.

[224] Although neither party presented evidence as to Celtic's market value when it vacated Hangar 8 there is evidence of Celtic's unavoidable losses. In *Yang's*, the Board did consider the use of an estimate of the present value of "operating income losses". However, the Board dismissed this approach in that particular case because the estimate presented had no factual basis.

[225] As *Yang's* and *Amdue* were both ultimately concerned with the calculation of damages where an owner failed to mitigate by relocating, the Panel will consider Celtic's claim in light of traditional mitigation damage calculations, and looks to the Supreme Court of Canada decisions of *Janiak* and *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation.*[31] for guidance. In both cases, damages were calculated by asking, in the circumstances, what damages would have been incurred had the plaintiff – in our case, Celtic – acted reasonably. Those losses will be the natural and reasonable consequence of the expropriation, and thereby be compensable under the *Act*.

[226] The Panel is satisfied that, had Celtic acted reasonably in response to the expropriation, it would

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[30] *Amdue*, *supra* note 14 at para 28.
[31] *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation*, [1979] 1 SCR 633 at para 80.

have relocated to a leased facility, ramped up operations and eventually obtained pre-expropriation levels. Accordingly, the Panel will consider Celtic's "future business loss" calculations for the period of February 1, 2017 to January 31, 2021, as a starting point to measure Celtic's post-expropriation loss. These calculations are based upon the assumption that Celtic would relocate within a 10-month period, and then ramp-up operations to pre-expropriation levels and are a reasonable estimation of what would have happened in 2013, had Celtic taken reasonable steps to relocate at the time of the expropriation.

2018 ABLCB 8 (CanLII)

Post-expropriation Business Losses – the Starting Point

[227] The Panel's analysis of the unavoidable losses Celtic would have suffered because of the expropriation begins with Ms. Hawryluk's BDO Final Report. The Report provides two potential scenarios:

- Scenario C – Future Loss of Income – Based on Estimates $720,000
- Scenario D – Future Loss of Income – Based on Historical Analysis $700,000

[228] The Scenarios differ in how revenues will ramp-up once Celtic re-established operations. In Scenario C, the ramp-up figures are based upon discussions with Celtic's management and accountants; Scenario D uses Celtic's historical ramp-up figures. The Panel finds that Scenario D is the most appropriate starting point to calculate post-expropriation business losses as it is based upon the ramp-up that Celtic actually experienced at its inception in 1998. The ramp-up estimates contained in Scenario C are not supported in the evidence.

Growth Rates

[229] The Panel acknowledges Ms. Morton's concern that the information relied on by BDO was provided by discussions with company management. Further, Ms. Morton argues that factors such as CMHC housing starts do not align well with Celtic's actual performance. The Panel notes that no alternative calculations were provided. In the absence of any alternatives, the Panel accepts the growth rates as utilized by BDO as a reasonable estimate of what Celtic would have experienced but for the expropriation.

Celtic's Future Operations

[230] The City questions Ms. Hawryluk's assumption that "[b]ut for the expropriation, Celtic Homes would have continued its operations at pre-expropriation levels." The City argues that there is no analysis or research to support this assumption and the Alberta economy changed dramatically in 2014. The Panel acknowledges that there is no research or analysis to support this assumption but, other than referencing a downturn in the Alberta economy in 2014, the EY report does not offer any alternative research or analysis. The BDO assumption appears to be reasonable.

Summary of Post-expropriation Business Losses

[231] The Panel finds that the unavoidable damages that Celtic would have suffered, had it mitigated its losses, would have been $700,000, less the 2% contribution margin adjustment, or $686,000.

b. Is Celtic entitled to a replacement facility or, in the alternative, the cost of capital to support relocating to a replacement facility?

[232] Celtic argues that it is entitled to $9,507,500 to replace Hangar 8: $7,900,000 to construct a new building, $1,327,500 in extras and $280,000 in office finishing. Celtic argues that this entitlement is supported by s. 42(2)(b). Further, Celtic points to multiple cases in which the relevant decision-maker included the cost of a replacement facility in its determination of disturbance damages.

[233] The City argues that Celtic's request for a replacement facility or financing is tantamount to a request for equivalent reinstatement, an approach to damages that is not supported by the legislation. The proper approach to damages is focused upon economic reinstatement and is the sum of the market value of the expropriated property, plus the costs and expenses incurred pursuant to s. 50 of the *Act*. On the contrary, equivalent reinstatement, achieved by awarding the value of the replacement property rather than the market value of the original, is reserved in the *Act* for two circumstances: the s. 47 "home for a home" principle and s. 46 special purpose properties that generally have no value on the market.

2018 ABLCB 8 (CanLII)

[234] For the reasons discussed below, regardless of whether the *Act* supports Celtic's proposed calculations, Celtic's request for damages for a replacement facility or financing for the same is inappropriate in the circumstances.

[235] To date, Celtic has not relocated; nor does it appear to the Panel that it is likely that Celtic will do so. This circumstance was contemplated by the Manitoba Court of Appeal in *Rebel Holdings Ltd. v. Division Scolaire Franco-Manitobaine*, where the Court stated,

> *While it would be unduly harsh in circumstances of necessity to restrict compensation only to costs that have been incurred, surely it must be shown on the balance of probabilities that those purported costs will indeed be incurred.*[32]

[236] Even if Celtic had satisfied its burden of proving that it would be relocating, the case law does not support Celtic's request for market value in addition to a replacement facility. The case law relied upon by Celtic indicates that, if the replacement remedy is available under the *Act*, the claimant is entitled to either the cost to replace Hangar 8 or its market value, not both.

[237] In *Houle v. Manitoba*,[33] the Commission awarded damages for the market value of the original dairy barn in addition to the barn's replacement cost. The Manitoba Court of Appeal found this to be a double recovery and reduced the award by the market value of the original barn:

> *If the respondents receive $128,800 (ie. the section 26(1)(a) award for market value of the old barn), as well as the cost of the new bard with an adjustment for betterment, there will be double recovery. In other words, it cannot be correct that the respondents would receive full payment for the old barn and payment for the cost of a new barn. In my view, the Commission's award must therefore be reduced by $128,800.*[34]

[238] In *Ciphery v. Alberta (Minister of Transportation)*,[35] the Board awarded the market value of the expropriated lands and the replacement cost of the apiary buildings that had been expropriated. The claimants were not awarded compensation for both the original and replacement apiary.[36]

[239] In *Bartle & Gibson Co. v. Edmonton (City)*,[37] the claimant sought compensation for the entire cost of a superior replacement property it had purchased. The Board rejected this claim and awarded disturbance damages based upon the value of a hypothetical warehouse replacement depreciated by 50%

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[32] *Rebel Holdings Ltd. v. Division Scolaire Franco-Manitobaine*, 2008 MBCA 65 at para 201 [*Rebel*].
[33] *Houle v. Manitoba* (2015), 115 LCR 77 (MLVAC).
[34] *Houle v. Manitoba*, 2016 MBCA 76 at para 70.
[35] *Ciphery v. Alberta (Minister of Transportation)* (2008), 95 LCR 280 (AB LCB) [*Ciphery*].
36 *Ibid*.
37 *Bartle & Gibson Co. v. Edmonton (City)* (1992), 47 LCR 158 (AB LCB) aff'd 1996 ABCA 42 [*Bartle & Gibson*].

to account for the age of the original expropriated property. The Board substituted the original market value with the replacement cost.[38]

[240] It also follows that, if Celtic had satisfied the Panel that it is appropriate to award disturbance damages for a replacement facility in the circumstances, similar to s. 46, Celtic would be entitled to the greater of market value or disturbance damages. In the circumstances, market value is higher. After considering all of the approaches to value, Hangar 8's market value has been determined to be $4,330,500. Celtic's request of $9,507,500 for a replacement building is based upon the same estimate relied upon in Mr. Maynard's cost approach calculation. Accordingly, the deductions should also be the same: $1,052,620 should be deducted for the concrete, $534,500 deducted for items duplicated in the Flynn Estimate and Maynard's list of 'extras' and $280,000 deducted for office finishing that also appears to be duplicated. If the 59% depreciation factor that the Panel found to be appropriate is applied – in keeping with *Bartle & Gibson* - Celtic's reinstatement claim is reduced to $3,132,556, which combines with the remainder of its market value claim – the leasehold advantage of $970,000 – to total $4,102,556.

2018 ABLCB 8 (CanLII)

[241] The evidence does not support Celtic's alternate proposal, the cost of financing a replacement facility. Again, the Panel is unconvinced that Celtic will be re-establishing its operations. Further, Mr. Menezes' evidence lacks the depth of analysis required to accurately assess Celtic's ability to obtain financing. Once Celtic failed to satisfy an initial liquidity test, Mr. Menezes' analysis ends. Key considerations are missed; for instance, the review is based upon Celtic's finances during non-operating years and fails to consider the possibility of personal guarantees, a common financing practice in commercial lending.

c. Is Celtic entitled to compensation for the equipment and materials sold? If so, what?

[242] Between receiving the Notice of Possession and its move from Hangar 8, Celtic sold off many large pieces of equipment and construction materials in private sales to various contacts for what appears to be steep discounts. The equipment included a truss system, an item of Bobcat equipment, and various trailers. Celtic also sold a door and jamb machine, a Spida computerized saw system, a forklift and many other smaller tools and supplies to Habitat for Humanity.

[243] Celtic argues that it should be awarded replacement cost for the items sold. Celtic submits that it was forced to sell the items quickly given the short period of time between the Notice of Expropriation and the original November 15, 2013, possession date – a period of just over three months. Storing these items would have required a significant investment of capital with no promise of return. It would be unreasonable to expect Celtic to store the equipment in hopes of compensation in the distant future.

[244] The City's relevant argument, given the Panel has determined that Celtic could have relocated, is that Celtic is not entitled to any loss because its failure to relocate made the equipment redundant. Further, Celtic has failed to prove that it has suffered a loss as a result of the sale. Finally, if a loss occurred, it was a result of Celtic's failure to mitigate, rather than the expropriation.

[245] Given the Panel's finding that Celtic does not intend to re-establish operations, it is inappropriate to award replacement cost.[39]

[246] The Panel is thus left to determine whether these damages were caused by the expropriation, the quantity of those damages and finally, whether Celtic could have mitigated its losses.

[247] The Panel accepts that the equipment had to be relocated from Hangar 8 because of the expropriation. Further, the Panel accepts that the relatively short time frame Celtic had to leave Hangar 8

38 *Ibid* at para 71.
39 *Rebel, supra* note 32.

limited Celtic's ability to conduct a complete analysis of its options regarding disposal or relocation of the equipment.

[248] The evidence quantifying this claim is scant. Celtic did not provide evidence respecting the value of the old equipment. Mr. Whelehan estimated the equipment was sold at a 40% loss. There are also problems with the replacement quotes: Celtic's claim for the largest piece of equipment, the truss system, is based upon a hand-written figure that fails to match the numbers on the estimate it is written upon. Further, it is unclear in many of the quotes that the replacement equipment is the same as the equipment sold.

[249] According to the only evidence available, the materials and equipment were sold at 40% below market value, resulting in a loss of $442,060.

[250] The Panel is satisfied that Celtic failed to mitigate the losses incurred. While the short time frame precluded an exhaustive search of alternatives, it did not prevent a reasonable one. Celtic failed to adequately explore the possibility of storage, instead opting to sell the equipment in informal sales. Hundreds of thousands of dollars' worth of equipment were sold without a valuation, a professional opinion or even an advertisement. The Panel is satisfied that the damages would have been less had Celtic taken these reasonable steps to mitigate its losses.

[251] Accordingly, the Panel finds that half of the loss incurred, $221,030, is directly attributable to Celtic's failure to take reasonable steps to mitigate its losses when dealing with the materials and equipment. The remaining $221,030 loss Celtic suffered as a result of the expropriation process.

d. Is Celtic entitled to compensation for the TMS Units? If so, what?

[252] In 2011, Celtic agreed to construct 25 units for Total Modular Solutions Ltd. ("TMS") for $1,646,800. Throughout 2012 Celtic built the 25 units, however, TMS suffered financial issues and only paid for 15 of the units. Celtic stored the remaining 10 units on site.

[253] In late 2012, Celtic quoted the remaining 10 units to Heritage Hotel for $698,000. Celtic learned by mid-2013 that Heritage Hotel would not purchase the TMS Units because its main contract with Imperial Oil was not renewed.

[254] On November 19, 2013, Celtic sold the TMS Units to Innovative Building Systems ("Innovative") for $205,000. After taking possession of the TMS Units, Innovative went bankrupt. Innovative only paid $115,000.

[255] Celtic is claiming $635,000 for the loss it suffered in the sale of the TMS Units – the difference between what it would have received from Heritage Hotel (plus $50,000 in shipping costs) less the amount it actually received from Innovative. Celtic argues that but for the expropriation, it could have waited for an appropriate buyer and obtained market value.

[256] The City submits that the expropriation did not cause Celtic's loss, rather the loss was caused by TMS's failure to complete the contract. Alternatively, Celtic failed to mitigate its losses by unreasonably continuing to improve the units for Heritage Hotel; without a contract, and then selling the units to Innovative Building Systems, a transaction involving the same salesperson as had brokered the failed TMS contract. Further, the City submits that the value of the TMS Units is overstated.

[257] The Panel is left to determine what damages were caused by the expropriation and whether Celtic could have mitigated its losses.

[258] Again, the Panel accepts that the TMS Units had to be dealt with in a short period of time as a

2018 ABLCB 8 (CanLII)

result of the expropriation. This limited Celtic's ability to deal with the TMS Units, and should also be a factor when considering whether Celtic's actions were reasonable.

[259] The Panel is not convinced that the damages Celtic is claiming were caused by the expropriation. The Panel accepts that while Celtic was faced with a short time frame in which to deal with the TMS Units, this did not necessitate selling the TMS Units at a value nearly $500,000 below market value to a purchaser with a questionable reputation. Celtic did not realistically consider storage. Unlike most of the equipment and materials discussed above, the TMS Units were being stored outside. Mr. Maynard estimated that secure outdoor storage for some of Celtic's trucks and trailers would cost $2,000 per month.[40] It took Celtic just under three months after TMS breached its contract to begin working with Heritage Hotel; the Panel finds it likely that the TMS Units would not have required storage for long. Storage costs would have been significantly less than the $635,000 Celtic claims as a loss.

[260] The Panel finds that had Celtic acted reasonable, and opted for outdoor storage rather than the sale, Celtic would have incurred $24,000 in losses, based upon a year's worth of outdoor storage costs incurred while Celtic found a buyer. Accordingly, Celtic is entitled to $24,000; the remainder of Celtic's claim is as a result if its failure to reasonably mitigate damages, not the expropriation.

[261] The City expressed concern that the TMS Unit losses have been incorporated into Celtic's business loss claim. The Panel notes that the City failed to demonstrate the inclusion of the TMS Units in the business loss calculations. Regardless, if the TMS Units were incorporated, their impact would be minor and no adjustment is warranted.

e. Is Celtic entitled to compensation for executive time?

[262] In some circumstances, the time that a claimant's executives spend dealing with an expropriation is compensable as a disturbance damage - an "expense naturally and reasonably arising out of the taking."[41] The rationale underlying this claim is that time executives spend dealing with the expropriation is time spent away from the business and consequently, a loss. This claim for disturbance damages is pursuant to s. 50, and is distinguished from the costs provisions contained in s. 39 of the *Act*, which entitles an owner to "the reasonable legal, appraisal and other costs actually incurred by the owner for the purpose of determining the compensation payable."

[263] In making its claim, Celtic relies upon *Bartle & Gibson,* where the Court of Appeal awarded disturbance damages for time spent by an officer of the corporation. This claim would not have been compensable pursuant to s. 39 of the *Act* because the claimant did not actually incur any additional costs; the officer dealing with the expropriation was paid the salary he would have received regardless of the expropriation.

[264] Celtic is claiming $100,000 for executive time spent upon the expropriation. This calculation is based upon $100 per hour for Mr. Whelehan (his employees make approximately $50 per hour) for the time he spent moving Celtic out of Hangar 8, and time afterwards. Mr. Whelehan asserts that when Celtic was moving out of Hangar 8, 85% of his time related to the expropriation. Since then, he estimates an average of 15-20 hours per week spent dealing with the expropriation. Mr. McGeown estimates that he has spent 15 hours per week over the past 3.5 years dealing with the expropriation. Celtic submits that, since Mr. Whelehan and Mr. McGeown have actually spent over $500,000 in time dealing with the expropriation, its claim for $100,000 is reasonable.

[265] In addition to leaving Hangar 8, a portion of Celtic's executive time claim relates to the time incurred in this action. Mr. Whelehan and Mr. McGeown spent nine days in questioning, and answered

[40] Transcript, Vol 7, at 763: lines 24-26 and at 764: lines 1-4 and Maynard's Report, Exhibit 9, Tab 46, at 58.
[41] *Bartle & Gibson*, *supra* note 37 at para 14.

2018 ABLCB 8 (CanLII)

180 undertakings. The hearing itself spanned 15 days.

[266] The City argues that Celtic is overstating the executive time incurred; in order to be compensable, it must be proven that Celtic is out of pocket. In support, the City relies upon *Shell Canada Ltd. v. Alberta (Minister of Transportation & Utilities)*,[42] and *Ravvin Holdings Ltd. v. Calgary (City).*[43] In both of those cases costs claims for executive time under s. 39 were denied on the basis that the claimant was not actually out of pocket. In *Shell*, the Board awarded executive time pursuant to s. 50 of the *Act*, an item that was not at issue between the parties to the case.

[267] The City also argues that Celtic is not entitled to executive time for hearing preparation. In support, the City relies upon *Park Projects Ltd. v. City of Halifax*.[44] In that case, the Nova Scotia Supreme Court, Appeal Division interpreted Nova Scotia's *Expropriations Act* costs provision (s. 52), particularly the phrase "other costs."

[268] If the Panel finds that Celtic is entitled to some executive compensation, the City submits that the amount should be closer to $15,000, based upon 150 hours for each of Mr. Whelehan and Mr. McGeown at $50 per hour.

[269] The Panel finds that $54,000 in compensation for executive time is appropriate in the circumstances, being 540 hours at $100 per hour.

[270] Given that many of Celtic's employees make approximately $50 per hour, it appears reasonable that Celtic's costs relating to Mr. Whelehan and Mr. McGeown be at a higher rate of $100 per hour.

[271] Most of Mr. Whelehan and Mr. McGeown's time dealing with the expropriation is prior to Celtic's move from Hangar 8. Celtic was a sizeable manufacturing operation; leaving Hangar 8 would have been a large and complex undertaking. It appears appropriate that Celtic's principals spent ¼ of their time during the nine-week period between the Notice of Possession and the Proposed Payment (August 6 to October 11, 2013) and ½ their time in the final nine weeks Celtic had possession of Hangar 8 (October 11 to December 15, 2013). Based upon 8-hour work days, this results in 540 hours spent upon the expropriation.

[272] The Panel is not satisfied that Celtic's claim for executive time spent after moving from Hangar 8 is compensable. Celtic was not operating its manufacturing business; disturbance damages for executive time is intended to address time that would have otherwise been spent with the business.

[273] In the circumstances, the Panel does not have to determine whether costs to participate in a compensation hearing are proper disturbance damages under the *Act*. Even if Celtic could claim disturbance damages for its contribution to the Board hearing, Celtic Land Development Corp. and Celtic Homes Inc. are the Claimants, and, since the manufacturing business was not operating, did not suffer a loss as a result of Mr. McGeown or Mr. Whelehan participating in the hearing.

[274] Furthermore, beyond the 187.5 hours documented in searching for a replacement facility, their time is not documented. The lack of results is also an indication that less time was spent than claimed.

[275] The Panel accepts that 540 hours of executive time, at $100 per hour, is compensable, for a total of $54,000.

[42] *Shell Canada Ltd. v. Alberta (Minister of Transportation & Utilities)* (1991), 46 LCR 133 (AB LCB) [*Shell*].
[43] *Ravvin Holdings Ltd. v. Calgary (City)* (1990), 44 LCR 198 (AB LCB) at para 74.
[44] *Park Projects Ltd. v. Halifax (City)* (1982), 25 LCR 193 (NSSC) at para 33 [*Park Projects*].

2018 ABLCB 8 (CanLII)

SUMMARY

[276] Given the interrelatedness of Celtic Land Development Corp. and Celtic Homes Inc., Celtic's counsel submitted that the compensation award could be combined. Alternatively, Celtic submitted that any market value award be made to Celtic Land Development Corp. and any remaining damage award be made to Celtic Homes Inc. The City was in agreement with this alternative should the Panel find additional compensation payable.

[277] Accordingly, the Panel finds that Celtic Land Development Corp., Lessee of Hangar 8, is entitled to:

• Market value of Hangar 8	$4,330,500
• Less the Proposed Payment	$2,880,000
• **Total Payable to Celtic Land Development Corp.**	**$1,450,500**

[278] Celtic Homes Inc., the business operating out of Hangar 8, is entitled to:

• Damages for a replacement facility/cost of capital	$0
• Damages for equipment and material sold	$221,030
• Damages for TMS Units	$24,000
• Damages for pre-expropriation business losses	$977,651
• Damages for post-expropriation business losses	$686,000
• Damages for executive time	$54,000
• **Total Payable to Celtic Homes Inc.**	**$1,962,681**

[279] Leave is granted to apply to the Board for a determination of interest pursuant to Section 66 of the *Act* and costs pursuant to Section 39 of the *Act*, if an agreement cannot be reached between the parties.

LAND COMPENSATION BOARD

E. Gordon Chapman, Presiding Member

Janice Kowch, Member

2018 ABLCB 8 (CanLII)

APPENDIX A

***Interpretation Act*, R.S.A. 2000, c. I-8**

> 20(7) *Unless otherwise expressed in an enactment, if*
>
> > (a) *a person who is appointed by or under the authority of an enactment to an office is engaged in an investigation, a hearing, a review, an appeal or a similar undertaking or in carrying out some other duty or function provided for under an enactment, and*
> >
> > (b) *that appointment expires or otherwise ends before that person concludes the investigation, hearing, review, appeal or undertaking or the carrying out of the duty or function,*
>
> *that person, unless otherwise directed by the person who has the authority to make the appointment referred to in clause (a) or the Minister responsible for the enactment under which the appointment was made, remains empowered to conclude that investigation, hearing, review, appeal or undertaking or the carrying out of that duty or function, including the making of any recommendation, report, determination or other conclusion that forms a part of that investigation, hearing, review, appeal, undertaking, duty or function.*

***Alberta Rules of Court*, Alta. Reg. 124/2010**

> 5.31(1) *Subject to rule 5.29, a party may use in support of an application or proceeding or at trial as against a party adverse in interest any of the evidence of that other party in a transcript of questioning under rule 5.17 or 5.18 and any of the evidence in the answers of that other party to written questions under rule 5.28.*
>
> (2) *Evidence referred to in subrule (1) is evidence only of the questioning party who uses the transcript evidence or the answers to the written questions, and is evidence only against the party who was questioned.*
>
> (3) *If only a portion of a transcript or a portion of the answers to the written questions is used, the Court may, on application, direct that all or each other portion of the transcript or answers also be used if all or any other portion is so connected with the portion used that it would or might be misleading not to use all or any other portion of the transcript or other answers.*

***Expropriation Act*, R.S.A. 2000, c. E-13**

> 39(1) *The reasonable legal, appraisal and other costs actually incurred by the owner for the purpose of determining the compensation payable shall be paid by the expropriating authority, unless the Board determines that special circumstances exist to justify the reduction or denial of costs.*

2018 ABLCB 8 (CanLII)

41 *The market value of land expropriated is the amount the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.*

42(1) *When land is expropriated, the expropriating authority shall pay the owner the compensation as is determined in accordance with this Act.*

(2) *When land is expropriated, the compensation payable to the owner must be based on*

(a) *the market value of the land,*

(b) *the damages attributable to disturbance,*

(c) *the value to the owner of any element of special economic advantage to the owner arising out of or incidental to the owner's occupation of the land to the extent that no other provision is made for its inclusion, and*

(d) *damages for injurious affection.*

50 *The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs and expenses as are the natural and reasonable consequences of the expropriation, including,*

(a) *when the premises taken include the owner's residence,*

(i) *an allowance of*

(A) *5% of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes, or*

(B) *the actual amount proved with respect to those items,*

whichever is the greater, to compensate for inconvenience and the costs of finding another residence, if the part of the land so used was not being offered for sale on the date of the expropriation, and

(ii) *a reasonable allowance for improvements, the value of which is not reflected in the market value of the land;*

(b) *when the premises taken do not include the owner's residence, the owner's costs of finding premises to replace those expropriated, if the lands were not being offered for sale on the date of the expropriation;*

(c) *relocation costs, to the extent that they are not covered in clause (a) or (b), including*

(i) *moving costs, and*

2018 ABLCB 8 (CanLII)

(ii) *legal and survey costs and other non-recoverable expenditures incurred in acquiring other premises.*

51(1) *The expropriating authority shall pay to a tenant occupying expropriated land, in respect of disturbance, so much of the cost referred to in section 50 as is appropriate having regard to*

(a) *the length of the term,*

(b) *the portion of the term remaining,*

(c) *any rights to renew the tenancy or the reasonable prospects of renewal,*

(d) *in the case of a business, the nature of the business, and*

(e) *the extent of the tenant's investment in the land.*

(2) *The tenant's right to compensation under this section is not affected by the premature determination of the lease as a result of the expropriation.*

53 *When a business is located on the land expropriated, the expropriating authority shall pay compensation for business loss resulting from the relocation of the business because of the expropriation and the Board may defer determination of the business losses until the business has moved and been in operation for 6 months or until a 3-year period has elapsed, whichever occurs first.*

54 *The Board may, on the application of the expropriating authority or an owner, include in determining compensation an amount not exceeding the value of the good will of a business when the land is valued on the basis of its existing use and, in the opinion of the Board, it is not feasible for the owner to relocate.*

2018 ABLCB 8 (CanLII)