ALBERTA LAND COMPENSATION BOARD

Citation: E-Z Air Inc. and E-Z Air Helicopter Training Inc. v Edmonton (City), 2018 ABLCB 7

Date: 2018-06-21
File No. DC2014.0034
Order No. 551

In the matter of the *Expropriation Act*, RSA 2000, Chapter E-13 (the "*Act*")

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

BETWEEN:

E-Z Air Inc. and E-Z Air Helicopter Training Inc.

Claimants

- and -

The City of Edmonton

Respondent

BEFORE: E. Gordon Chapman, Presiding Member
Shannon Boyer
Donald A. Sibbald, Q.C.
(the "Panel")

APPEARANCES:

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

For the Respondent: Debi L. Piecowye
Cara L. Patterson

HEARING: Held in Edmonton, Alberta on March 27, 28, 29, 30, 31 and April 3, 4, 5, 7 and 13, 2017.

WRITTEN BRIEFS: Respondent – July 4, 2017
Claimants – July 18, 2017

ORDER

Introduction

[1] The Claimants applied for a determination of compensation arising from an expropriation by the Respondent ("City") of lands located at the Edmonton City Centre Airport ("Airport").

[2] The Claimants seek compensation for the market value of a sublease and license as well as disturbance damages for losses claimed to have arisen from the sale of a helicopter, the sale of helicopter equipment, the acquisition of a helicopter simulator, executive time and business losses allegedly caused by the expropriation process leading up to the expropriation and the expropriation itself.

[3] The Panel heard testimony under oath or affirmation from the following witnesses:

- For the Claimants – Ezra Bavly, Dror Bavly[1], Paul Lane, Chris McEwen, Dallas Maynard and Crystal Hawryluk; and
- For the City – Mark Hall, Brian Gettel and Theresa Reichert.

[4] Counsel for the parties provided oral closing argument which was supplemented by written submissions on the application of s. 43 of the *Act*. The last of those submissions was received by the Board on July 18, 2017.

[5] The parties jointly requested the Panel reserve the determination of the interest payable under s. 66 of the *Act* and the costs payable under s. 39 of the *Act*.

After the Hearing

[6] In accordance with s. 20 of the *Interpretation Act*, Member Chapman continued to adjudicate this matter notwithstanding his appointment expired November 30, 2017.

General Chronology of Events

[7] By lease dated March 25, 1996, the City leased the lands known as the Airport lands to Edmonton Regional Airport Authority ("ERAA").

[8] Hamilton Aviation Ltd. ("Hamilton") leased a portion of the Airport lands (which included Building 19 and Hangar 20) from ERAA under a lease dated January 20, 1986, which was renewed under an agreement dated May 10, 1989, and amended by an agreement dated September 1, 2000 ("Head Lease"). The Head Lease term was to expire May 31, 2024.

[9] Hamilton subleased a portion of Building 19 to the Claimant E-Z Air Inc. under a sublease dated February 2008 ("E-Z Air Sublease").

[10] Hamilton subleased Hangar 20 to McEwen's Aviation Services Inc. ("McEwen's") under a sublease dated May 1, 2002. McEwen's granted a Hangar Space and Ramp Parking License dated June 1, 2012, to E-Z Air Inc. which was amended by agreement dated November 1, 2012 ("License").

[11] The Certificate of Approval was registered on title on July 25, 2013.

[12] At the time of the expropriation, the Claimants carried on business at the Airport in Building 19

[1] Dror Bavly's testimony was provided by way of audio/video conference since he resided in Israel at the time of the hearing.

and Hangar 20. As discussed in greater detail below, the business included a helicopter training school, helicopter maintenance and helicopter charter service.

[13] The Claimants gave up possession at the Airport in November 2013 and, following a dormant period, relocated to the Parkland Airport in early 2014.

Issues

1. What compensation is payable for the market value, if any, of the E-Z Air Sublease and the License?

    a. Is compensation payable under s. 42 of the *Act*?
        i. Is the License compensable under the *Act?*
        ii. What is the market value of the E-Z Air Sublease and License under s. 42 of the *Act*?
    b. Is compensation payable under s. 43 of the *Act*?
        i. What is the purpose and intent of s. 43?
        ii. What, if any, compensation is payable pursuant to s. 43?

2. What compensation is payable for disturbance damages?

    a. Should an adverse inference be drawn against the Claimants for not calling Matthew Wecker as a witness?
    b. What, if any, damages are payable from the sale of the Bell Jet Ranger helicopter?
    c. What, if any, damages are payable from sale of the helicopter equipment?
    d. What, if any, damages are payable from the acquisition of the helicopter simulator?
    e. What, if any, damages are payable for executive time?
    f. What, if any, damages are payable for business losses?
        i. Should the business losses be determined using the three or five-year pre-expropriation average financial data?
        ii. What is the appropriate loss period?
        iii. Should 2011 maintenance, parts and tool expenses incurred by E-Z Air Helicopter Training Inc. be normalized?
        iv. Should normalized or actual rates of remuneration be utilized for the business owners?
        v. Should an average salary be attributed to Mr. Wecker?
        vi. Should there be a deduction for losses caused by events other than the expropriation?

3. What, if any, interest and costs are payable?

Findings and Analysis

I Overview

[14] The Board's authority to determine the compensation payable is found in the *Act*. For ease of reference, ss. 41, 42, 43, 45, 50, 51 and 53 are set out in Appendix A to the Order.

[15] In determining the compensation payable, the Panel is guided by the Court of Appeal's direction in *Thoreson v. Alberta (Minister of Alberta Infrastructure)* that: "the exercise is intended to provide full and fair compensation to a landowner whose private interests in land are being taken by government to serve the public interest."[2]

[2] 2006 ABCA 250 at para. 10.

[16] The governing principle is that the "statute should be read in a broad and purposive manner in order to comply with the aim 'to fully compensate a land owner whose property has been taken.'"[3]

[17] *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*[4] ("*Dell Holdings*") established that the expropriation which causes the damages is not limited to the actual taking of the land in question but rather relates to the expropriation process. The Court said:

> *37 The courts have long determined that the actual act of expropriation of any property is part of a continuing process. In McAnulty Realty, supra, at p. 283, Duff J. noted that the term "expropriation" is not used in the restrictive sense of signifying merely the transfer of title but in the sense of the process of taking the property for the purpose for which it is required. Thus whether the events that affected the value of the expropriated land were part of the expropriation process, or, in other words, a step in the acquisition of the lands, is a significant factor for consideration in many expropriation cases. See Tener, supra, at pp. 557-59. Here there can be no doubt that Dell's land would have come on stream for sale as developed lands in 1981 rather than 1984 but for the process of expropriation. Damages should therefore be awarded for the losses occasioned as a result of the process of expropriation.*
>
> …
>
> *38 … The 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. …*

[18] The Court in *Dell Holdings* expressed "complete agreement"[5] with the reasoning in *Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*[6] ("*Shun Fung*") awarding compensation for damages which occur before the actual date of expropriation. As stated in *Shun Fung*:

> *Coming events may cast their shadows before them, and resumption is such an event. A compensation line drawn at the place submitted by the Crown would be highly artificial, for it would have no relation to what actually happens. That cannot be a proper basis for assessing compensation for loss which is in fact sustained.*[7]
>
> …
>
> *… losses incurred in anticipation of resumption and because of the threat which resumption presented are to be regarded as losses caused by the resumption as much as losses arising after resumption. This involves giving the concept of causal connection an extended meaning, wide enough to embrace all such losses. To qualify for compensation a loss suffered post-resumption must satisfy the three conditions of being causally connected, not too remote, and not a loss which a reasonable person would have avoided. A loss sustained post-scheme and pre-resumption will not fail for lack of causal connection by reason only that the loss arose before*

[3] *Ibid*, at para. 12.
[4] [1997] 1 S.C.R. 32.
[5] *Supra*, at para. 45.
[6] [1995] 2 A.C. 111 (H.L.).
[7] *Dell Holdings, supra* note 4 at para. 43 and 44, quoting from *Shun Fung*. The Panel notes "resumption" is the same concept as expropriation.

> *resumption, provided it arose in anticipation of resumption and because of the threat which resumption presented.*

[19] As noted above, *"[t]he approach to damages flowing from expropriation should not be a temporal one; rather it should be based upon causation.*[8] When considering the pre-expropriation claims, the date when the shadow period may have started is not the question. Rather the question is whether a claimed loss was caused by the shadow cast by the expropriation process which led up to the expropriation.

[20] To determine whether any of the claimed losses which occurred before the registration of the Certificate of Approval in July 2013 were caused by the expropriation process, consideration must first be given to the factual background.

II The Facts

[21] An understanding of the chronology of events is important.

[22] Ezra and Dror Bavly immigrated to Canada from Israel in the early 1990's. They both served in the Israeli armed forces, Ezra as a helicopter pilot and Dror as a helicopter mechanic. After working for other companies, they started their own business in 1994 operating out of Building 38 at the Airport. E-Z Air Helicopter Training Inc. ("E-Z Helicopter") and E-Z Air Inc. ("E-Z Air") were separately incorporated since the former was GST exempt as an educational operation. Ezra and Dror Bavly were the sole shareholders of both corporations.

[23] Ezra Bavly was the Transport Canada designated Chief Pilot and Director of Operations. Dror Bavly was the Transport Canada designated Director of Maintenance.

[24] The Airport was located in close proximity to downtown Edmonton. Until 1996 scheduled air service was provided utilizing two runways. Following a city wide referendum on the future of the Airport that year, scheduled air service ended.

[25] Following the closure of one of the runways, non-aviation users became more common at the Airport. Building 38, from which the Claimants had been operating, was sold to a plastic manufacturing company. The Bavlys were concerned about the safety of carrying on the helicopter business in close proximity to flammable liquids so they moved operations to Building 19 and Hangar 20 in 2000.

[26] Edmonton City Council passed a motion on July 8, 2009, which approved the phased closure of the Airport. As part of that process, steps were taken to close one of the runways in August 2010 and ERAA surrendered portions of the lands that were subject to its lease with the City. Steps were to be undertaken to "…work with users to develop a suitable business plan to operate the [Airport] as a going concern until final closure date is determined…."[9] City Administration was also directed to develop a communications strategy to inform public audiences …"about the impact of this decision, timelines, milestones, land development and transit impacts…"

[27] There is no direct evidence that the Bavlys were aware of Council's motion.

[28] Under the July 8, 2009, motion, Council directed the City Manager to take steps to permit the City of Edmonton to develop the Airport into mixed-use development, and to immediately begin setting out the long term vision, community consultations and international design competition. The competition resulted in the City retaining experts who provided a report dated January 2012, which was adopted by Council on

[8] *Dell Holdings*, *supra* note 4 at para 38.
[9] Exhibit 5 at Tab 45.

May 16, 2012, as the City Centre Area Redevelopment Plan ("the ARP"). Under the ARP, Building 19 and Hangar 20 are within the 'Agrihood District', which includes medium- and high-density residential development.

[29] On June 21, 2012, Paul Lane of Hamilton told Ezra Bavly that Hamilton would not extend the E-Z Air Sublease, which was due to expire on March 31, 2013. Mr. Lane explained that he had "found" that the City planned to close the Airport as soon as the end of 2012 and that Hamilton's lawyer had advised against extending the E-Z Air Sublease.[10]

[30] Mr. Lane testified:

> *We -- we enjoyed operations with them. They were essential to what we did, quite frankly, in terms of fuel services, et cetera. So yeah, we had good business relations with them. We have would have [sic] kept them for a tenant -- as a tenant as long as they were willing to.*[11]

[31] The term of the License was to expire on May 30, 2017. Christopher McEwen testified that McEwen's intended to rent the hangar from Hamilton "*as long as they were available to us*."[12] He also testified that but for the expropriation, the relationship with E-Z Air would have "*continued indefinitely, long term*."[13]

[32] By letter dated September 4, 2012, E-Z Air was advised that a report would be presented to the Executive Committee of City Council at a meeting on September 19, 2012. In the report administration was recommending that the Executive Committee recommend that City Council approve "expropriation of the various interests … required to carry out and fulfill the ARP."

[33] Following City Council approval, E-Z Air and a number of other parties were served with a Notice of Intention to Expropriate dated October 5, 2012. That Notice was registered on title on the same date.

[34] Notices of Objection were filed. As a result of being unable to complete the inquiry process within the time required under s. 15 of the *Act*, the City issued and served a Notice of Abandonment dated February 27, 2013, but recommenced the process by issuing and serving a second Notice of Intention to Expropriate dated February 27, 2013. That Notice was registered on title on February 28, 2013.

[35] Following receipt of the inquiry officer's report, the City issued a Certificate of Approval dated July 18, 2013, which was registered at Land Titles Office on July 25, 2013. The City issued a Notice of Expropriation and a Notice of Possession (requiring possession on November 15, 2013) on August 6, 2013.

[36] The City's Notice of Proposed Payment for $0.00 was dated October 14, 2013.

The Claims

[37] The Claimants submit that there was so much uncertainty about the future operations at the Airport by 2011 that Ezra and Dror Bavly developed what they referred to as a 'survival mode type of plan'. The stated purpose of the plan was to reduce operating expenses and generate sufficient cash to carry on operations. The key components of that 'plan' were for Dror Bavly to be replaced and to sell a Bell Jet

[10] Exhibit 6 at Tab 12.
[11] Transcript page 327, lines 3 – 8.
[12] Transcript at page 777, lines 13 – 15.
[13] Transcript at page 778, line 8.

Ranger helicopter ("Jet Ranger") and some associated equipment.

[38] Ezra Bavly, however, also testified that even if the expropriation did not occur, the long range plan was for him to reduce his active role in the operations and *"mainly step back and, again, I don't know if you call it retire, but it's kind of half active retirement or whatever. If later on in the future there will be, you know, some other opportunities for the business, we'll look at it at that point, but that was the main goal for both myself and my brother*."[14]

[39] Dror Bavly looked for alternate employment and moved back to Israel in November 2012 to work as an inspector. Before his departure, Andrew Wells was hired to replace him. After a transition period of about eight months, during which Dror travelled back and forth to Edmonton from Israel, Mr. Wells took over as Director of Maintenance.

[40] In his testimony Dror Bavly stated:

> *Okay. This company that was established in 1994, and we are working hard for it to be successful company was supposed to be -- at the end supposed to be our retirement income. And then what happened is we got to a point where we saw that the outcome of this expropriation leads us to -- not to where we were supposed to be.*[15]

[41] The Jet Ranger was sold in September 2012. Some of the associated equipment was sold in October 2012 and the rest in April 2013. As discussed below, the Claimants assert that these sales, and their losses, were caused by the expropriation process.

[42] In October 2013, E-Z Helicopter agreed to lease hangar space at Bon Accord where the remaining helicopter was stored. The Claimants ceased operation at the Airport and vacated the premises in November 2013.

[43] By an agreement effective December 31, 2013, the Bavlys sold 90 percent of the shares in E-Z Air and E-Z Helicopter to Lonestar Aviation Ltd. ("Lonestar"). Lonestar was controlled by Mathew Wecker ("Wecker"), a former student of E-Z Helicopter.

[44] Wecker took over Ezra Bavly's role as Operations Manager. James Pantel, who had been employed as a flight instructor for some time, became E-Z Air's main flight instructor and assumed increasing responsibility in that role from Ezra Bavly. Mr. Pantel was also a former student.

[45] In late 2013, Wecker learned that a new airport was opening at Parkland Alberta, approximately a 30-minute drive from Edmonton. The Claimants' business was re-established at that location, initially operating out of temporary facilities, including an ATCO trailer, starting in March 2014. It moved into a newly constructed hangar in the fall of 2014.

[46] Ezra Bavly had a decreasing role in the operations and left full-time employment in June 2014 by which time Mr. Pantel had become the Chief Pilot and Wecker was Director of Operations.

[47] By the end of 2014, the business had returned to the point that no claim is advanced for business loss for any time thereafter.

[14] Transcript at page 83, lines 1-8.
[15] Transcript at page 161, lines 12-18.

III Qualification of Appraisal Experts

[48] Dallas Maynard ("Maynard") is an appraiser who testified on behalf of the Claimants. He was tendered as an expert in property appraisal and in the assessment of disturbance damages.

[49] The City did not take issue with him being qualified as an expert on market value but objected to his qualification as an expert on disturbance damages.

[50] Maynard is a certified appraiser with many years of experience. He worked for several years for the Province of Manitoba valuing and acquiring land, largely for highway development. This included being involved in assessing and negotiating 400 to 500 cases involving disturbance damages, most of which were with respect to impacts on farm land.

[51] Since 1991, he has operated his own appraisal firm, the primary role of which is doing land negotiations for provincial and municipal governments and commissions. Much of that work relates to partial takings for highways, including disturbance damages.

[52] He has testified before the Board, the Metis Settlement Appeal Tribunal, the Alberta Court of Queen's Bench and the Ontario Superior Court.

[53] Maynard has been a pilot for over 40 years. He has undertaken valuations of airport properties for Transport Canada.

[54] Although his report addresses a number of matters, the only two areas of disturbance damages he identifies are claims for a replacement flight training simulator and the time spent by the Bavlys on the relocation of the business. Regarding the former, he was not going to opine on the value of the replacement, but provide an explanation of the approval process. Regarding the latter, his testimony would be limited to providing an estimate, based on his experience, of the amount of time that would be expected to be expended and the rate at which it would be paid.

[55] The Panel accepted Maynard as an expert in appraisal of land value, but not in assessment of disturbance damages. The Panel was not persuaded that expertise was required to speak to the matters which Maynard was going to address and thus found no need to qualify him as an expert in the assessment of disturbance damages. The Panel also took into consideration that under s. 28(6)(b) the Board "is not bound by the rules of law concerning evidence".

[56] He was permitted to provide his testimony on the assessment of disturbance damages, but the Panel would consider his background when weighing the reliability of same. In doing so, the Panel was aware that the Bavlys had provided summaries of the time they claimed was spent on expropriation matters, which was not available when Maynard prepared his report. He acknowledged that the actual data was more reliable than his estimate.

[57] The City tendered Brian Gettel ("Gettel") as an appraiser with expertise in land valuation. Gettel testified that he has been an expert witness before various boards well over 200 times.

[58] The Claimants did not object and the Panel accepted his qualifications as proposed.

IV The Issues

1. What compensation is payable for the market value, if any, of the E-Z Air Sublease and the License?

a. Is compensation payable under s. 42 of the *Act*?

i. Is the License compensable under the *Act?*

[59] The parties disagree whether the License is compensable under the *Act*.

[60] The Claimants argue that the License is compensable because the *Act* contemplates an expropriating authority expropriating a lesser interest (s. 3) and that, in the words of the Manitoba Court of Appeal, "*Unless the Legislature uses explicit language to deny compensation, I think it should be held that they are entitled to receive compensation.*"[16]

[61] The City acknowledges that the License makes E-Z Air an 'owner' under the *Act*, but argues that the *Act* specifically precludes licensees from compensation. S. 42 does not support market value compensation to Licensees because it is limited to "land", defined in these circumstances as being 'any estate or interest in land' (s.1(h)). Further, the expropriation of the License is not recoverable as a disturbance damage as ss. 50 and 51 specifically contemplate compensation to a 'tenant' not a 'licensee'.

[62] The Panel is not convinced that the *Act* precludes compensation to licensees. S. 3 states that an expropriating authority can "*acquire any lesser interest by way of profit, easement, right, privilege or benefit in, over or derived from the land.*" Further, the term 'owner' encompasses those in possession of the land (s. 1(k)(iii)). S. 42 of the *Act* permits compensation payable to an 'owner' when land is expropriated, and claims for disturbance damages are not limited to those contained in ss. 50 and 51.

ii What is the market value of the E-Z Air Sublease and License under s. 42 of the *Act*?

[63] Both appraisers testified that applying the willing buyer and willing purchaser approach under s.41 results in a conclusion that there is no market value in the E-Z Air Sublease and License, above what the Claimants were paying. Even though the evidence indicated that the Sublease would have been renewed but for the expropriation, that renewal would have been at a market rental rate, and thus had no market value.

[64] Both appraisers agreed that the proper method to determine market value in the case of a leasehold interest is the difference between the rent payable under the lease and the market or economic rent.

[65] The Panel accepts that, but for the expropriation, the Claimants would have renewed the E-Z Air Sublease. That finding is based on the evidence of the Bavlys, McEwen and Lane as set out above.

[66] There is, however, no evidence to suggest that, but for the expropriation, the rent payable on renewal of the E-Z Air Sublease would not have been market rent. As stated in *The Law of Expropriation and Compensation in Canada ("Todd")*:

> *A right to renew will not add to the market value of the outstanding term if the rent upon renewal is to be agreed upon by the parties or by*

[16] *Progressive Developments (1978) Ltd. v. Winnipeg (City)*, 1982 CanLII 2978 (MB CA)

> *arbitration. In such a case, it must be assumed that the renewal terms will be at the full economic rent.*[17]

[67] Further, the Panel finds that there is no residual value in the E-Z Air Sublease as it had expired and the Claimants were in an over holding position. Thus, there was no value in the month-to-month lease as it could not be transferred to a third party.

[68] With respect to the License, the Panel is satisfied that it has no market value in the circumstances. Gettel testified that due to the 60-day termination clause, a willing buyer would not pay anything for the balance of the License, thus there is no compensable loss of rental advantage. Maynard testified that the License did not have market value above its face value. The Panel also considered the terms of the License in determining that it had no value: in addition to the 60-day cancellation, the License was non-transferable, required E-Z Air to purchase fuel from McEwan's, had no set location, and was specifically limited to E-Z Air's helicopters.

[69] Accordingly, the E-Z Air Sublease and License have no compensable value under ss. 41 and 42 of the *Act*.

b. Is compensation payable under s. 43 of the *Act*?

[70] The parties provided written submissions after the hearing regarding the purpose, intent and application of s. 43 of the *Act*.

[71] The Claimants argue that the E-Z Air Sublease and License are compensable under s. 43 of the *Act.* S. 43 applies when an owner is forced to give up possession of the expropriated lands:

> *If the owner of the land that is being or was expropriated is or was in occupation and as a result of the expropriation it is or was necessary for the owner to give up occupation of the land, the value of the land is the greater of*
>
> *a) the market value of the land determined as set out in section 41, or*
>
> *b) the aggregate of*
>
> *i) the market value of the land determined on the basis that the use to which the expropriated land was being put at the time of its taking was its highest and best use, and*
>
> *ii) damages for disturbance.*

[72] The City argues that s. 43 does not apply in the circumstances, and therefore, no compensation is payable for the market value of the Sublease and License.

i. What is the purpose and intent of s. 43?

[73] The parties disagreed regarding the purpose and intent of s. 43. The Claimants argue that s. 43 should be interpreted expansively, applying in any circumstances where the market value of any occupied

[17] Todd, Eric C.E., *The Law of Expropriation and Compensation in Canada*, 2nd Ed. (Scarborough: Carswell, 1992) at page 415.

property does not justly take into account its value. The City argues that s. 43 is a codification of the rule enunciated in *Horn v. Sunderland Corporation*[18] and acts as a cap on damages and prevents double recovery.

[74] The *Institute of Law Research and Reform* describes the rule in *Horn v. Sunderland*: where the highest and best use of expropriated land is other than its highest and best use, "*The owner should not receive the higher price plus the costs that he would have had to incur to realize it.*"[19] For example, if the highest and best use of a parcel of agricultural land was as subdivided residential, if the expropriated owner is awarded its value as subdivided residential, the owner should not be awarded disturbance damages that would have been incurred to develop. To receive both would be a double recovery, as the owner would have had to incur the expenses to realize the higher use. In *Minute Muffler Installations Ltd. v. Minister of Housing and Public Works,* this Board held that s. 43 (then s. 41) is the codification of this rule.[20]

[75] The Claimants argue that the *Horn v. Sunderland* rule is just one application of s. 43. S. 43 can lend a "remedial hand" where the traditional s. 41 market value analysis does not do justice. In support, the Claimants point to wording in Ontario's *Expropriations Act*[21], and a report of the UK Law Commission[22], both of which appear to be worded to clearly enunciate the *Horn v. Sunderland* rule more so than the *Act*.

[76] The Claimants argue that the modern approach to statutory interpretation in *Rizzo & Rizzo Shoes Ltd.*[23], coupled with stated scheme and object of expropriation legislation in *Dell Holdings* as being remedial should result in the Panel interpreting s. 43 expansively.

[77] In *Dell Holdings,* the Court stated,

> *The words of the section should be given their natural and ordinary meaning in the context of the clear purpose of the legislation to provide fair indemnity to the expropriated owner for losses suffered as a result of the expropriation.*[24]

[78] The Panel notes that the above principles of statutory interpretation are engaged where legislation is ambiguous. In the circumstances, the Panel finds that there is no such ambiguity and confirms the Board's decision in *Minute Muffler*. The plain and ordinary meaning of s. 43 to address circumstances in which the highest and best use is different than the actual use to which occupied-expropriated land is being put at the time of the expropriation. In those circumstances, the *Act* prescribes that an owner is entitled to the higher of the alternate calculations. S. 43 is a codification of the *Horn v. Sunderland* rule.

[79] Even using the lens of *Dell Holdings* and the broad and purposive approach, the panel is not convinced that the language set out in the legislation is unclear. This reading of s. 43 is in keeping with the *Dell Holdings* principle that the purpose of the *Act* is to provide fair indemnity.

[18] [1941] 2 K.B. 26.
[19] ALRI, Report No. 12, "Expropriation" (Edmonton, Alberta: March, 1973) at page 73 (City's Brief, Tab 1).
[20] *1981 CarswellAlta* 547 at para. 30.
[21] R.S.O. 1990, c. E-26
[22] U.K., The Law Commission, *towards a Compulsory Purchase Code*: (1) Compensation (Final Report) Justice Toulson *et al*., (London: The Law Commission, 2003), at page 60.
[23] [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2
[24] *Dell Holdings, ibid* at para. 27.

ii. What, if any, compensation is payable pursuant to s. 43?

The Claimants' Position

[80] The Claimants argue that the compensation payable for the market value of the E-Z Air Sublease and the License should be determined under s. 43(b). The losses sustained in relation to the E-Z Air Sublease and License are higher when the market value is based on their combined operations, being a helicopter flight training school, a charter business and a helicopter maintenance business operated as "an aviation facility at an airport that was not closing down."[25]

[81] The highest and best use in mind, Maynard testified that the only available comparable rental space at the time of the expropriation was at the Edmonton International Airport ("EIA"), which achieves higher rental rates than the Airport and Parkland Airport. It is asserted that the value of the Claimants' interest is the difference over time, between the rent under the E-Z Air Sublease and the License when compared to the rental rates at the EIA.

[82] Three alternative levels of compensation for the E-Z Air Sublease are proposed depending on the time period:

- $473,664.00 – utilizing the period to the end of the Head Lease between ERAA and the City (38 years);
- $251,631.84 – utilizing the period to the end of the Hamilton lease (11 years); or
- $110,554.68 – utilizing the period to the end of the sublease (4 years).

The City's Position

[83] The City argues that the market value of the E-Z Air Sublease and License should be determined under s. 41 and s. 42 of the *Act* and outlined a number of arguments in defense of the application of s. 42, including:

- S. 43(b) is not applicable on the facts of this case.
- There is no evidence of a conflict in the actual use versus the highest and best use.
- Should s. 43(b) be applied, the Claimants have failed to provide sufficient evidence to support a difference in market value when comparing actual use and highest and best use.

Reasons for Panel's Findings

[84] The Panel is not persuaded that section 43 applies on the facts of this case.

[85] S. 43 has not been triggered, as there is no difference between the highest and best use of the Sublease and License and their actual use. This is an aviation facility being used for aviation purposes.

[86] The parties' experts agreed that the highest and best use of the E-Z Air Sublease is for aviation purposes.

[87] In order to determine the actual use, the Panel looked at how the space was being used at the effective date. The key is how the space is being used at the time, not with an expectation of the future. The Panel is not convinced that the combination of the Claimants' three uses of the space on the effective date (classroom, office and aviation) deviate from the highest and best use of aviation in any meaningful

[25] Claimants' Brief re s. 43 at para. 39.

manner. It is not abnormal for aviation facilities to include office space, and there was no indication that the classroom space was abnormal.

[88] Even if s. 43 was triggered, the Claimants' evidence fails to establish what the loss would have been. As stated in *Kerr v. Minister of Transportation (No. 1)*, the onus is on the Claimants to establish the aggregate of market value plus damages for disturbance found in s. 43(b).[26]

[89] The market value of a leasehold interest is its rental advantage, which is the difference between the rental rate that could be obtained on the market and the current rental rate, multiplied by the remaining lease term. In circumstances governed by s. 43, where the actual use and the highest and best use of a property conflict, the market rental rate, and consequently the market value of the leasehold interest, may be different.

[90] Maynard's quantification is premised on the amount payable, under both the E-Z Air Sublease and License, not changing on renewal. He did not provide a basis for not assuming the renewal would have been at market rate. In the absence of evidence as to what that renewal rate would have been, the Panel cannot determine if there was a difference on which to base the value in comparison to the EIA.

[91] The Panel is not convinced that, if s. 43 applied, the EIA is an appropriate comparison. Even if the EIA was the sole location offering similar facilities as the Claimants had in the E-Z Air Sublease and License, the evidence does not support a finding that the EIA would permit another helicopter flight school.

Summary on Market Value

[92] The Panel finds that no compensation is payable for market value of the E-Z Air Sublease and License.

2. What compensation is payable for disturbance damages?

[93] Damages attributable to disturbance or more commonly, disturbance damages, is one of the categories for which compensation is payable under s. 42(2) of the *Act*. Such damages are defined as "economic loss suffered by an owner by reason of having to vacate expropriated property."[27]

[94] S. 51 of the *Act* allows for compensation to be payable to a tenant for the appropriate amount of relocation costs, including moving and other costs, having regard to the enumerated factors. The Panel was advised that the parties have resolved those issues.

[95] The Court in *Amdue Holdings Ltd. v. Calgary (City)* held that disturbance damages under what is now s. 42(2)(b) of the *Act* are not restricted to the "costs and expenses" under s. 50 or "costs" under s. 51, rather, "[t]he word 'damages' covers losses suffered by the Tenant Company owing to the expropriation."[28]

a. Should an adverse inference be drawn against the Claimants for not calling Matthew Wecker as a witness?

[96] The City contends that the Panel should draw an adverse inference against the Claimants from their failure to call Wecker as a witness at the hearing.

[26] *Kerr v. Minister of Transportation (No. 1)*, [1980] 20 LCR 67, at page 81.
[27] *Todd*, *supra* note 17 at page 274.
[28] 1980 ABCA 143 at para. 26.

[97] As set out in *Vector Energy Inc. v. Pacific Gas and Electric Company*[29]:

> *[32] The general rule as to adverse inference from the failure to call a witness or witnesses is well stated in J. Sopinka, S. N. Lederman and A.W. Bryant,* ***The Law of Evidence in Canada****, 2d (Toronto: Butterworths 1999) at 297:In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.*

[98] It was argued that from the beginning of 2014, Wecker, through Lonestar, was the controlling mind of both E-Z Air and E-Z Helicopter. His evidence of the factors which influenced the business decisions and the consequences of those decisions from that point forward may have been contrary to the evidence presented by the Claimants.

[99] The Panel accepts the City's position that it would have been challenging, at best, for the City to call Wecker. He, through Lonestar, is the controlling shareholder of the Claimants, both E-Z Air and E-Z Helicopter, and as such, is adverse in interest to the City.

[100] On the other hand, due to Wecker's role with E-Z Air and E-Z Helicopter, the City was able to and did question Wecker as part of the pre-hearing proceedings. Moreover, a number of excerpts from the transcripts of his questioning were entered as evidence by way of read-ins by the City.

[101] The City did not provide persuasive examples of contradictions between the Bavlys' evidence and Wecker's questioning to support concluding that, had Wecker testified at the hearing, his evidence "*would be contrary to the* [Claimants'] *case, or at least would not support it."*[30] Rather, only general comments were made expressing concern that his evidence may have been detrimental to the Claimants' case.

[102] As acknowledged by the City, drawing an adverse inference is a matter of discretion. Given the unusual circumstances of the City having the ability to read in Wecker's evidence from questioning and the lack of persuasive examples of contradictions between his testimony and that of the Bavlys, the Panel finds that this is not an appropriate case to exercise that discretion.

[103] The Panel will now turn to a consideration of each of the claims for disturbance damages.

b. What, if any, damages are payable from the sale of the Bell Jet Ranger helicopter?

[104] The Bell Jet Ranger helicopter was purchased in 2000 by 869088 Alberta Ltd. ("# Ltd.") for $379,290.22 US, which equated to $551,048.84 CDN using the then prevailing exchange rate.

[105] E-Z Air owned 92.55 % of the shares of # Ltd. and Randel Babiak owned 7.45 % of the shares. Mr. Babiak was a former student who worked part time for E-Z Air when needed for charter work using the Jet Ranger.

[29] 2000 ABQB 178.
[30] *Ibid.*

[106] Under a Memorandum of Understanding dated March 27, 2000, between E-Z Air and Randel Babiak, it was agreed to operate # Ltd. "for the purpose of purchasing and leasing out" the Jet Ranger to E-Z Air and E-Z Helicopter.

[107] The Jet Ranger was sold by # Ltd. in September 2012 after having been advertised starting sometime in 2011. The sale price of $380,000.00 US equates to $371,830.00 CDN using the then prevailing exchange rate.

[108] E-Z Air claims that the loss of $179,228.84, being the difference in the purchase and sale price in Canadian dollars, was incurred because the expropriation forced E-Z Air to sell at a time in which the exchange rate had a significantly negative impact upon the sales price. It claims 97.55% of that loss, being $165,876.00.

[109] The Claimants submit that, although the Jet Ranger was owned by # Ltd., E-Z Air suffered a loss. It is argued that the proceeds flowing through # Ltd., a corporate vehicle which was set up solely to apportion a small ownership interest to a former student, should not be used as a basis to deny the claim. Further, the financial arrangements between E-Z Air and # Ltd. support E-Z Air's claim for damages.

[110] The Claimants cite *Therrien v. True North Properties Ltd.* ("*Therrien*")[31] to support their position that flow-through entities set up for tax purposes should not preclude a determination of damages. In that case, an employee was paid through his professional corporation for tax reasons. He sued for wrongful dismissal. The Court held that the professional corporation was merely a vehicle for receiving payment and the true employment relationship existed between its shareholder, the employee, and the employer.

[111] By analogy, # Ltd. was merely a vehicle for sharing ownership and E-Z Air's interest in # Ltd. was nothing more than the value of its interest in the Jet Ranger.

[112] By the time the Jet Ranger was sold, the expropriation process had developed to the stage that it was reasonable for E-Z Air to take steps to protect itself by creating a source of cash to allow the Claimants to continue to operate for as long as possible. The companies' revenue in 2011 and 2012 was increasing, but the uncertain future made it reasonable to take steps to allow the business to carry on in the face of the potential expropriation.

[113] The City submits that since # Ltd. is not a party; did not have an interest in land to be expropriated; and did not operate at the Airport, no compensation should be payable. Alternatively, the evidence is not sufficient to establish a causal connection between the sale and the expropriation. Reference is also made to the lack of evidence of the fair market value of the Jet Ranger. Further, the City questioned why the alleged loss is converted from Canadian dollars to US dollars in the absence of convincing evidence of the need to do so.

[114] For compensation to be payable for the sale of the Jet Ranger, the Panel would have to find that one or both of the Claimants suffered a loss from that sale and, having regard to the date of the sale, that the loss was caused by the shadow preceding the expropriation. In defence, the City argued that the Jet Ranger was not owned by either of the Claimants, but rather by a separate corporation in which E-Z Air owned shares.

[115] The Panel finds that the facts in the present case are clearly distinguishable from *Therrien*. In *Therrien*, the issue involved the wrongful dismissal of an accountant who had contracted with his

[31] 2007 ABQB 312, affirmed on the relevant issue 2009 ABCA 44.

employer through his professional corporation for income tax purposes. Contrast this with the corporate arrangement at issue: # Ltd. was specifically and solely established to acquire the Jet Ranger so that ownership could be shared with Randel Babiak. *Therrien* involves significantly different circumstances and a different area of law. Further, the Panel is unconvinced that the same policy considerations underlying a wrongful dismissal case such as *Therrien* would support the extension of *Therrien*'s holding into an expropriation analysis.

[116] The Panel finds that if the sale in September 2012 resulted in a loss, that loss was suffered by # Ltd., not E-Z Air. The *Act* is to be "given a broad and liberal interpretation consistent with its purpose."[32] Such an interpretation does not lead to awarding compensation to a corporation which is not a party to these proceedings. # Ltd. held no interest in the land expropriated and is not an "owner" to whom compensation can be payable under s. 42 of the *Act*.

[117] The Panel's determination is further supported by a review of the financial transaction itself. The Claimants assert that the proceeds of the sale went to # Ltd.'s shareholders, Mr. Babiak and E-Z Air, consequently, E-Z Air suffered the loss. In support, the Claimants refer to the # Ltd.'s Financial Statement for the period ended July 31, 2014. The Statement of Income and Retained Earnings for # Ltd. includes the entry: "Wind-up of assets to E-Z Air Inc. $305,079" without further explanation. Moreover, the Financial Statement for # Ltd. for the period ended July 31, 2013, which includes the time of the sale, contains entries for Other Income of "Realized gain on disposal of asset $349,737" and Foreign exchange gain $9,393". There is no corresponding entry in the Financial Statements of either E-Z Air or E-Z Helicopter for the relevant years to indicate the funds were paid to either of them. In the absence of any further explanation, the Panel is not persuaded that the sale proceeds were paid to E-Z Air as alleged. This indicates that any loss experienced as a result of the sale of the Jet Ranger helicopter was not suffered by E-Z Air.

[118] The claim for disturbance damages from the sale of the Jet Ranger is dismissed.

c. What, if any, damages are payable from sale of the helicopter equipment?

[119] The Claimants seek compensation from two sales of equipment which could only be used with the Jet Ranger. It is submitted that since the Jet Ranger sale was caused by the expropriation process, the loss from the sale of the equipment is also compensable.

[120] The first relates to the sale in October 2012 of dual wheels, a sling lanyard, a barrel hook and endless loop for $1,365.00 owned by E-Z Air. The Bavlys estimated that amount was a 30% reduction from the true value and that the items were sold only because the Jet Ranger was sold. A claim of $965.00 is advanced.

[121] The second sale was of two Bambi buckets owned by E-Z Air, which are used for firefighting, for $3,800.00 in April 2013. A quotation was provided indicating a new bucket would have cost $8,148.00 or two buckets for $16,296.00. Dror Bavly estimated that a 50% depreciation reduction was appropriate, which results in a claim of $4,348.00.

[122] The City submits that there should be no compensation payable arising from either sale. It has not been established the sales were caused by the expropriation or the related process. The City submits that the sales occurred because E-Z Air was no longer renting the Jet Ranger from # Ltd. and the equipment had become surplus. Alternatively, there is insufficient evidence to prove the damages. The alleged loss is based on undocumented estimates from the Bavlys without any objective verification. The fact the Bavlys

[32] *Dell Holdings, supra* note 4 at para. 21.

did not agree on the appropriate reduction for the depreciation on the Bambi buckets indicates the lack of reliability in the Bavly estimates.

[123] The Panel finds that the evidence provided is insufficient to establish, on a balance of probabilities, that a loss was incurred. The only information regarding the alleged difference between the sale prices and the claimed actual value were the Bavlys' unsubstantiated estimates. No persuasive basis was provided for the depreciation percentage utilized. No photographs or other evidence of the condition of the equipment at the time of the sales was provided. The only information regarding efforts to market the sale of the equipment is a notice advising of the sale. The Panel was not provided with persuasive evidence regarding how the notice was publicized.

[124] To establish that there was a compensable loss it is necessary to provide more than mere assertions that the equipment was sold for less than market value. In the absence of such evidence, the claimed amounts are speculative. The claims for damages from the sale of the helicopter equipment are dismissed.

d. What, if any, damages are payable from the acquisition of the helicopter simulator?

[125] E-Z Helicopter's students had use of a helicopter flight simulator, also known as a flight training device, as part of the helicopter training provided at the Airport. This allowed students to experience various flight conditions which could not have been safely replicated during training.

[126] The simulator used at the Airport in Building 19 ("Original Simulator") was not a 'stock model'. Rather it had been assembled with parts from various sources. Transport Canada certified it as a Level 2 Flight Training Device in March 2005. That certification was, however, an "Interim Certificate."

[127] The Claimants assert that Transport Canada would not certify the Original Simulator for use anywhere other than at the Airport. Arrangements were made, following the move to Parkland, for temporary use of a fixed wing simulator at the Edmonton Flying Club. This equipment did not allow the students to experience many of the activities associated with helicopter flying. A replacement Level 2 certified simulator was purchased in February 2015 by E-Z Helicopter for the new location at the Parkland Airport. The cost for the replacement was $109,000 (US) which converts to $135,683.20 (CDN). The invoice for the purchase notes it was a 'demo'. The costs of the replacement simulator is claimed to have been caused by the expropriation.

[128] The City argues that this claim should be denied on the basis that the evidence does not establish that Transport Canada would not recertify the Original Simulator. Alternatively, the quantum should be reduced to $28,000.00 based on deducting the proceeds from the sale of the replacement simulator for $80,000.00 in December 2015. A 50% reduction for betterment is also warranted, however, the City could not provide evidence to support the quantification of the betterment because the Original Simulator was unique, having been assembled with components from various sources. The Panel accepts the evidence of Ezra Bavly that Transport Canada would not certify the Original Simulator for use at another location. His evidence is supported by the information that the Interim Certificate was issued in 2005 under draft guidelines of Transport Canada. As Ezra Bavly testified:

> *Q Did E-Z Air take any steps to appeal this verbal decision not to recertify this flight simulator, sir?*
> *A We spoken to them.*
> *Q Did you try to engage in any formal appeals of this decision, sir?*
> *A Not formal appeal. But if you look at the certificate, it says on the certificate "interim certificate," which they explain that to us also at the beginning that since there are no standards for simulators or flight*

> *training devices, you say in Canada, and they like what they saw in the meantime they will give us the authorization to use it as a flight training device Level 2. But we had a very clear indication from Transport Canada that this is a unique kind of a setup, and the moment Transport Canada is going to come with new guidelines for helicopter simulators, we will have to comply with them, whatever will be the guidelines. And we agreed, and then we were certified that way. So until today I don't think Transport Canada decided any guidelines for simulators. And if not with expropriation, this helicopter simulator would still function and work.*[33]

[129] No contrary evidence was presented to suggest that Transport Canada's guidelines have changed such that the Interim Certificate would have been withdrawn. In other words, but for the need to move the flight training school from the Airport as a result of the expropriation, there would not have been a need to replace the Original Simulator. The benefits of having a helicopter flight simulator are self-evident. It allowed students to be "in a very vivid situation of emergency, which we cannot duplicate in real flying."[34] The Board finds that it was reasonable for E-Z Helicopter to purchase a replacement simulator.

[130] The Panel considered the City's argument that the cost of the replacement simulator should be reduced for betterment. The replacement simulator was a 'demo'. The invoice for the purchase notes that a $40,000.00 (US) discount was applied to reflect its prior use. Although the details are limited, the evidence supports finding that the Original Simulator was older than the replacement. There is, however, insufficient evidence to find that the replacement was 'better', either in terms of operating capability or expected operational life.

[131] Moreover, the expropriation put E-Z Helicopter in the position of having to purchase a certified replacement. There is no evidence to support finding that a less expensive option was available. To the contrary, by purchasing a demo a savings of $40,000 (US) was achieved.

[132] The replacement simulator was sold to Kolibri Helicopters Inc. ("Kolibri"). The Bill of Sale dated December 22, 2015, allocates $80,000.00 to the simulator. The City argues that amount should be deducted from any damages awarded from acquisition of the replacement on the basis that any loss was reduced by receipt of those funds.

[133] Wecker is the sole Director and 65% shareholder of Kolibri. At the time of this sale he was also the controlling shareholder of E-Z Air and E-Z Helicopter. As a result, the sale is between non-arm's length corporations. The Panel finds that how the ownership was addressed between the two related corporations should not be a factor in determining the compensation payable for the cost of acquiring the replacement.

[134] For the foregoing reasons, compensation for disturbance damages from the acquisition of the replacement helicopter is $109,000 (US), which the uncontroverted evidence establishes, converts to $135,683.20 (CDN).

[33] Transcript at page 425, lines 16-26 and page 426, lines 1-15.
[34] Transcript at page 47, lines 7-9.

e. What, if any, damages are payable for executive time?

[135] Claims are advanced for the following time spent by Ezra Bavly, Dror Bavly and Matthew Wecker:

• Ezra Bavly – 712.80 hours at $50.00 per hour:	$35,640.00
• Dror Bavly – 84.40 hours at $50.00 per hour:	$4,220.00
• Matthew Wecker – Expenses and time at $40.00 per hour:	$1,444.93
Total	$41,304.93

[136] With the addition of travel and accommodation expenses of $3,132.48 for Ezra Bavly, the total amount claimed is $44,437.41.

[137] The City acknowledges that some compensation should be payable for executive time but maintains it should be limited to $20,000.00. The City takes no issue with the travel accommodation expenses claimed.

[138] The Panel will address each of the three grounds advanced in support of the proposed reduction.

[139] First, it is submitted that the time spent looking for new premises and relocating to Parkland is recoverable but, the time spent after March 2014 is not, since by then the business was back in operation.

[140] Executive time is intended to provide compensation not just for activities related to addressing the negative consequences of the expropriation, such as relocating the business operations. It also includes compensation for time reasonably spent advancing a claim for compensation arising from the expropriation. In *Madge v. Alberta (Infrastructure and Transportation)*[35] ("*Madge CA*"), the Court of Appeal overturned the trial judge's decision to award as costs "compensation to [the landowner] for his time spent in advising counsel, preparing for trial, attending trial and generally dealing with the claim".[36] The Court of Appeal directed that "the award for the owner's time is re-characterized as damages for disturbance."[37] The Panel applies the same reasoning to the claim for executive time which seeks compensation for activities undertaken on behalf of the corporation whose property interest has been expropriated.

[141] Second, the City contends that the amount payable should be reduced because by June 2013, Dror Bavly, and by June 2014, Ezra Bavly, were no longer being paid by the Claimants. Therefore, it is argued the companies are not out of pocket for the time spent after those dates. This fact is said to distinguish the finding in *Bartle & Gibson Co. Ltd. v. Edmonton (City)* [38] where the Court awarded compensation for the time spent on the basis that the executive was carrying out duties outside their ordinary responsibilities so the claimant company was entitled to be compensated for the time it had paid for those tasks to be undertaken.

[142] The Panel accepts the Claimants' submission that this is too narrow an interpretation of the *Act*. As discussed above, the *Act* is to be "given a broad and liberal interpretation consistent with its purpose." To deny compensation for the time spent by former employees advancing the claim for compensation from an expropriation would not "provide full and fair compensation".[39]

[35] 2012 ABCA 296.
[36] *Madge v. Alberta (Infrastructure and Transportation)*, 2011 ABQB 287 at para. 53.
[37] *Madge CA*, *supra* note 35 at para. 12.
[38] 1996 ABCA 42.
[39] *Thoreson*, *supra* note 2 at para. 10.

[143] Third, the City also takes issue with the claimed hourly rate. It was suggested that the rate should be based on the earning reported in the T4 slips in evidence divided by the number of "hours they worked on average for full-time employees".[40]

[144] The City did not provide the result of its proposed method of determining the hourly rate to be utilized. It is not clear to the Panel what "average" is being referenced. In any event, the $50.00 per hour proposed by the Claimants is a reasonable rate for the activities undertaken.

[145] In summary, the Panel rejects the position advanced by the City regarding the claim for Executive Time and awards the full amount sought, being $44,437.41 to be payable jointly to the Claimants.

f. What, if any, damages are payable for business losses?

[146] The Panel was provided with opinion evidence from two qualified business valuators: Crystal Hawryluk of BDO Canada LLP on behalf of the Claimants and Theresa Reichert of Deloitte LLP on behalf of the City. Both were qualified, without objection: Hawryluk as an expert to give opinion evidence in the quantification of business losses and evaluation, and Reichert as an expert to give opinion evidence in business valuation, loss quantification, financial accounting and analysis.

[147] Both experts agree that between early 2013 and the end of 2014, the Claimants suffered a business loss compared to their earlier performance. The question is the quantum of the loss and whether those losses were caused by the expropriation process.

[148] Hawryluk and Reichert agreed on the methodology which should be applied to determine the quantum of the business losses. The method in general terms, is a comparison of the actual contribution margin with the contribution margin which would have occurred but for the expropriation. The contribution margin is determined by deducting direct costs from revenue.

The Claimants' Position

[149] In Hawryluk's first report, she opined that the business loss was in the range of $192,000 to $255,000 for E-Z Air and $210,000 to $234,000 for E-Z Helicopter depending on whether three or five-year pre-expropriation financial data was utilized. In response to the criticism of her analysis by Reichert ("the Reichert Report") Hawryluk reduced the loss range in her rebuttal report to $94,000 to $133,000 for E-Z Air and $252,000 to $267,000 for E-Z Helicopter, again dependent on the length of time the pre-expropriation financial data is employed. She disagreed, however, with some of the adjustments proposed in the Reichert Report. Those differences are addressed below.

[150] Hawryluk's analysis was based on the loss period starting at the beginning of the 2013 fiscal periods for each of the Claimants (being January 1, 2013, for E-Z Helicopter and April 1, 2013, for E-Z Air) and continuing through to the end of 2014. The Claimants argued that the expropriation process cast a "shadow"[41] on their business which caused the business losses to start no later than the beginning of 2013.

[151] No claim for any future loss was advanced.

[152] Based on Hawryluk's opinion, the Claimants submit that compensation should be payable for E-Z Air's business losses in the amount of $133,000.00 and for E-Z Helicopter's business losses in the amount of $267,000.00.

[40] Transcript at page 1318, line 26 to page 1319 line 3.
[41] *Shun Fung*, *supra* note 6 at para. 17.

The City's Position

[153] The City acknowledges that some compensation should be payable for business losses, but does not propose a specific amount.

[154] Under s. 53 of the *Act*, compensation is payable "for business loss resulting from the relocation of the business because of the expropriation". The City acknowledges that there is a period of time after the Claimants left the Airport in November 2013 until the business was re-established at the Parkland Airport during which they suffered compensable losses. On that basis, the City accepts that the losses sustained in the months from November 2013 through March 2014 are fully attributable to the expropriation. No specific amount was provided.

[155] In addition, the City acknowledges that *Dell Holdings* provides the Panel with authority to award business losses for a broader period of time than contemplated by s. 53 of the *Act*. Unlike the Claimants, however, the City is not specific on when that loss period should start and end.

[156] In the City's submission, the earliest start date would be in February 2013 when the first Notice of Abandonment was served and the second Notice of Intention to Expropriate was issued. It argues, however, that no losses were sustained in the first three or four months of 2013 in any event.

[157] The City did acknowledge that some losses were incurred before November 2013 when the business moved from the Airport. Those losses are said to have been caused by the departure of students because the Claimants were unable to assure them that the course would be completed in early 2014. Again, no specific amount was provided.

[158] The Reichert Report critiques the analysis provided by Hawryluk and proposed adjustments to the loss calculation. Although the Reichert Report states it used a loss period from November 15, 2013, to December 2014, Reichert testified that the period she analyzed was actually from the beginning of each of the Claimants 2013 fiscal periods to the end of 2014, the same periods used by Hawryluk. After adjusting her data to reflect a reduced loss period, Reichert opined that the business losses were in the range of $117,000 to $134,000 for E-Z Air and in the range of $127,000 to $217,000 for E-Z Helicopter. The lower and upper end of the range is, as with Hawryluk, based on whether a three or five year average of the pre-expropriation financial data is used.

[159] After reviewing the Hawryluk rebuttal report, Reichert presented a revised summary which identified only two differences between the experts' opinions: Hawryluk's proposed normalization of 2011 maintenance, parts and tool expenses incurred by E-Z Helicopter and the amount that should be deducted for owner services.

[160] As discussed below, the City asserts that some portion of the businesses losses quantified in the experts' reports was caused by other factors and not the expropriation. Losses caused by other factors should be deducted from the compensable business losses.

Reasons for Panel's Findings

[161] The Panel must answer the following questions to determine the amount payable to the Claimants for business losses:

- Should the business losses be determined using the three or five-year pre-expropriation average financial data?
- What is the appropriate loss period?

- Should 2011 maintenance, parts and tool expenses incurred by E-Z Helicopter be normalized?
- Should normalized or actual rates of remuneration be utilized for the business owners?
- Should there be a deduction for losses caused by events other than the expropriation?

i. Should the business losses be determined using the three or five-year pre-expropriation average financial data?

[162] Both experts provided information based on both three and five-year averages for the pre-expropriation period. The amount selected forms the basis from which to determine the business losses at issue.

[163] The Claimants maintain that the three-year period is more relevant being closer in time to the events. The City submits the five-year period provides a more accurate reflection since it captures the 'ups and downs' of the business over the years.

[164] In the initial Hawryluk report, high, low and mid-point estimates of business losses were provided. The high estimate is based on three years' financial statements (2010, 2011 and 2012) while the low estimate is based on five years (2008, 2009, 2010, 2011 and 2012).

[165] Over this five-year period, the consolidated revenues of both companies demonstrated variability, ranging from a low of approximately $450,000 to a high of approximately $750,000. Years 2011 and 2012 were the highest revenue years of the five years analyzed and therefore the average of the 2010, 2011 and 2012 years yields higher average revenue than the average of the 2008, 2009, 2010, 2011 and 2012 years.

[166] As depicted by the graph on page 1 of Exhibit 11, the Panel determined that the variability in revenue demonstrated more of a cyclical pattern than simple random variability. The three-year (high) estimate would only encompass a portion of the cycle and provide an artificially high estimate of business losses. While it is not clear that the five-year (low) estimate covers the entire cycle and thus using this scenario could result in an artificially low estimate of losses, it would be more accurate than the high estimate as it considers more of the cycle.

[167] Based on the above, the Panel finds that the five year (low) estimate would provide the most accurate estimate of the business losses. The remainder of the Panel's analysis is based on utilizing the low estimate from the ranges provided.

ii. What is the appropriate loss period?

[168] The loss period is the time during which the expropriation process cast a shadow which negatively impacted the business operations of the Claimants. As discussed above, *Dell Holdings* provides that the test is not temporal, but rather is based on causation.

[169] The experts both calculated the losses using the same period, being from the beginning of the 2013 fiscal year for each of the Claimants to the end of 2014.

[170] The City acknowledges the period could start as early as February 2013 when the Notice of Abandonment was served and the second Notice of Intention to Expropriate was issued.

[171] The Panel is persuaded that by early 2013 the expropriation process was causing a loss for the Claimants' business. By that stage, the following events had taken place:

- On May 16, 2012, the ARP was adopted by City Council;

- In June of 2012, Hamilton advised that the E-Z Air Sublease, which was due to expire on March 31, 2013, would not be renewed because the Airport would be closing;
- In a letter dated September 4, 2012, the Claimants were advised the City's Executive Committee was going to recommend City Council approve the expropriations required to implement the ARP; and
- A Notice of Intention to Expropriate dated October 5, 2012, was served on the Claimants. That Notice was registered on title on the same date.

[172] In finding that the beginning of the loss period for each of the Claimants is the 2013 fiscal period, the Panel also considered the impact on the Claimants' business by the number of students who left the training school. Departing students resulted in a loss of revenue of at least $220,000. In early 2013 there were only two students and both of them left without completing the course.

[173] The City did not challenge the Claimants' position that the end of the loss period was the end of 2014. The evidence supports a finding that by that time, the Claimants operations were back or, at least close, to their pre-expropriation levels.

[174] Using the five-year average and the loss period accepted by the Panel, Hawryluk estimated that E-Z Air's business loss was $94,000 and E-Z Helicopter's business loss was $252,000.

[175] The Panel now considers whether Reichert's proposed adjustments should be applied against the Claimants' losses.

iii. Should 2011 maintenance, parts and tool expenses incurred by E-Z Helicopter be normalized?

[176] The highest revenue year reported by the Claimants was 2011. Hawryluk opined that there was an abnormally high cost associated with maintenance, parts and repairs in that year (the "maintenance costs"). She concluded that it was an unusual and nonrecurring problem. On that basis, she then normalized or, in this case, adjusted these costs downward which resulted in increasing profits for that year and thus increasing the projected business losses. Reichert disagreed that this was an unusual and nonrecurring problem and stated the following:

> *I do not have the same opinion. When I review the numbers, it looks quite similar if you look at averages. So if you compare fiscal 2011 to the prior year, the average of those two numbers are actually virtually the same as the two years after 2011. And that holds whether you are looking at the pure dollar value or as a percentage of revenue.* [42]

[177] Reichert stated that the impact of the maintenance costs, in isolation from other impacts, would be to decrease the business losses claimed by approximately $24,000.

[178] The Panel finds that the maintenance costs for 2011 were not an unusual and nonrecurring problem. While the actual numbers looked like a substantial increase, as a percentage of revenue, the additional costs were not unusual. Further, the long term average costs remained relatively stable. As a result, the maintenance costs should not be normalized.

[179] The Panel accepts Reichert's opinion that if no normalization is applied, there is a $24,000 reduction in E-Z Helicopter's business loss.

[42] Transcript, at page 1025.

iv. Should normalized or actual rates of remuneration be utilized for the business owners?

[180] Hawryluk treated the owner's remuneration as discretionary and utilized normalized rates. Reichert disagreed, stating "[w]ere the owners not to provide these services, it would be necessary to employ arms-length parties for these services". [43] Her initial estimate was that Hawryluk's treatment of this remuneration as discretionary resulted in overstating the business losses by approximately $158,000 to $180,000. After adjustments prompted by the Hawryluk Rebuttal Report, Reichert reduced her estimate on the amount of the overstatement to $83,000.

[181] The analysis in Reichert's report and her revised conclusions in Exhibit 11 are based on the amounts reported in the Claimants' General Ledger Salaries and Benefits Account. She assumed that the owners were paid market wages and made no adjustments or normalizations.

[182] Under cross-examination, she was asked to divide the amounts attributable to Ezra Bavly by the number of hours worked each year. The results were as follows:

- For 2012 - $170.72 per hour
- For 2013 - $107.72 per hour
- For 2014 - $296.15 per hour

[183] These amounts are clearly very different than the Alberta Wage and Salary Survey for a top level helicopter instructor and pilot and would not be representative of the normal operating costs of the Claimants.

[184] She acknowledged that: "I think it's possible that a normalization is required. I do not know if Hawryluk's is completely appropriate."[44]

[185] Based on the foregoing, the Panel determines that it is appropriate to use the normalized rates for the owners in calculating the business losses. As Reichert based her suggested adjustments on the actual numbers reported in the financial statements rather than normalized amounts, the Panel does not accept her estimated $83,000 downward adjustment to the business losses.

v. Should an average salary be attributed to Mr. Wecker?

[186] Hawryluk used the average salary for an operations manager based on the Alberta Wage and Salary Survey. Based on Wecker's limited experience in a management role, Reichert proposed using the starting level which would be $23,000.00 per year less than the amount used by Hawryluk.

[187] The Panel agrees that allocating the higher salary to someone with essentially no background in management and certainly no experience in managing business operations similar to those of the E-Z Air companies, over states his contribution. The higher the salary attributed to Wecker, the higher the costs and subsequently, the lower the business loss. The Panel finds that the salary attributed to Wecker should be reduced by $23,000. This has the net effect of increasing the business loss by $23,000. Since Wecker was managing both companies, this adjustment should be split proportionally between E-Z Air and E-Z Helicopter.

[43] Exhibit 8, Tab 9, Page 13, para 4.13.
[44] Transcript at page 1072, lines 3 – 4.

vi. Should there be a deduction for losses caused by events other than the expropriation?

[188] Hawryluk assumed that 100% of the business losses were due to the expropriation. This was disputed by the City. Reichert offered several potential impacts which could have decreased the level of business losses incurred by the Claimants that they attribute to the expropriation. She acknowledged that she did not critically assess whether those factors would have occurred but for the expropriation.

[189] Reichert did not quantify the impact of the factors discussed below. To assist the Panel, she provided examples of the impact by suggesting a 25% and 50% downward adjustment. Reichert acknowledged that the 25% and 50% adjustments are illustrations only and not her opinion of the appropriate allocation.

[190] After review, below, the Panel acknowledges that these factors could have negatively impacted the Claimants' business operations. However, these impacts were not quantified. The percentage reductions proposed by Reichert had no evidentiary foundation, factual or opinion, and were simply speculative. The Panel finds that it is not appropriate to reduce the business losses due to the impact of factors unrelated to the expropriation.

- Loss of ACES Contract

[191] Starting in 2009, E-Z Helicopter was the manufacturer representative of ACES Systems, an American supplier of vibration analysis equipment for rotating parts. The evidence establishes that only a minimal amount of revenue, probably in the order of 5 % of the overall revenue, was generated from this source. The relationship was cancelled in March 2014 by ACES Systems.

[192] The loss of the ACES contract would negatively impact revenues and profits. The City submits that the loss of this contract is not as a result of the expropriation. Based on evidence read in from questioning of Wecker, the City maintains that ACES canceled the contract due to the departure of Dror Bavly and was not caused by the expropriation. The Claimants argue that Dror Bavly departed because of the expropriation.

[193] The extent of this impact cannot objectively be determined from the financial records but, as the ACES income was a small portion of the overall revenue, a maximum of 5% of the revenue over an 8-month period, this impact is determined by the Panel to be immaterial.

- The Loss of Key Personnel – the Bavlys

[194] The departure of the chief mechanic and chief instructor, both considered to be experts in their respective areas and well known as such in the local helicopter community, combined with their replacement by less experienced personnel, could have had a negative impact on the reputation of the companies and this could impact student enrollment and revenues.

[195] The City submits that the departure of the Bavlys was not as a result of the expropriation.

[196] The Panel considered this argument and notes that the potential impact of this issue was not quantified nor conclusively shown to be a result of anything other than the expropriation. The Panel is, however, cognizant of the evidence that the Bavlys had developed a retirement plan. How the expropriation affected the timing of that event is uncertain.

- The Sale of the Jet Ranger

[197] The sale of the Jet Ranger in the fall of 2012 removed the opportunity to participate in any firefighting activity, effectively eliminating any revenue from this activity. The City submits that the sale of this helicopter was not as a result of the expropriation.

[198] The Panel considered this argument and notes that the potential impact of this issue was not quantified nor conclusively shown to be a result of anything other than the expropriation.

[199] On balance, the Panel is not persuaded that the evidence provides a foundation on which to find that the businesses losses were materially contributed to by the factors proposed by Reichert.

Summary of Business Losses

[200] In summary, the Panel finds that the Claimants have suffered business losses as calculated by Hawryluk in her rebuttal report, using five-year pre-expropriation data, subject to:

- a $24,000 reduction to the loss incurred by E-Z Helicopter for the treatment of the 2011 maintenance, parts and tool expenses; and
- a $23,000 increase to the loss incurred (distributed proportionally) for the adjustment to Wecker's salary ($9,200 to E-Z Air and $13,800 to E-Z Helicopter).

[201] As a result, the compensation payable for business losses is as follows:

- For E-Z Air – $103,200.00; and
- For E-Z Helicopter – $241,800.00

Summary of Disturbance Damages

[202] In summary, the Panel finds that the following disturbance damages are payable:

• Compensation for the sale of the Jet Ranger	$0.00
• Compensation for the sale of the helicopter equipment	$0.00
• Compensation payable to E-Z Helicopter for acquisition of helicopter flight simulator	$135,683.20
• Compensation payable jointly to the Claimants for Executive Time	$44,437.41
• Compensation payable to E-Z Air for Business Losses	$103,200.00
• Compensation payable to E-Z Helicopter for Business Losses	$241,800.00

***3.* What, if any, interest and costs are payable?**

[203] As requested by the parties, the issues of interest under s. 66 of the *Act* and costs under s. 39 of the *Act* are reserved with leave is granted to apply to the Board within 90 days for a determination of those issues, if an agreement cannot be reached between the parties.

V. Order

1. The claim for compensation for market value is dismissed.

2. Compensation is payable as follows for disturbance damages:

• Compensation for the sale of the Jet Ranger	$0.00
• Compensation for the sale of the helicopter equipment	$0.00
• Compensation payable to E-Z Helicopter for acquisition of helicopter flight simulator	$135,683.20
• Compensation payable jointly to the Claimants for Executive Time	$44,437.41
• Compensation payable to E-Z Air for Business Losses	$103,200.00
• Compensation payable to E-Z Helicopter for Business Losses	$241,800.00

3. Leave is granted to apply to the Board within 90 days 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

Shannon Boyer**,** Member

Don A. Sibbald, Q.C., Member

APPENDIX A

From the *Expropriation Act*, RSA 2000, Chapter E-13, as amended:

Definitions

1(k) *"owner" means*

(i) a person registered in the land titles office as the owner of an estate in fee simple in land,

(ii) a person who is shown by the records of the land titles office as having a particular estate or an interest in or on land,

(iii) any other person who is in possession or occupation of the land,

(iv) any other person who is known by the expropriating authority to have an interest in the land, or

(v) in the case of Crown land, a person shown on the records of the department administering the land as having an estate or interest in the land;

Determination of market value

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.*

Principles of compensation

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.

Value of occupied land

43 *If the owner of the land that is being or was expropriated is or was in occupation and as a result of the expropriation it is or was necessary for the owner to give up occupation of the land, the value of the land is the greater of*

(a) the market value of the land determined as set out in section 41, or

(b) the aggregate of

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

(ii) damages for disturbance.

Determining value of land

45 *In determining the value of the land, no account may be taken of*

(a) any anticipated or actual use of the land by the expropriating authority at any time after the expropriation;

(b) any value established or claimed to be established by or by reference to any transaction or agreement involving the sale, lease or other disposition of the land, if that transaction or agreement was entered into after the commencement of expropriation proceedings;

(c) any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation;

(d) any increase or decrease in the value of the land due to the development of other land that forms part of the development for which the expropriated land is taken;

(e) any increase or decrease in value that results from the imposition or amendment of a land use bylaw, land use classification or analogous enactment made with a view to the development under which the land is expropriated.

Disturbance compensation to owner

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

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

Disturbance compensation to tenant

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.*

Business losses

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.*