

Court of King's Bench of Alberta

**Citation: Remington Development Corporation v ENMAX Power Corporation, 2025
ABKB 526**

**Date: 20250915
Docket: 2201 13321
Registry: Calgary**

Between:

Remington Development Corporation

Appellant

- and -

ENMAX Power Corporation

Respondent

**Reasons for Judgment
of the
Honourable Justice C.D. Simard**

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I. Introduction

[1] Remington Development Corporation (**Remington**) owns 11.27 acres of land in the east Beltline area of downtown Calgary (the **Interlink Lands**). Remington purchased most of the parcels making up the Interlink Lands from Canadian Pacific Railway Company (**CP**) in 2002, and then one final small parcel from another owner in 2010.¹ Until recently, two overhead power transmission lines (the **Transmission Lines**) crossed the Interlink Lands. Until they were removed in 2023, the Transmission Lines had been located there and had been operated continuously from at least 1948.

[2] On May 17, 2018 (the **Effective Date**), the Surface Rights Board (the **SRB**, now known as the Land and Property Rights Tribunal, or **LPRT**)² granted four right of entry orders (the **ROE Orders**) to ENMAX Power Corporation (**ENMAX**), the operator of the Transmission Lines. The ROE Orders gave ENMAX the right to enter the parts of the Interlink Lands on which the Transmission Lines were located, for purposes “incidental to the construction, operation or removal of” the Transmission Lines.

[3] The granting of the ROE Orders triggered a mandatory hearing before the LPRT “to determine the amount of compensation payable” pursuant to section 23 of the *Surface Rights Act*, RSA 2000 c S-24 (the *SRA*). That hearing (the **LPRT Hearing**) was held in September, October and November 2020. On October 21, 2022, the LPRT ordered ENMAX to compensate Remington by making a \$7.9 million lump sum payment, and annual payments of about \$357,000 (the **LPRT Decision**).

[4] Both parties have appealed the LPRT Decision to this Court. Between October 7 and November 1, 2024, I heard their appeals, as a trial. The parties submitted their primary written closing arguments on December 16, 2024, and their reply written closing arguments on January 17, 2025. They made their oral closing arguments on February 26, 2025.

[5] For the reasons that follow, I have concluded that the LPRT made a number of unreasonable errors in the LPRT Decision and I order that:

- (a) ENMAX must compensate Remington by making a one-time payment of \$11,078,123; and
- (b) ENMAX must pay Remington interest on that amount, from the Effective Date, at the Bank of Canada rate on the Effective Date.

II. Background and Context of this Appeal

A. The Interlink Lands and the Transmission Lines

[6] On the Effective Date:

¹ Also in 2002, Remington entered into agreements to buy two additional nearby parcels of land from CP, located north of the Interlink Lands (respectively, the **9th Avenue Lands** and the **10th Avenue Lands**). The purchase and sale of the 9th Avenue Lands closed without incident, but the purchase and sale of the 10th Avenue Lands did not. CP sold the 10th Avenue Lands to the Province of Alberta. In 2008, Remington commenced an action in this Court against CP, seeking specific performance of the agreement to sell Remington the 10th Avenue Lands (the **CP Action**). I will say more about the CP Action later in this Judgment.

² I will refer to this body throughout this Judgment by using its current name, the LPRT.

- (c) the Interlink Lands comprised 11.27 acres, registered as 13 separate parcels, all owned by Remington. **Appendix “A”** to this Judgment is a map showing those 13 parcels and identifying the corresponding 13 certificates of title;
- (d) the Transmission Lines were located on and above parts of four of the 13 parcels.³ Those four parcels (the **Subject Properties**) together comprise 4.40 acres. The parts of the Subject Properties that were covered by the ROE Orders (the **ROE Lands**) comprise 1.23 acres. The ROE Lands are shown (cross-hatched) within the Subject Properties in the map attached as **Appendix “B”** to this Judgment;⁴ and
- (e) the Transmission Lines were double-circuit 138 kiloVolt (**kV**) lines. They were comprised of high-voltage aerial wires, suspended by six large steel lattice towers approximately 70 feet (21.3 m) tall. **Appendix “C”** to this judgment are photographs of the wires and supporting towers; and
- (f) the land use zoning designation of the Interlink Lands was CC-X, or “City Centre Mixed Use District”.

[7] By 1970, ENMAX and CP were party to three Right of Way Agreements (the **ROW Agreements**), which authorized ENMAX and its predecessors to operate the Transmission Lines on the Interlink Lands. Either ENMAX or CP could terminate the ROW Agreements on three months’ notice, after which ENMAX would be required to remove the Transmission Lines from the Interlink Lands, at its own expense. When Remington purchased the bulk of the Interlink Lands in 2002, CP assigned the ROW Agreements to Remington.

[8] Since January 1, 2009, Remington has leased the entirety of the Interlink Lands to the Calgary Exhibition and Stampede (the **Stampede**). The Stampede uses the Interlink Lands for parking and storage.

B. Legislative Framework

[9] Section 25 of the *SRA* governs compensation hearings like the LPRT Hearing. The relevant portions of that section state:

- 25(1) The [LPRT], in determining the amount of compensation payable, may consider
- (a) the amount the land granted to the operator might be expected to realize if sold in the open market by a willing seller to a willing buyer on the date the right of entry order was made,
 - (b) the per acre value, on the date the right of entry order was made, of the titled unit in which the land granted to the operator is located, based on the highest approved use of the land,

³ The four Subject Properties correspond to the four Certificates of Title that are depicted accurately in Appendix “A”: 101 193 535; 081 029 381 +1; 021 448 100 and 021 448 100 +12.

⁴ For some reason, the map in Appendix “B” labels the Certificate of Title for one of the Subject Properties as 201 172 226. However, I am satisfied that the correct Certificate of Title number for that Subject Property, as at the Effective Date, was 081 029 381 +1, as accurately shown in Appendix “A”.

- (c) the loss of use by the owner or occupant of the area granted to the operator,
 - (d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,
 - (e) the damage to the land in the area granted to the operator that might be caused by the operations of the operator, and
 - (f) any other factors that the [LPRT] considers proper under the circumstances.
- (2) Where the right of entry order to which the compensation relates is made on or after July 4, 1983, the [LPRT] may, in determining the compensation payable, ignore the residual and reversionary value to the owner or occupant of the land granted to the operator.

C. The LPRT Decision

[10] The LPRT awarded compensation with reference to subsections 25(1)(a) – (d) of the *SRA*. I summarize the most relevant parts of the LPRT Decision as follows:

- (a) **Subsection 25(1)(a)**. The LPRT agreed with both parties that this subsection was inapplicable;
- (b) **Subsection 25(1)(b)**. The LPRT made a one-time award of \$7,916,482 under this subsection, based on the value of the ROE Lands. The LPRT’s rationale for this award was:
 - (i) the proper interpretation of the term “titled unit” in subsection 25(1)(b) is the parcel identified in a certificate of title, in which the lands covered by the ROE Orders are located. In this case, that was the 4.44 acre Subject Properties, but not the entire 11.27 acre Interlink Lands;
 - (ii) thus, under subsection 25(1)(b), the LPRT could award compensation only for the 1.23 acre ROE Lands, using the per acre value of the 4.44 acre Subject Properties based on the “highest approved use” of the Subject Properties;
 - (iii) in valuing the Subject Properties, the LPRT took into account the rest of the Interlink Lands, for two reasons: first, because the language in section 25(1) permitted the LPRT to consider facts beyond the boundaries of the Subject Properties; and second, because taking into account the larger assemblage of Interlink Lands would affect the market value of the Subject Properties, as stipulated in the Canadian Uniform Standards of Professional Appraisal Practice (**CUSPAP**);
 - (iv) the “highest and best approved use of the land” in subsection 25(1)(b) is synonymous with the phrase more commonly used in real property valuations: “highest and best use”. The highest and best use of the Subject Properties was high-density, mixed-use development in the medium term,

with the positive attribute of being part of a larger land assembly which increased their market value;

- (v) the LPRT used the following methodology to value the Subject Properties:
 - A. it used the direct comparison approach adopted by both parties' valuation experts;
 - B. it preferred Remington's expert's (Mr. Wagar) comparable properties over those of ENMAX's expert (Mr. Wasmuth);
 - C. it found that the potential environmental contamination of the Interlink Lands was not a significant factor affecting the timing or cost of developing the Subject Properties, or their market value;
 - D. it valued the Interlink Lands in their entirety and pro-rated that value to the Subject Properties on a proportionate area basis; and
 - E. it rejected Mr. Wagar's use of the "target" floor area ratio (**FAR**) provided by Remington for the Interlink Lands, and instead chose to use the "base" FAR of 5 as at the Effective Date;⁵
 - (vi) this methodology yielded a calculated value of \$96,714,090 for the entire Interlink Lands, or \$8,581,552 per acre. Applying that per acre value to the 1.23 acre ROE Lands yielded a value of \$10,555,309;
 - (vii) the LPRT did not recognize any reversionary value, because it found the evidence on that point to be uncertain and speculative. The LPRT therefore did not reduce its subsection 25(1)(b) award by any reversionary value amount; and
 - (viii) the LPRT found that Remington did enjoy residual value (such as the ability to transfer density among the different parcels in the Interlink Lands, the tax benefit associated with the lease to the Stampede, and the ability to use the Subject Properties as collateral to obtain financing). The LPRT quantified this residual value as 25% of the calculated value of the ROE Lands, and reduced the value by that percentage;
- (c) **Subsection 25(1)(c)**. The LPRT found that:

⁵ The experts all generally agreed on the same definition of "floor area ratio," or FAR. FAR is a measure of building density, and it means the quotient of the total gross floor area of all buildings on a parcel divided by the area of the parcel. For example, a one-storey building that covers 100% of the surface area of a parcel would have a FAR of 1. Adding a second storey would increase the FAR to 2. That same FAR of 2 could also be achieved by building a four-storey building that only covers 50% of the total parcel area. For parcels in the City of Calgary (the **City**), the governing municipal planning document sets the permitted FAR, both a "base" FAR and then a maximum, or "bonus" FAR. As at the Effective Date, the 2006 Beltline Area Redevelopment Plan (**Beltline ARP**) set a base FAR for the Interlink Lands was 5, with a potential maximum FAR of 7. The City has the discretion to allow or not allow a FAR above the base FAR. Therefore, developers can only achieve a higher than base FAR by reaching agreement with the City. The City publishes the criteria it will consider in deciding whether to permit bonus FAR. For the Interlink Lands as at the Effective Date, the bases on which the City would consider discretionary bonusing were published in the Beltline ARP, and they were: the provision of community amenity space; publicly accessible private open space; the provision of affordable housing units; and heritage designation.

- (i) a reasonable timeline for the development of the Interlink Lands would be about 10 years after the Effective Date, given the uncertainties involving the local economy, the location of the proposed Green Line light rail transit (**LRT**) development, and the location of a proposed roadway underpass;
 - (ii) Remington's use of the Interlink Lands during this interim period would likely be to continue leasing the Interlink Lands to the Stampede;
 - (iii) the only loss of use during this interim period was Remington's inability to use the area occupied by the bases of the Transmission Line towers for parking; and
 - (iv) the LPRT awarded an annual amount of \$500 per tower per year for this loss of use, subject to being revisited in the future;
- (d) **Subsection 25(1)(d)**. The LPRT found that:
- (i) the phrase "remaining land of the owner" in subsection 25(1)(d) meant the Subject Properties, in this case;
 - (ii) Remington was entitled to compensation for a 10 meter wide strip of land in the Subject Properties, located adjacent to the ROE Lands;
 - (iii) the total area of this strip was 1.1 acres;
 - (iv) based on its earlier calculation of value under subsection 25(1)(b) of \$6,436,164 per acre (after the 25% reduction for residual value), the total diminution of value related to this 1.1 acre strip was \$7,079,780;
 - (v) the LPRT did not award this as amount a one-time lump sum, because the timing and form of future development was too speculative. Therefore, it awarded annual compensation, reviewable every five years; and
 - (vi) the LPRT set the annual compensation using an annual yield rate of 5%. This resulted in an annual payment of \$353,989; and
- (e) **Interest**. The LPRT awarded interest pursuant to section 25(9), at the Bank of Canada rate in force on the Effective Date.

D. Litigation History

1. Summary

[11] The parties share a long history of litigation involving the Interlink Lands and the Transmission Lines. I will summarize the parts of that history that are relevant to these appeals.

[12] On March 31, 2005, Remington notified ENMAX that it was terminating the ROW Agreements and that, pursuant to their terms, ENMAX was required to remove the Transmission Lines on or before June 30, 2005. ENMAX refused.

[13] In November 2008, Remington commenced an action in this Court alleging trespass and breach of contract, and seeking damages against ENMAX (the **Civil Action**). In November 2011, Park J granted an Order in the Civil Action (the **Park Decision**) in which he decided that:

- (a) CP's assignments of the ROW Agreements to Remington were valid and enforceable as against ENMAX;
- (b) Remington had been entitled to issue the termination notices respecting the ROW Agreements in March 2005; and
- (c) ENMAX had to bear the cost of burying or moving the Transmission Lines (the evidence before Park J was that it would cost approximately \$11.8 million to reroute and bury the Transmission Lines).

[14] Park J directed ENMAX to make an application to the Alberta Utilities Commission (the **AUC**) for permission to remove the Transmission Lines from the Interlink Lands, and ordered that the Transmission Lines could not be removed from the Interlink Lands in the absence of an AUC order.

[15] On June 21, 2012, the Alberta Court of Appeal dismissed ENMAX's appeal of the Park Decision. On January 17, 2013, the Supreme Court of Canada denied ENMAX's application for leave to appeal that dismissal.

[16] On August 7, 2014, ENMAX filed an application with the AUC, seeking approval to remove the Transmission Lines from the Interlink Lands (the **AUC Application**). ENMAX proposed rerouting the Transmission Lines to the south of the Interlink Lands, burying them underground for the vast majority of their length, along 11th Avenue S.E. ENMAX estimated that the relocation along this preferred route would cost \$13.3 million and would take 12 months to complete. ENMAX proposed to recover these costs from its ratepayers. In the AUC Application, ENMAX had identified five other viable route options, but rejected all of them. Four of them would leave portions of the Transmission Lines on or under the Interlink Lands, to which Remington would not consent, and the fifth would move the Transmission Lines to lands owned by Alberta Infrastructure, who also would not consent.

[17] On May 14, 2015, the AUC denied the AUC Application (the **AUC Decision**), making the following key findings:

- because the cost of relocation was proposed as a system cost, which meant that it would be paid by customers of ENMAX, the AUC had to be satisfied that approving the preferred route was reasonable in the circumstances;
- ENMAX had advised the AUC that if it did not approve the relocation, ENMAX would have no other option but to negotiate a right-of-way agreement with Remington, or apply to the LPRT for a right-of-entry order. If ENMAX had to make an application to the LPRT, ENMAX would also seek to pass any LPRT-ordered compensation onto its ratepayers in its next cost-of-service application;
- the cost of acquiring a right-of-way through an application to the LPRT would be uncertain, because the LPRT had not recently determined the value of land within downtown Calgary. However, the AUC found that this uncertainty was an insufficient basis upon which to accept ENMAX's preferred route;
- the main justification advanced by ENMAX in support of its preferred route was that Remington would not agree to continue having the Transmission Lines on its land. However, the AUC did not have any detailed information about Remington's development plans, other than ENMAX's statement that it had been

shown a high-level schematic of the future commercial and residential development. The AUC therefore lacked information about whether the Transmission Lines were incompatible with Remington's future development plans;

- in a number of its past decisions, the AUC had stated that as part of its decision-making process it would only consider developments that have received approval or are in the process of receiving approval. Information about developments that were less advanced was too uncertain and speculative for the AUC to take into account;
- due to the lack of information on Remington's development plans and on any potential impacts the Transmission Lines could have on such a development, and for the reasons articulated in its previous decisions, the AUC was not persuaded that the relocation was necessary. Other route options were only deemed "non-viable" because of Remington's refusal of them. The AUC was not convinced that the preferred route was the best route;
- the AUC also took into account the disruptions that the required construction would have on residents and businesses in the area. If the Transmission Lines did not need to be relocated, any construction impacts would be avoided; and
- the AUC concluded that the proposed relocation was not in the public interest.

[18] Remington asked the AUC to review and vary the AUC Decision, but on September 16, 2015, the AUC refused to do so. Remington then sought leave to appeal the AUC Decision but the Alberta Court of Appeal dismissed its leave application on January 8, 2016.

[19] Pursuant to section 12(1) of the *SRA*, no operator has a right to enter the surface of any land for or incidental to the construction, operation or removal of a power transmission line until it has obtained the consent of the owner or has become entitled to right of entry by reason of an LPRT order. Pursuant to section 15(1) of the *SRA*, if an operator cannot acquire an owner's consent, it can apply to the LPRT for a right of entry order.

[20] On July 5, 2017, ENMAX applied for the ROE Orders. As I have noted above, the LPRT granted the ROE Orders about 10 months later, on May 17, 2018.

2. The Relevance of the Litigation History in these Appeals

[21] Both parties introduced evidence about their long-standing and contentious litigation dispute about these issues. They both urged me to rely on that evidence to make findings about the AUC Application. ENMAX attributes the failure of the AUC Application to Remington's lack of detailed plans for the development of the Interlink Lands, and its non-participation in the AUC Application. Remington retorts that ENMAX either failed to give it proper notice to participate in the hearing, or lulled it into thinking that it did not need to participate.

[22] On the evidence before me in these appeals, it would be impossible for me to make a finding about whether one or the other party was responsible, or more responsible, for the AUC not approving the AUC Application. More importantly, I do not have to pass judgment on any of these historical disputes to decide these appeals, and I find that it would be inappropriate for me to do so. My task in these appeals is narrow and specific: to determine whether the LPRT Decision was reasonable, and if not, to vary it based on my own judgment. The only reason that I have set out the history of the parties' litigation in some detail is because that history is relevant

to my narrow, specific task. I will address some of this background litigation history in my analysis of the issues below.

III. Issues

[23] The issues I must decide are:

- (a) what is the standard of review in these appeals; and
- (b) are the LPRT Decision and the LPRT's rationale reasonable?

IV. Analysis

A. What is the Standard of Review in these Appeals?

[24] Section 26 of the *SRA* is the provision that gives parties a right to appeal compensation decisions under section 25 to this Court. Subsections 26(6) and (7) of the *SRA* state:

- (6) An appeal to the Court shall be in the form of a new hearing.
- (7) The Court
 - (a) has the power and jurisdiction of the [LPRT] in determining the amount of compensation payable and the person to whom the compensation is payable,
 - (b) shall determine the amount of compensation payable and the person to whom the compensation is payable,
 - (c) shall
 - (i) confirm the order of the [LPRT], or
 - (ii) direct that the compensation order be varied in accordance with its judgment, and
 - (d) shall make directions as to costs of the appeal in accordance with subsection (9).

[25] Thus, appeals of section 25 compensation decisions are somewhat unique. Both parties are entitled to introduce new evidence, in a trial setting. Remington and ENMAX both did that here. I have the same power and jurisdiction as the LPRT to determine compensation, and I must either confirm the LPRT Decision or vary it.

[26] Section 19 of the *Land and Property Rights Tribunal Act*, RSA 2000, c L-2.3 (the *LPRTA*) mandates that I review the LPRT Decision by applying the reasonableness standard. The Supreme Court of Canada in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 58 – 66 provided the following guidance for a reasonableness review like this one:

- I am to take a “reasons first” approach, by assessing two things: the outcome of the LPRT Decision, and the process the LPRT followed to make that decision as disclosed in its reasons;
- I cannot simply substitute my own decision for the LPRT Decision;

- the LPRT Decision does not need to be perfect. However, it must be justifiable, and the reasons for it must justify the decision transparently and intelligibly; and
- examples of the types of “fundamental flaws” on the basis of which I could find the LPRT Decision to be unreasonable would be:
 - a failure of rationality or logic in the LPRT’s reasoning process; or
 - a failure of justification in light of the legal and factual constraints (such as the governing statutory scheme in the *SRA*, the proper interpretation of the *SRA*; applicable case law; the evidence before the LPRT; the submissions of the parties; the past practices and decisions of the LPRT and the potential impact of the LPRT Decision).

[27] *Enbridge Pipelines (Athabasca) Inc v Karpetz*, 2010 ABQB 108 was an appeal to this Court of an LPRT decision. At para 43, Macklin J summarized how I am to treat the new evidence introduced in these appeals:

- if the new evidence contradicts or undermines evidence that was heard by the LPRT, that evidence may cast doubt on the reasonableness of the LPRT Decision;
- this is the case even if the LPRT had not received any evidence on a similar point; and
- therefore, the new evidence can render the LPRT Decision unreasonable, regardless of how the LPRT reached its decision.

[28] Based on this guidance in the *LPRTA* and the caselaw, I have approached these appeals by:

- first considering the LPRT Decision, including the LPRT’s reasoning;
- assessing the evidence that I heard in these appeals, to decide whether the LPRT Decision and the LPRT’s reasoning is reasonable; and
- only where I find that the LPRT Decision or the LPRT’s reasoning is not reasonable, varying the LPRT Decision in accordance with my judgment on the issue, based on the evidence that I heard in the appeals.⁶

B. *Post Facto* Evidence

[29] It is helpful to address the issue of after the fact (“*post facto*”) evidence before beginning my analysis. The admissibility of this type of evidence arose in these appeals, as it does in many compensation cases under section 25 of the *SRA*, because the hearings took place long after the Effective Date. The LPRT Hearing was held in late 2020 and early 2021, two and a half years after the Effective Date. These appeals were heard in late 2024, six and a half years after the

⁶ Throughout this judgment, I will use the phrase “unreasonable error” to describe a finding or conclusion by the LPRT that I have concluded is unreasonable, using the approach I have described in paragraphs 26 – 28 of this Judgment. Because the word “error” is sometimes associated with the correctness standard, I want to clarify that my use of that word in the phrase “unreasonable error” does not mean that I have applied the correctness standard in these appeals. I have not. I have applied only the reasonableness standard, in the way I have described in paragraphs 26 – 29. I simply find “unreasonable error” to be a useful and grammatically appropriate shorthand phrase.

Effective Date. It was therefore somewhat inevitable that the parties would attempt to introduce evidence of what had happened after the Effective Date.

[30] The parties largely agreed about the proper approach to *post facto* evidence in section 25 compensation hearings: *post facto* evidence is inadmissible with respect to the inquiries under subsection 25(1)(a) and (b), but admissible with respect to the inquiries under subsection 25(1)(c) and (d). I generally agree, but it is important to set out the principles regarding this issue because the parties disagreed about whether certain evidence was or was not *post facto* evidence.

[31] In *Beta Management v Edmonton (City)*, 2017 ABQB 571, Renke J heard an appeal from an assessment board. The issue he had to decide was the proper assessed value of a property as at July 1, 2015. The property had been sold in 2011 (before the assessment date) and again in early 2016, about six months after the assessment date. The assessment board had refused to use the evidence about the 2016 sale to help it assess the value of the property, and Renke J agreed with that approach. At paras 62 – 79, he comprehensively reviewed the relevant caselaw and summarized the governing principles as follows:

- *Post facto* evidence is not relevant to the valuation of an asset at a specific point in time;
- this is not necessarily a special rule of evidence, but rather just an application of the normal rule that evidence must be relevant to be admissible. *Post facto* evidence about what occurred after a valuation date is not admissible because it is not relevant to the issue of the value of a property as at that date;
- *post facto* evidence potentially could be relevant to some issues that may arise in a valuation dispute, separate from the core question of value itself. Examples of such separate issues recognized in the case law include:
 - the accuracy of projections used in a valuation;
 - the reasonableness of assumptions made by valuers; or
 - the physical quality of an “unchanged component” of the assessed property (such as the tonnage and grade of ore present in a mining property).

[32] I agree with Renke J’s statement of the law at para 75:

The true “rule” engaged by *post facto* evidence is relevance. Relevance concerns the relationship between information and a fact-in-issue. ... In the case of valuation, the fact-in-issue is market value as of the valuation date. Market value depends on information that is available on the valuation day, in the circumstances that prevail on the valuation day. Critically, market value is a prediction, based on market conditions and information available at the time. It is not a “fact” ... *Post facto* evidence is not relevant to the issue of market value because, being after-the-fact, it was not known at the valuation date. It could not have been known to support the prediction of value. Further, *post facto* evidence does not necessarily emerge from the conditions that obtained on the valuation date. The “exceptions” to the “*post facto* evidence rule” are not exceptions to a legal rule but examples of types of situations in which after-the-fact evidence is relevant to some issue other than market value itself. Throughout, the use of the evidence is guided by the legal principle of relevance. [citations omitted]

[33] Subsections 25(1)(a) and (b) of the *SRA* specifically direct the LPRT (and this Court in an appeal) to consider market price and per acre value, respectively, “**on the date the right of entry order was made**”. The only evidence that is relevant to the inquiries under these subsections is evidence of facts that were known or could have been known on the Effective Date. The parties both agreed with this approach in principle, although they both asked me to deviate from different times, urging me to consider *post facto* evidence that was helpful to their respective cases.

[34] I will address some of *post facto* evidence submitted or relied upon by the parties in these appeals, during my analysis of the issues below.

C. Is the LPRT Decision, and the Reasoning in it, Reasonable?

1. The Proper Overall Approach to Compensation under Section 25 of the *SRA*

[35] The purpose of the compensation scheme under section 25 of the *SRA* is to ensure that the landowner is “made whole”: *ATCO Electric Ltd v Pratch*, 2019 ABQB 466 at para 92 (*Pratch*). The goal is to fairly compensate the landowner for its loss, not to overcompensate or it, or undercompensate it: *Lecuyer Cattle Company v Co-operative Energy Development Corporation*, 1985 CanLII 1208 (ABQB) at para 21.

[36] The purpose of section 25 compensation is easy to state, but is quite difficult to apply in this case. Both parties agree, and the LPRT acknowledged in the LPRT Decision, that this case is factually unique, if not entirely unprecedented, in the context of section 25 compensation cases. Almost all reported compensation decisions under section 25 of the *SRA* involve a utility operator or mineral lessee operating on rural lands. This case is very different: on the Effective Date, the Subject Properties covered by the ROE Orders were zoned for high-density development, and they are located in the downtown core of a city with over 1 million residents.

[37] The subsection 25(1) factors that I have listed in paragraph 10 of this Judgment are not to be applied formulaically or slavishly. Rather:

- (a) the LPRT’s and this Court’s consideration of the factors is permissive, not mandatory (this is made clear by the words “**may** consider” in the opening clause in subsection 25(1);
- (b) the factors are not mutually exclusive; but rather, they all may be considered. Regardless of whether all, some, or none of the subsection 25(1)(a) – (d) factors are considered, the emphasis must always be on determining what amount properly compensates the owner for the infringement: *Sawiak v Petroleum Ltd*, 1989 ABCA 324 at paras 9, 12; and
- (c) the factors are not exclusive, nor are they a code. There is an “omnibus” provision in subsection 25(1)(e) that authorizes the LPRT and this Court to also consider “any other factors that [are considered] proper under the circumstances”.

[38] Because the purpose is to properly compensate the owner, it is the actual loss suffered by the owner, as established by the evidence, that must determine the proper compensation. Renke J summarized this overarching principle well in *Pratch* at para 97:

Compensation must be for actual loss, for loss supported by evidence relevant to the type of loss claimed. The type of loss claimed will affect the type of evidence

needed to support that claim. Put another way, if the type of loss claimed lacks support by the relevant type of evidence, there can be no award for that type of loss claimed.

[39] I will analyze the LPRT Decision by considering each of the four factors in subsections 25(1)(a) – (d) of the *SRA*, sequentially. That is how the LPRT structured the LPRT Decision, that is how the parties presented their cases in these appeals, and that is how the LPRT and this Court approach these cases in the reported decisions.

2. Was the LPRT Decision Respecting Subsection 25(1)(a) Reasonable?

[40] For the following reasons, I find that the LPRT Decision was reasonable, as was the LPRT’s reasoning, in deciding that subsection 25(1)(a) does not apply in this case.

a. The LPRT Decision and Reasoning

[41] Subsection 25(1)(a) permits the LPRT and this Court to consider “the amount the land granted to the operator might be expected to realize if sold in the open market by a willing seller to a willing buyer on the date the right of entry order was made.”

[42] At the LPRT Hearing, both parties had argued that section 25(1)(a) (which the LPRT calls the “small parcel approach”) was inapplicable to this case. The LPRT agreed. In this case, the “land granted to the operator” was the ROE Lands. The LPRT found that there was no evidence of any market for the purchase and sale of those narrow ROE Lands.

b. The Parties’ Positions

[43] In these appeals, Remington maintained the same position it had taken in the LPRT Hearing: that subsection 25(1)(a) was inapplicable. However, ENMAX argued that the Court should overturn the LPRT’s decision not to award compensation under subsection 25(1)(a). ENMAX’s argument was based on the following factual foundation, and ENMAX urged me to find that these facts had been proven in the appeals:

- (a) the ROE Orders constitute only a temporary, partial taking;
- (b) the highest and best use of the Subject Properties as at the Effective Date, as determined by the LPRT, was future high-density mixed-use development, but only starting 10 years after the Effective Date;
- (c) until development starts, the highest and best interim use of the Subject Properties would only be as a surface parking lot; and
- (d) as at the Effective Date, it was probable that the Transmission Lines would be relocated prior to the Interlink Lands being developed. ENMAX submitted that the evidence in these appeals “clearly established that ENMAX’s rights-of-way would be vacated within 10 years of the Effective Date.” In support of this proposed finding, ENMAX asked me to consider the fact that the Transmission Lines had been relocated in 2023 as corroborative evidence.

[44] Based on this proposed factual foundation, ENMAX argues that as at the Effective Date the only “loss” for which Remington was entitled to be compensated was the loss of income that it would suffer during the interim period, before the Transmission Lines were removed.

[45] To quantify this loss, ENMAX relied on the expert testimony of Michael Parsons. I qualified Mr. Parsons as an expert in the area of the appraisal of real property, including market value of partial interest, loss of use, and adverse effects/injurious affection. Mr. Parsons opined about the interim income that Remington would have lost because of the presence of the Transmission Lines and the ROE Orders, employing the income approach to valuation, and using this methodology:

- (a) he determined an amount of land rent per parking stall of \$1,390 per year (based on publicly available income and expense data from the City, which is a large commercial parking lot operator in downtown Calgary);
- (b) he determined the number of parking stalls (23) from which Remington would not be able to earn income, corresponding to the areas occupied by the six Transmission Line tower bases;
- (c) he calculated the annual lost revenue corresponding to the 23 unavailable stalls as: 23 (stalls) X \$1,390 (annual land rent per stall) = \$31,975 (annual lost revenue);
- (d) he calculated an additional loss of revenue corresponding to 79 additional surface parking stalls that would be located in the ROE Lands, under the aerial Transmission Lines. Because Mr. Parsons believed that the impact of the aerial Transmission Lines on the surface use of these areas was minimal, he applied a use factor of 17.5%, based on appraisal literature. He therefore calculated this additional loss as: 79 (stalls) X \$1,390 (annual land rent per stall) X 17.5% (use factor) = \$19,219 (annual lost revenue);
- (e) he added the two components of annual lost revenue to derive total annual lost revenue: \$31,975 + \$19,219 = \$51,200; and
- (f) he calculated the total lost revenue over the entire 10 year interim use period before the Transmission Lines would be inevitably removed and the Interlink Lands could be developed: \$51,200 X 10 = \$512,000.

c. My Analysis of the LPRT’s Decision and Reasoning

[46] I do not accept the approach proposed by ENMAX under subsection 25(1)(a), for a number of reasons.

i. Subsection 25(1)(a) is Inapplicable to this Case

[47] First, the subsection 25(1)(a) factor (which the LPRT refers to as the “small parcel” approach) simply does not apply to the facts of this case. The subsection 25(1)(a) factor is very specific: it speaks of “the amount the land granted to the operator might be expected to realize” if that land was “**sold** in the open market by a willing seller to a willing buyer on the date the right of entry order was made”. The LPRT and this Court have consistently interpreted these words to mean that it is appropriate to consider this factor only if there is an actual market for the purchase and sale of the parcel to which the right of entry order applies: *Access Pipeline Inc v Rizzoli*, 2015 ABSRB 383 at page 6; *Gallivan v Alta Power Ltd*, [1988] 88 AR 214 (QB) at para 53.

[48] The “small parcel” in this case is the ROE Lands. The ROE Lands cover 1.23 acres. As can be seen in Appendix “B” to this Judgment, the ROE Lands are very narrow and long. They are not completely contiguous, and they could not be accessed from public areas without crossing the Interlink Lands or other privately-owned lands. There was no evidence introduced

in the appeals that established there is any actual market for the ROE Lands. In the absence of that kind of evidence, the subsection 25(1)(a) factor has no application.

ii. The Factual Basis for Mr. Parsons' Opinion on Subsection 25 (1)(a) Compensation is Hypothetical and Not Supported by the Evidence

[49] The second reason that I reject ENMAX's approach to subsection 25(1)(a) is that Mr. Parsons' income approach valuation is entirely hypothetical. Mr. Parsons' opinion is based on the premise that Remington would operate a commercial surface parking lot on the Interlink Lands. However, there was no evidence whatsoever that Remington ever used the Interlink Lands in that way, or that it ever would. The evidence about Remington's current use of the Interlink Lands was uncontested: by the Effective Date, it had been leasing the Interlink Lands to the Stampede for over nine years. The rent payable, and the other consideration that Remington received by under that lease, was not dependent on how the Stampede utilized the Interlink Lands. There was no evidence suggesting that the Stampede would have paid higher rent if the Transmission Lines were not present, or if the six Transmission Line tower bases were not present.

[50] Thus, Mr. Parsons' opinion that Remington would suffer a loss related to income that it could not earn because of the area occupied by the six towers was supported by no evidence. It was purely theoretical.

[51] Because Mr. Parsons' opinion is based on facts not proven in the evidence, I am entitled to give it less weight: *R v Wilband*, [1967] 2 SCR 14 at 21. However, the problem with his income approach value opinion goes further than that. It provides no assistance to the Court, given the clear purpose of the section 25 compensation analysis that guides me in these appeals: to make Remington whole for the loss that it has actually suffered. Because Remington never operated the Interlink Lands as a commercial surface parking lot, and because there was no evidence that it would ever do so, Remington did not in fact suffer any loss related to such a use. The attempt to quantify Remington's loss with reference to reduced parking lot revenue, when Remington never earned parking lot revenue from the Interlink Lands, is completely irrelevant.

3. Was the LPRT Decision Respecting Subsection 25(1)(b) Reasonable?

a. Overview

[52] For the reasons that follow, I have concluded that the LPRT's award under subsection 25(1)(b) was not reasonable. Based on the evidence I heard in the appeals, the LPRT made five unreasonable errors.

[53] Applying the law of compensatory damages to the evidence presented in these appeals, I have concluded that Remington's actual loss caused by the presence of the Transmission Lines was a 10-year delay in developing the entirety of the Interlink Lands. To compensate Remington for this loss, ENMAX must pay Remington a one-time award under subsection 25(1)(b) of \$11,078,123, plus interest.

The LPRT's Overarching Unreasonable Error

[54] The LPRT's first, and overarching, error was unreasonably failing to properly identify the true nature of Remington's actual loss. As I have noted above, the purpose of the SRA compensation scheme is to make Remington whole – in other words, to compensate it for the

actual loss that it suffered, but not to overcompensate it or undercompensate it. To make the owner whole, the award must match the loss. Under subsection 25(1)(b), the LPRT awarded Remington the fair market value of the ROE Lands (partially reduced to recognize some residual value retained by Remington). Thus, the notional loss that this award compensated Remington for was the permanent loss of the ROE Lands. However, the evidence in these appeals did not establish that Remington would permanently lose the ROE Lands; rather, it established that after a delay caused by the presence of the Transmission Lines, Remington would develop the entirety of the Interlink Lands (including the ROE Lands). Thus, the nature of the actual loss that Remington suffered was the delay of its recovery of the market value of all the Interlink Lands, not the permanent loss of the market value of the ROE Lands. The LPRT's subsection 25(1)(b) award did not keep Remington whole, because it did not compensate Remington for its actual loss.

The LPRT's Four Specific Errors

[55] The LPRT made four additional unreasonable errors, which contributed to its overarching error:

- (a) Specific Error 1: unreasonably interpreting its jurisdiction under subsection 25(1)(b), to prevent it from awarding compensation “beyond the titled units”;
- (b) Specific Error 2: unreasonably assessing Remington's reversionary value in the Interlink Lands;
- (c) Specific Error 3: making unreasonable fact findings about the cause of the delay in developing the Interlink Lands; and
- (d) Specific Error 4: unreasonably assessing Remington's residual value in the Interlink Lands.

[56] I will explain each of the LPRT's unreasonable errors in detail below.

[57] I recognize that the LPRT is entitled to deference, within the context of the reasonableness standard of review that I must apply in these appeals (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65). Courts in this Province have repeatedly recognized that the LPRT has specialized expertise in awarding compensation under the SRA: e.g. *Imperial Oil Resources Ltd v 826167 Alberta Inc*, 2007 ABCA 131 at para 15. I acknowledge that specialized expertise. However, this case involves extremely unique (indeed, entirely unprecedented) factual circumstances for a section 25 compensation analysis. This was acknowledged by the parties, their counsel and many of the expert witnesses who have significant experience testifying before the LPRT. I did not have before me the entire evidential record that was before the LPRT. I have decided these appeals on the evidence entered before me, and it is on the basis of that evidence that I have concluded that the LPRT unreasonably erred.

b. The LPRT Decision and Reasoning

[58] The LPRT awarded compensation of \$7,916,482 under subsection 25(1)(b),⁷ on the basis I have already summarized in paragraph 10 of this Judgment.

⁷ In the course of considering subsection 25(1)(b), the LPRT also addressed the subsection 25(2) factors of residual value and reversionary value. I will do the same thing.

c. The Parties' Positions

[59] In these appeals, Remington argued that, although the LPRT generally accepted Remington's position on subsection 25(1)(b) in the LPRT Decision, it made the following errors:

- (a) using a FAR of 5 for the entirety of the Interlink Lands, rather than a 7 FAR on the western portion and a 6 FAR on the eastern portion; and
- (b) using a price per buildable square foot that was lower than the one proposed by its valuation expert Mr. Wagar.

[60] In these appeals, ENMAX's primary position on subsection 25(1)(b) was that this factor (commonly called the "*en bloc* approach") was completely inapplicable, because it was certain that the Transmission Lines would be removed after the Effective Date, meaning that the taking authorized by the ROE Orders was only temporary. ENMAX argued that subsection 25(1)(b) would be applicable only if the taking was permanent. Since the taking was not permanent, the only reasonable basis for a compensation award to Remington was Mr. Parsons' income approach, which I have already described above, and rejected, in my analysis of subsection 25(1)(a).

[61] In making this argument, ENMAX relied heavily on the fact that the Transmission Lines were removed in 2023. I cannot rely on that evidence, as it is irrelevant *post facto* evidence.

[62] ENMAX's alternative argument on subsection 25(1)(b), if I find that the *en bloc* approach is appropriate, was that while some of the LPRT's findings regarding subsection 25(1)(b) were reasonable, its ultimate valuation of the ROE Lands was not. ENMAX says the following findings of the LPRT were reasonable:

- (a) the highest and best use of the Interlink Lands was phased high-density mixed residential, commercial and light industrial development starting approximately 10 years after the Effective Date, with interim use as a surface parking lot;
- (b) the base FAR for the Interlink Lands at the Effective Date was 5, and this was the appropriate FAR to be used in valuing the Interlink Lands; and
- (c) there would need to be a deduction from the award, to recognize the residual value to Remington of the rights-of-way acquired by ENMAX.

[63] However, ENMAX argued that the LPRT erred by making the following findings:

- (a) refusing to make a deduction to the per acre value of the Interlink Lands despite the fact that the comparable properties reviewed by Remington's expert witness Mr. Wagar were all significantly smaller than the Interlink Lands; and
- (b) reducing the award by only 25% to account for the residual value that Remington would retain despite ENMAX's taking. ENMAX argued that, because all the development potential of the ROE Lands could be transferred to the balance of the Interlink Lands, the correct reduction for residual value should be larger, between 82.5% and 100%.

d. My Analysis of the LPRT's Decision and Reasoning

[64] I will conduct my analysis of the LPRT's subsection 25(1)(b) award in the following sections:

- (a) summarizing the governing compensation principles;
- (b) identifying the “taking” for which Remington is to be compensated;
- (c) determining Remington’s loss caused by that taking;
- (d) assessing the award necessary to compensate Remington for its loss; and
- (e) considering the remoteness of Remington’s loss.

[65] In the course of proceeding through these different sections of my analysis, I will explain in detail the LPRT’s five unreasonable errors that I have identified above.

i. The Compensatory Damages Principles That Apply in this Case

[66] As I have noted, the guiding principle of the *SRA* compensation scheme is to keep the owner whole, by compensating it for its actual loss. Remington has the burden of proof of establishing its actual loss, on a balance of probabilities: *Pratch* at para 92.

[67] The goal of compensatory damages is to put the wronged party in the position it would have occupied if the wrong had not occurred: James Edelman, *MacGregor on Damages*, 21st ed (2021: Thomson Reuters) at 2-001, page 14. Thus, to compensate properly, it is necessary to precisely identify the wrong, and the position that the wronged party would have been in had the wrong not occurred.

[68] There are various rules that potentially limit the extent of compensatory damages for which a wrongdoer will be held liable. These rules are often discussed under the general heading of “remoteness”. The goal of these rules is to prevent liability for damages that are unfair, unreasonable or unforeseeable. The courts have generally developed the remoteness rules in cases involving the two most common types of claims for compensatory damages: breaches of contract and torts.

[69] The Supreme Court of Canada has stated that the same remoteness principles apply to both tort and contract claims: *Asamera Oil Corp Ltd v Sea Oil and & General Corp*, [1979] 1 SCR 633 at page 673. However, the terminology is not always used consistently, and there are often significant differences in how the principle is discussed in breach of contract and tort cases. As noted in a prominent damages text:⁸

In the law of contracts, the question of remoteness is always considered to be a remedial question. In torts, on the other hand, it is impossible to draw a clear dividing line between questions of liability and damages. This is because the test of foreseeability is used in the law of negligence to determine not only the extent of damages payable by the defendant but whether there is sufficient legal nexus between plaintiff and defendant in the first place, whereas the legal nexus in a contract case is determined by the existence of the contract itself. A test of reasonable foresight is used in negligence cases to determine whether the defendant owed a duty, whether there was a breach of the duty and whether the damage claimed is too remote.

⁸ S.M. Waddams, *The Law of Damages*, looseleaf edition (2021: Thomson Reuters) 14:12 at page 14-29 (*Waddams*).

[70] While this is not a breach of contract or a tort case, the law of compensatory damages that has been developed in those contexts applies. More specifically, I am satisfied that the remoteness principles of causation and the reasonable foreseeability of loss must be applied in this case to properly determine Remington’s loss, and to ensure that it is not overcompensated or undercompensated. The LPRT and this Court have both applied those two principles in many section 25 compensation cases.

Causation

[71] Defendants can be liable only for losses that they have caused. The “general, but not conclusive” test for causation is the “but for” test. This test requires that the plaintiff prove on a balance of probabilities that the injury would not have occurred but for the wrongful act of the defendant: *Athey v Leonati*, 1996 CanLII 183 (SCC) at para 14 (*Athey*). The Supreme Court of Canada also enunciated the following related principles in *Athey* at paras 15 – 33:

- the “but for” test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant’s wrong “materially contributed” to the defendant’s loss;
- a contributing factor is “material” if it falls outside the *de minimis* range;
- the causation test need not be applied too rigidly. Scientific precision is not required; rather, causation is a “practical question of fact which can best be answered by ordinary common sense.” Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof;
- it is not necessary for the plaintiff to establish that the defendant’s negligence was the sole cause of the plaintiff’s loss. As long as a defendant is part of the cause of an injury, the defendant is liable, even though its act alone was not enough to cause the loss; and
- there is no basis to reduce the liability of a defendant who caused or materially contributed to a loss because other (non-tortious) causal factors for which they are not responsible also contributed to the loss.

[72] The LPRT has frequently applied the “but for” test in section 25 compensation cases, to determine whether owners had proved that the operator’s taking caused the loss: *e.g. Penn West Petroleum Ltd v Parkland Industrial Estates Ltd*, 2015 ABSRB 42 at pages 4, 8, 10 - 12; *ARC Resources Ltd v Drayton Valley Investments Ltd*, 2015 ASRB 706 at page 5; *Altalink Management Ltd v Franklin*, 2017 ABSRB 219 at page 16; *Lexin Resources Ltd v 1724732 Alberta Ltd*, 2017 ABSRB 473 at pages 5, 6; *Bearspaw Petroleum Ltd v The Village of Big Valley*, 2021 ABLPRT 141 at para 91; and *Singh v MAGA Energy Ltd*, 2022 ABLPRT 1420 at paras 101, 106 and 127.

Reasonable Foreseeability

[73] Causation alone is not enough. A defendant will be liable for damages caused by their wrongful act only if the plaintiff also leads sufficient evidence to establish on a balance of probabilities that the **type** of damage they suffered was a “reasonably foreseeable” result of the wrongful act: *Rankin (Rankin’s Garage & Sales) v JJ*, 2018 SCC 19 at paras 22, 24.

[74] While they may not have framed the inquiry in the precise language of foreseeability (or the related term “proximity”), the LPRT and this Court have often refused to award damages in SRA compensation cases when the evidence of a claimed loss was too “speculative” or “remote”: e.g. *Altalink Management Ltd v Yaltho*, 2014 ABSRB 219 at page 9 (*Yaltho*); *Terasen Pipelines (Corridor) Inc v R&M Schroter Enterprises Ltd*, 2013 ABQB 482 at para 88. As noted by Renke J in *Pratch* at para 96, in SRA compensation cases, “‘remoteness’ imposes a normative limit on the scope of inferred injury.”

[75] Our Court of Appeal has recently reinforced the principle that compensatory damages can be awarded only if they are reasonably foreseeable: *Remington Development Corporation v Canadian Pacific Railway Company*, 2025 ABCA 244 (*Remington/CP*). Although that case was a breach of contract claim, it provides helpful guidance because the loss that the plaintiff claimed there was being prevented from acquiring a parcel of land that it wanted to develop.⁹ The Court of Appeal invoked the rule in *Hadley v Baxendale*¹⁰ and reiterated the following important compensatory damages principles:¹¹

- in a claim involving the development value of a parcel of land, the measure of damages can be limited by the reasonable foreseeability of the loss, which in turn will depend at least partly on the facts that were objectively contemplated by the parties or by market participants; and
- when assessing compensatory damages, while the type of loss must be reasonably foreseeable, the quantum or extent of the loss generally need not be foreseeable to be recoverable.

[76] I will discuss causation and remoteness further below in the context of the evidence I heard in these appeals.

The Standard of Proof Required to Prove Future Facts

[77] Because the bulk of the important compensation factors in this case must be considered as at the Effective Date, much of the evidence in these appeals was forward-looking. In other words, that evidence spoke from the perspective of the Effective Date and looked forward into the future about what was likely to happen after the Effective Date.

[78] Our law has established rules about how courts are to assess the evidence of such future events in the context of compensatory damages claims. The Supreme Court of Canada articulated these rules in *Athey* at paras 27 and 28:

- hypothetical events (such as how the plaintiff’s life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities;
- instead, they are simply given weight according to their future likelihood;
- a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation; and

⁹ This recent reported case concerned a breach of contract claim by the owner in this case, Remington, against CP, respecting lands located north of the Interlink Lands. Although some of the background facts in that case and this case are the same, they are entirely distinct disputes.

¹⁰ (1854), 9 Exch 341, 156 All ER 145.

¹¹ *Remington/CP* at paras 82, 88, 101.

- by contrast, past events must be proven and once proven they are treated as certainties.

[79] Slatter JA commented helpfully about this fact-finding process in *Hogarth v Rocky Mountain Slate Inc*, 2013 ABCA 57 at para 35:

This is a common sense process, based on inferences from the evidence, and the law does not require proof to a scientific standard: ... But the inferences and findings of causation must be based on the evidence; that is what distinguishes judicial fact finding from “speculation”.

[80] Thus, the LPRT and this Court are required to test all the evidence that looks forward from the Effective Date about future events or possibilities not on the balance of probabilities standard, but using the “real and substantial possibility” standard.

[81] I have applied this standard of proof when considering forward-looking evidence about what might happen after the Effective Date.

ii. What is the “Taking” that Remington is to be Compensated For?

[82] To properly determine compensation, it is necessary to first precisely identify the act or conduct that is alleged to have caused the claimant’s loss.

[83] In breach of contract and tort cases, the answer to this question is self-evident: the wrong to be compensated for is the defendant’s breach of the parties’ contract, or the defendant’s commission of a tort. However, the answer to this question is not expressly stated in the *SRA* or the reported section 25 compensation cases. While the *SRA* section 25 compensatory scheme is undoubtedly **triggered** by the making of a right of entry order (*Sabo v AltaLink Management Ltd*, 2024 ABCA 179 at para 52 (*Sabo CA*)), the *SRA* does not identify the act or conduct that is to be compensated for. Is compensation to be provided only for the infringement of the owner’s rights that is embodied in the right of entry order? Or is compensation to be determined by also considering the physical infrastructure or facilities built on, under or over their land pursuant to the right of entry order?

[84] I asked the parties this question during closing submissions, and they both generally agreed that the “thing” for which Remington is to be compensated is not only the infringements of its rights imposed by the ROE Orders, but also the continued presence of the Transmission Lines on the Interlink Lands pursuant to those ROE Orders.

[85] In the reported cases, the LPRT and reviewing courts often describe the conduct that the owner is being compensated for as the “taking”. Accordingly, I will use the term “taking” to mean the act or conduct for which Remington is to be compensated under section 25. The reported decisions show that in section 25 cases, the LPRT (and this Court in appeals) considers the full factual context of a taking. This includes not only the formal legal infringement of the owner’s rights via the right of entry order that grants legal authorization to the operator, but also the full factual circumstances of the physical infrastructure that has been or will be constructed and operated on the owner’s lands. These circumstances include the past, present and future impact of the infrastructure on the owner and their lands, and the likely future fate of the infrastructure and of the lands.

[86] This approach is consistent with the governing law of compensatory damages. The Court must take into account all relevant facts and context in determining appropriate compensation.

On the particular facts of this case, that includes the long-standing presence of the Transmission Lines on the Interlink Lands prior to the Effective Date,¹² and the significant history of the parties' dealings prior to the Effective Date. The parties both tendered a significant volume of evidence about these types of facts without objection, and I admitted that evidence, finding that it was relevant and material.

[87] Therefore, I find that the taking for which Remington is to be compensated in accordance with section 25 of the *SRA* and the governing principles of compensatory damages law is:

the infringement of Remington's rights as embodied in the ROE Orders, and the continued presence of the Transmission Lines on the Interlink Lands that was authorized by those ROE Orders, in the context of all the factual circumstances existing as at the Effective Date.

[88] The LPRT's mandate was to keep Remington whole by awarding compensation that would put Remington back in the position it would have occupied, but for the loss it suffered as a result of this taking, as appropriately determined (and limited) by the law of compensatory damages.

[89] I will now analyze the loss suffered by Remington as a result of this taking.

iii. What Loss did the Taking Cause / What Position Would Remington Have Been in "But For" the Taking?

[90] I will analyze this question by breaking it into the following stages:

- (a) explaining the LPRT's overarching unreasonable error -- failing to correctly identify the true nature of Remington's loss;
- (b) identifying the true nature of that potential loss, based on the evidence in the appeals; and
- (c) analyzing causation – did the taking cause Remington to suffer an actual loss, and if so, to what extent?

A. The LPRT Unreasonably Failed To Identify the True Nature of Remington's Potential Actual Loss¹³

[91] I have described this as the LPRT's first, or "overarching," unreasonable error.

[92] For the reasons set out below, I find that the evidence in the appeals established that the true nature of Remington's potential loss was not the loss of the market value of the ROE Lands. It was the delay in recovering the market value of the entire Interlink Lands.

[93] The goal of section 25 compensation is to keep an owner whole. Therefore, there must be alignment between the owner's loss and the award that compensates it for that loss. In the

¹² Remington argued that it should be compensated for the infringement of its rights in the ROE Orders and the presence of the Transmission Lines on the Interlink Lands, as if the Transmission Lines were to be newly-constructed after the granting of the ROE Orders. I decline to follow that approach, which would be somewhat artificial.

¹³ In this section and the next section of my Judgment, I use the term "potential" actual loss when I am analyzing the **conceptual or essential nature** of Remington's loss, as opposed to analyzing whether an actual loss occurred and what caused it.

LPRT Decision, the LPRT (at para 79) correctly noted this need for alignment, stating that its task was to determine what amount properly compensates the surface owner for the infringement of its rights.

[94] The LPRT did not expressly articulate the loss suffered by Remington. It also did not articulate whether or how Remington's loss was caused by the taking, nor how the compensation it awarded would make Remington whole for its loss. Rather, the LPRT appeared to simply apply the customary "*en bloc*" approach under subsection 25(1)(b): determine the market value of the lands affected by the taking, and award that amount, reducing it by any reversionary or residual value.

[95] As I have explained in paragraph 10 of this Judgment, the LPRT awarded Remington the market value of the ROE Lands (reduced by an amount of value that Remington would recover from the ROE Lands despite the taking by ENMAX). For the award and the actual loss to align, as they must, the actual loss Remington must have suffered is the permanent loss of the market value of the ROE Lands, while somehow retaining 25% of the market value of the ROE Lands.

[96] This award was unreasonable because the evidence in the appeals established that, sometime after the Effective Date, the Transmission Lines would be removed and the Interlink Lands as a whole (including the ROE Lands) would then be developed. As a result, Remington would never suffer a permanent loss of the market value of the ROE Lands. That cannot be the nature of Remington's potential actual loss. Remington will recover the market value of the ROE Lands at the same time it recovers the market value of all the Interlink Lands. The evidence in the appeals proves that the nature of Remington's potential actual loss as at the Effective Date was the delay it would experience receiving the market value (through sale or development) of the entirety of the Interlink Lands.

[97] This conclusion results from the following specific facts, which I find that the evidence in these appeals established, as at the Effective Date:

- (a) the highest and best use of the Interlink Lands was high density, mixed-use development;
- (b) the only parties who would pay market value for the Interlink Lands would be one or more sophisticated property developers like Remington, who would be capable of developing the Interlink Lands;
- (c) neither Remington nor any other developer would develop the Interlink Lands except to their highest and best use;
- (d) neither Remington nor any other developer would develop the Interlink Lands without developing the Subject Properties (including the ROE Lands) at the same time;
- (e) neither Remington nor any other developer would develop the Interlink Lands until the Transmission Lines were removed; and
- (f) the Transmission Lines would be removed sometime after the Effective Date, after which the Interlink Lands would be developed to their highest and best use.

[98] The chain of reasoning that the LPRT followed to make its subsection 25(1)(b) award was:¹⁴

- (a) the proper approach under subsection 25(1)(b) was to determine the value of the “titled units” based on the “highest approved use” (these are two phrases used in subsection 25(1)(b) of the titled units, and then prorating that value to the percentage of the titled units that were taken;¹⁵
- (b) the term “titled unit” in subsection 25(1)(b) is, on the facts of this case, correctly interpreted as “certificate of title” and in this case, the “titled units” are the four Subject Properties in which the ROE Lands are located;¹⁶
- (c) the phrase “highest approved use” in subsection 25(a)(b) is, on the facts of this case, synonymous with “highest and best use”;¹⁷
- (d) there is nothing in section 25 of the *SRA* that allows the LPRT to award compensation “beyond the titled unit.” The phrase “titled unit” is from subsection 25(1)(b) and the LPRT based this decision in part on *Sabo v AltaLink Management Ltd*, 2022 ABQB 156 (*Sabo QB*);¹⁸
- (e) the LPRT could consider facts outside the boundary of the titled units (such as the fact that the Subject Lands were part of the larger assemblage of Interlink Lands) to establish the per acre value of the titled units, and in this case the larger assemblage of the entire Interlink Lands as a whole has a positive effect on the value of the Subject Properties;¹⁹
- (f) the highest and best use of the Subject Properties is as a mixed-use high-density commercial and multi-residential development which would be developed as part of the Interlink Lands;²⁰
- (g) a reasonable timeframe for the development of the Interlink Lands “could be in the medium term” and until that development, the current use of the Interlink Lands as a parking lot will likely continue;²¹
- (h) the LPRT would not consider any reversionary value of the ROE Lands, because the evidence about the future removal of the Transmission Lines was “uncertain and speculative” and was not “clear and usable”;²² and
- (i) there was “sufficient clear and compelling evidence” of significant residual value to Remington (the ability to transfer FAR from the ROE Lands to other parts of the Interlink Lands, the potential for transferring to the City a portion or all of the

¹⁴ I have listed here only the LPRT’s findings about the conceptual nature of the taking, and about reversionary and residual value. I have not listed the LPRT’s findings about the quantification of the award. I will address those findings in a subsequent section of this Judgment.

¹⁵ LPRT Decision, para 81.

¹⁶ LPRT Decision, para 89.

¹⁷ LPRT Decision, para 94.

¹⁸ LPRT Decision, paras 88 – 93.

¹⁹ LPRT Decision, paras 97 – 102.

²⁰ LPRT Decision, para 116.

²¹ LPRT Decision, para 120.

²² LPRT Decision, para 185.

ROE Lands for compensation, the continued use of the ROE Lands for parking, and the ability to continue to use the ROE Lands as collateral).²³

[99] There was ample evidence in the appeals establishing that the findings listed in subparagraphs (b), (c), (e), (f) and (g) were reasonable.

[100] However, I find that the LPRT's findings listed in subparagraphs (a), (d), (h) and (i) were unreasonable errors. Also, while the LPRT's finding in subparagraph (g) was superficially reasonable, the LPRT unreasonably erred in failing to find that the presence of the Transmission Lines was the cause of the medium-term development delay.²⁴

B. The True Nature of Remington's Potential Actual Loss

[101] I will now explain the evidence on the basis of which I have made each of the key fact findings listed in paragraph 97 above. I will discuss each of the LPRT's five unreasonable errors in the course of this discussion.

My Fact Finding That The Highest and Best Use of the Interlink Lands on the Effective Date was High Density, Mixed-Use Development

[102] The evidence on the appeals amply supported this finding, and both parties agreed this was proven.

[103] The parties introduced evidence from a number of witnesses with expertise in real estate valuation and appraisal:

- (a) for Remington, Bradford Wagar and Brian Gettel. I qualified Mr. Wagar as an expert in the area of land valuation and real estate appraisal. I qualified Mr. Gettel as an expert in the area of the impact of overhead transmission infrastructure on the market value of land, including loss of use, adverse effects and injurious affection; and
- (b) for ENMAX, Michael Parsons and Jennifer Pitts. I have already described my qualification of Mr. Parsons. I qualified Ms. Pitts as an expert in the area of the methodology used to quantify the impact of overhead power transmission infrastructure on the market value of land, including adverse effects and injurious affection.

[104] Mr. Wagar and Mr. Parsons both referenced the definition of "highest and best use" from CUSPAP: "the reasonably probable use of [the subject property], that is physically possible, legally permissible, financially feasible, and maximally productive, and that results in the highest value." They both agreed that the highest and best use of the Interlink Lands as at the Effective Date was high-density, mixed-use development.

²³ LPRT Decision, para 201.

²⁴ These unreasonably erroneous findings are all subsumed in the one overarching error and the four specific errors that I have already identified.

Highest and Best Use, Market Value and their Relationship

[105] The concepts of highest and best use and market value are central to this case, and it is important to discuss those concepts in some detail. Mr. Wagar and Mr. Parsons both spoke about the relationship between these two concepts. They agreed that:

- (a) the highest and best use of a property is central to determining its market value. Mr. Parsons said that highest and best use is “fundamental to the assessment of value ... [it] identifies the most probable, competitive use to which a property can be put ... [it] is based on the competitive forces within the market ... and provides the foundation for a detailed investigation of the competitive position of a property in the minds of market participants.” Similarly, Mr. Wagar testified that “highest and best use, quite simply, will in every way influence the final value estimate in a market value assignment”; and
- (b) the applicable definition of “market value” was the one set out in CUSPAP:

The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and the seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

[106] In previous decisions, the LPRT has acknowledged the key relationship between the concepts of highest and best use, and market value, noting: “[t]he concept of highest and best use of land is the fundamental basis on which property is valued”: *Montana Alberta Tie Ltd v KERCP Farms Incorporated*, 2014 ABSRB 474 at page 6.

[107] The LPRT has also acknowledged the well-established principle that market value is a measure of the **present value** of a parcel of land, and that present value includes all the land’s **potential future uses**: *AltaLink Management Ltd v Royal West Property Corp*, 2014 ABSRB 221 (*Royal West*) at page 11; *Yaltho* at 8. The LPRT explained this relationship in *Royal West* at page 11:

The Panel finds it inconceivable that buyers and sellers would not consider zoning, development potential, future revenue, future costs, probability, and risk in making their decisions. Market value already includes all of these factors properly discounted...

[108] It was clear from the testimony of Mr. Wagar and Mr. Parsons that their direct comparison appraisals of the Interlink Lands also embodied this principle. Their opinions on the market value of the Interlink Lands as at the Effective Date “priced in” the future development potential and attributes of the Interlink Lands. Stated simply, the market value of the Interlink Lands as at the Effective Date represents the price at which a knowledgeable buyer and seller would agree to a transfer, taking into account their development in line with their highest and best use, and considering all the future contingencies that could affect that development. Stated somewhat differently, for a development property like the Interlink Lands, the market value represents the knowledgeable buyer and seller’s informed estimate of the present value of the future net income that would be earned from developing the property to its highest and best use.

My Fact Finding That The Only Parties Who Would Pay Fair Market Value For The Interlink Lands Would Be One Or More Sophisticated Property Developers Like Remington, Who Would Be Capable Of Developing The Interlink Lands

[109] The evidence supporting this finding was ample, and not seriously disputed by either party.

[110] The Interlink Lands are a relatively large 11.27 acre aggregation of land in the Beltline area, which borders Calgary’s downtown core. On the Effective Date they were zoned as CC-X, or “City Centre Mixed Use” which is for a mix of commercial, residential and limited range of light industrial uses.

[111] The statutory and non-statutory planning documents that the City had published by the Effective Date envisioned mixed use (including residential), high density development for the Beltline area generally, including the Interlink Lands.

[112] The Beltline ARP was adopted by the City in 2006 and prior to the Effective Date, it had been most recently amended in March 2018. The vision for the Beltline area stated in the Beltline ARP was:

The Beltline will be an authentic, livable and diverse high density urban community. This will be reinforced by creating high quality neighbourhoods through the provision of a wide variety of land uses and building types supported and enhanced by high quality private development and public spaces and amenities.

[113] Remington lead evidence about what the development of the Interlink Lands to its highest and best use as a high-density, mixed-use property could look like. Remington called Jamie Clark as an expert witness. Mr. Clark is an architect and I qualified him to give expert evidence in the area of the design and construction of high-density mixed-use developments.

[114] ENMAX argued that I should give Mr. Clark’s evidence less weight because most of his experience was designing low- and medium-rise buildings, not high-rise buildings. ENMAX also suggested that, because his report was created in 2024,²⁵ it constituted improper *post facto* evidence.

[115] I reject those criticisms. While Mr. Clark has never worked on a project with buildings as tall as the proposed development of the Interlink Lands discussed in his expert report, I did not find that this made his evidence less credible or reliable. He has worked on large tower projects in Regina and Saskatchewan and similar, although smaller, projects in Calgary. He clearly has a comprehensive knowledge of all the necessary considerations and processes associated with the design and construction of high-density, mixed-use buildings. I am satisfied that Mr. Clark has sufficient experience with high-rises to opine on the scenarios he presented.

[116] The *post facto* criticism is also misplaced. I am not relying on Mr. Clark’s opinion as evidence of specific developments that Remington was planning to execute as at the Effective Date, nor did Remington propose that I should do so. Rather, the relevance of Mr. Clark’s opinion is in demonstrating some types of high-density, mixed-use developments that could possibly be constructed on the Interlink Lands, the design parameters that go into those types of

²⁵ Scenario A in Mr. Clark’s report was created in 2021 and used in Remington’s pre-application to the City that year. He then created Scenarios B and C in 2024 as part of his expert report for these appeals.

developments, and how the presence of the Transmission Lines could impact different development designs.

[117] ENMAX also argued that Mr. Clark could not be an impartial witness. Remington is a major client of his 15-person architectural firm. Remington accounts for 30% of his firm’s business, and he spends 50% of his personal time on Remington work. Despite these significant connections, I found that Mr. Clark genuinely attempted to give impartial answers and opinions. On one or two occasions during his cross-examination, he lost his objectivity and argued, and he also failed to make one or two admissions that I thought were objectively justified. Overall however, I do not find that these minor shortcomings materially affected the credibility or reliability of his evidence.

[118] In his expert report, Mr. Clark presented three alternate scenarios for a high-density mixed-use development of the westernmost 4.036 acres (between 4th Street SE and the road allowance for 5th Street SE) of the Interlink Lands:

- (a) Scenario A was the development of the site with the Transmission Lines having first been removed;
- (b) Scenario B showed the development of the site, assuming that the Transmission Lines remained present; and
- (c) Scenario C demonstrated how the site could be developed in two phases, with the south portion being built while the Transmission Lines were present and the north portion then being built after their removal.

[119] Mr. Clark’s Scenario A drawings formed the substance of the May 2021 “pre-application” that Remington submitted to the City for its proposed development of the Interlink Lands, about which I will say more later in this Judgment.

[120] Remington also called David Crane as an expert witness. I qualified him to give expert evidence in the areas of quantity surveying and the cost of construction. In his expert report and testimony, he opined on the costs of developing the western portion of the Interlink Lands under Mr. Clark’s three scenarios. His conclusions were that, in 2024 dollars, it would cost \$710 million to build Scenario A, \$588 million to build Scenario B, and \$520 million to build Scenario C.

[121] Mr. Clark’s and Mr. Crane’s evidence demonstrated, generally, what “high-density mixed-use” development of the Interlink Lands would look like, in terms of design and cost. In layman’s terms, the development would comprise a mixture of high-rise and hotel apartment “point” towers²⁶ with subsurface parking and significant ground-level commercial and retail amenities. Together, these two witnesses’ evidence satisfied me that development of the Interlink Lands as high-density mixed use lands, in line with their highest and best use, would be a very substantial undertaking in terms of scale and cost. This is the type of development that could be carried out only by sophisticated, well-funded property developers.

²⁶ “Point” towers is the term used by architects to describe the relatively narrow high-rise buildings we commonly see in downtown cores in North American cities. In point towers, the elevator shafts, staircases and mechanical and electrical distribution sites are all clustered together in a central “core”, with the dwelling or office units located around that core, on the outside of the building. Point towers are limited to floor plates of approximately 7,000 ft² to 8,000 ft². Point towers are contrasted with “remote core buildings”, in which the elevator shafts are located a greater distance away from the staircases.

[122] The fact that only sophisticated property developers would purchase or develop the Interlink Lands was also corroborated by the evidence of the two valuation experts, and is indeed inherent in the concept of market value. As I have noted above, the market value of the Interlink Lands as at the Effective Date is derived from and closely related to their highest and best use, in other words as future high-density mixed-use lands. The only parties who will pay that market value are parties who have the capability to carry out that development.

[123] Remington purchased the Interlink Lands for the purpose of developing them, and there was no evidence suggesting that they would ever be used for any other long-term purpose. Remington acted consistently with this intended use from the beginning of its ownership of the Interlink Lands. As early as November 2004, it submitted a Tentative Plan Application to the City, which appeared to include the Interlink Lands, as well as the 9th Avenue Lands and the 10th Avenue Lands.²⁷

[124] I am satisfied that Remington, a sophisticated and experienced developer of large-scale real estate projects, had the capability at the Effective Date to develop the Interlink Lands to their highest and best use. Remington had the capacity to recover for itself the market value of the Interlink Lands, by developing them. I also find that the only parties who would agree to pay the market value of the Interlink Lands that Remington would reasonably demand in any sale, would also be parties with similar expertise and experience. Mr. Wagar confirmed this directly, testifying that any potential buyers of the Interlink Lands would be “sophisticated.”

[125] Thus, viewed as at the Effective Date, the future owners of the Interlink Lands would either be Remington and/or one or more other large, sophisticated property developers who would have the capability to develop the Interlink Lands to their highest and best use.

My Fact Findings That:

Neither Remington Nor Any Other Developer Would Develop The Interlink Lands Except To Their Highest And Best Use;

Neither Remington Nor Any Other Developer Would Develop The Interlink Lands Without Developing The Subject Properties (Including The ROE Lands) At The Same Time; and

Neither Remington Nor Any Other Developer Would Develop The Interlink Lands Until The Transmission Lines Were Removed.

[126] I am satisfied that the evidence in the appeals proved these three facts. These three findings and the evidence I have relied on to make them are closely related, so I will discuss them together.

[127] The evidence supporting these findings came largely from Mr. Clark. I will summarize the most relevant portions of his evidence, and also discuss the other evidence that touched on these issues. Mr. Clark’s report looked at the possible development of the western portion of the Interlink Lands²⁸ under three different scenarios I have described above in paragraph 118 of this Judgment.

²⁷ Park Decision at para 15.

²⁸ The portion of the Interlink Lands between 4th Street SE and the 5th Street SE road allowance.

[128] Mr. Clark testified about the highest and best use of the site. He did not use the phrase “highest and best use” in exactly the same sense as the appraisal/valuation expert witnesses. While they used it in reference to its definition in CUSPAP, Mr. Clark used it to signify a project design that maximizes all the key parameters that an owner might evaluate. In the case of high-density mixed use developments in downtown Calgary, those parameters include:

- a subsurface parkade design that efficiently accounts for traffic flow to and from the site, maximizes the number of parking stalls and minimizes the number of levels, optimally to no more than four;
- efficient design of the point towers, their columns and cores;
- maximization of the number of residential units, with marketable designs and sizes; and
- compliance with all applicable building codes, zoning, by-laws and other regulations.

[129] Mr. Clark also described a “viability threshold” for a building, which was the point below which a developer would not carry out a project. The concept is that as constraints force the design for a project to move below the optimum (highest and best use) design, a point will be reached at which the project is no longer viable. In Mr. Clark’s view, the viability threshold is usually a very high percentage (90% or greater) of a project’s highest and best use.

[130] Based on his evidence, I am satisfied generally that Mr. Clark’s designs represent the type of buildings that Remington or another sophisticated developer of the Interlink Lands would seek to build on the site.

[131] The crux of Mr. Clark’s evidence was the comparison of his three Scenarios.

[132] In his opinion, Scenario A represented the highest and best use of the western portion of the Interlink Lands, and exceeded the viability threshold. In Scenario A, there is a 4-level subsurface parkade with 1400 parking stalls. That size of parkade supports three residential point towers (55, 60 and 64 stories in height) and one 45-storey hotel point tower.

[133] Mr. Clark explained convincingly how parkade design drives what kind of point towers can be built above grade on a site like the Interlink Lands. In a parkade, there is a minimum size requirement for stalls and driving lanes. The applicable City by-law mandates a minimum number of parking stalls per above-ground unit. Thus, there is an incentive to maximize the number of parking stalls, but there are physical constraints on how many stalls can be built in a given area. Subsurface parkade construction is also expensive and complicated. I accept Mr. Clark’s evidence that because the water table is high in downtown Calgary,²⁹ constructing additional levels below four subsurface parkade levels becomes substantially more expensive, and is to be avoided if possible.

[134] In Mr. Clark’s opinion, the reason that Scenario A allows for optimization of the site is because, with the Transmission Lines removed, the maximum areal extent of the site (to the required minimum setbacks from the property lines around the perimeter) can be used for the subsurface parkade, and also for the point towers. In other words, four parkade levels covering the entire areal extent of the site provide a large number of parking stalls which in turn allow a larger number of apartment and hotel dwelling units, in higher point towers.

²⁹ This was confirmed by the Phase 2 ESA expert report of Mr. Bowles, described later in this Judgment. Mr. Bowles found the groundwater depth in the Interlink Lands to vary between 4.9 and 5.7 meters below the surface.

[135] In Scenario B, the Transmission Lines remain in place. As a result, 13.8% of the site area is unavailable for subsurface or aboveground construction, correlating to the area occupied by the Transmission Lines and a 9-meter setback from their center line, along the north perimeter of the site. This causes some compression and realignment of the structures to be built on the remaining 86.2% of the site, and increased inefficiencies. Mr. Clark estimated that in Scenario B as compared to Scenario A, 300 fewer parking stalls could be built, as a result of which 44 fewer stories could be built in the four point towers, equal to 385 fewer residential and hotel units.

[136] In Scenario C, the Transmission Lines remain in place while the southern portion of the site is built. After the Transmission Lines are removed, the northern portion is built. Mr. Clark opined that this would result in significant additional inefficiencies and costs. Significantly, two separate self-contained parkades would have to be constructed, one during each phase of the development. Mr. Clark estimated that in Scenario C as compared to Scenario A, 530 fewer parking stalls could be built, as a result of which 80 fewer stories could be built in the point towers, equating to 700 fewer residential and hotel units.

[137] As I have already noted, Mr. Clark was a credible and qualified expert. I found his methodology, analysis and assumptions to be reasonable and logical. I accept his conclusions about the relative magnitude of the reduction of the development potential of the Interlink Lands that results from the presence of the Transmission Lines. He did not purport to opine on the relative profitability for Remington or another developer of developing the Interlink Lands under the three scenarios. However, I do not need to rely on his evidence to make any findings about that issue.

[138] There was one potential shortcoming with Mr. Clark's opinion. In all three scenarios, he used a FAR of approximately 10. While this was within the range of permitted FAR for the Interlink Lands at the time he created his Scenario A in 2021, it was well above the FAR permitted as at the Effective Date (a base FAR of 5, up to a maximum of 7). Thus, his opinion about the highest and best use and the viability threshold of the Interlink Lands in 2021 did not address the situation as it existed at the Effective Date.

[139] When he was cross-examined on this point, he agreed that if he had used a FAR of 5 in his three scenarios, less parking stalls would be required to maximize the (significantly lower) development potential of the Interlink Lands. He said he had done the calculation to determine the number of parking stalls that would be required at a FAR of 5, but they were not in his report. ENMAX's counsel chose not to pursue that point any further in cross-examination. However, in re-examination and re-cross examination, Mr. Clark addressed this issue further. He explained that even at a FAR of 5, a reasonable developer would still push the parkade floorplate and the above-ground floorplates out to the maximum areal extent, so they would still look the same in all three of his scenarios. The lower FAR would just result in fewer aboveground levels being built. In his opinion, this is because pushing the area of the floorplates out to the maximum extent increases the relative affordability of construction, so reasonable developers will always do that. He also stated that his conclusions about the viability of his three scenarios would not have changed if he had used a FAR of 5 or 7. Scenario A would be viable and scenarios B and C would not. The relative magnitude of the decreased development potential would still make scenarios B and C unattractive.

[140] I accept Mr. Clark's evidence on these points. It was logical, thoughtful and in my view authoritative.

[141] It is not necessary for me to make any findings about whether the development of the Interlink Lands to their highest and best use would take the exact form of Mr. Clark's Scenario A. I also do not need to make any findings about whether developing the Interlink Lands under his Scenarios would be profitable or not. Those are all questions that go to the **absolute** value of the Interlink Lands, resulting from their development. As I have explained above, the expert evidence from the appraisers fully addresses the question of absolute value, and the concept of market value that those experts employ inherently imports into their absolute value opinions all relevant considerations and contingencies about how the Interlink Lands could be developed to their highest and best use.

[142] Thus, while Mr. Clark's evidence did not speak to the **absolute** value or profitability of the Interlink Lands, it did not need to. Rather, I find that the real significance of his evidence was in demonstrating the significant **relative magnitude** of the negative impacts that the presence of the Transmission Lines has on the developability of the Interlink Lands. I accept his evidence about the relative magnitude of these negative impacts, and his conclusions that the presence of the Transmission Lines would make the high-density, multi-use development of the Interlink Lands unattractive to reasonable and prudent developers. I accept his evidence that the relative magnitude of developability loss caused by the Interlink Lands is very significant: an approximate 21% loss of parking stalls (1400 to 1100) and dwelling units (1832 to 1447) from Scenario A to Scenario B; and an approximate 38% loss of parking stalls (1400 to 870) and dwelling units (1832 to 1132) from Scenario A to Scenario C.

[143] ENMAX did not call any evidence to contradict Mr. Clark's expert evidence on design maximization and viability, so his evidence was uncontradicted, other than in cross-examination. It was also corroborated by other evidence.

[144] Remington called Chris Ollenberger as an expert witness and I qualified him to give expert opinion evidence in the areas of real estate development and real estate development management.³⁰ Mr. Ollenberger is an experienced real estate developer. In his opinion, a reasonable and prudent real estate developer would be willing to develop the western portion of the Interlink Lands in accordance with Mr. Clark's Scenario A, but not under his Scenario B or C. While he did not conduct a *pro forma* financial analysis of the three scenarios, he presented what I found to be a compelling and logical rationale for this opinion. He said scenario B and C would be unprofitable because the loss of residential and hotel units in those scenarios would result in a loss of revenue to the developer that would be greater than the corresponding reduction in construction costs. He explained that this is because many of the construction costs are relatively inelastic. While these conclusions are partially impacted by the same potential flaw in Mr. Clark's opinion (the use of an unrealistically high FAR), I accept the accuracy of the general principle, which Mr. Ollenberger was well-qualified to comment on: for any given property, developers will seek to maximize development potential, and any substantial reduction in that maximum potential will consequentially make the development much less attractive. This accorded with Mr. Clark's evidence that in point-tower construction, the developer is incentivized to maximize the number of floors, because once the custom concrete formwork is made for the floorplate, it is a relatively repeatable process to simply pour an additional floor. It

³⁰ I refused to admit into evidence part of Mr. Ollenberger's primary expert report and the entirety of his rebuttal report, because they were duplicative of other expert evidence that Remington had already introduced. The remaining portions of his primary report were admitted, and he also gave oral testimony.

is logical that there are such economies of scale in large-scale construction projects and that developers being prevented from maximizing them decreases profitability.

[145] Randy Remington, the president of Remington, also testified about this issue. He said that the development of the Interlink Lands while the Transmission Lines were present was “not economically viable” and that the Transmission Lines were “totally in the way” of anything Remington wanted to do. Mr. Remington’s reasons for these views were many of the same opinions voiced by Mr. Clark about the loss of parking stalls and dwelling units. I place only limited weight on these subjective statements from Mr. Remington. Obviously, he is not a disinterested witness. Also, he had the benefit of seeing Mr. Clark’s expert report before he testified.

[146] ENMAX’s cross-examination of Mr. Remington elicited further evidence that corroborated Remington’s assertion that it would not have developed the Interlink Lands while the Transmission Lines remained in place:

Q Thank you, sir. Now, if Remington actually developed these interlink lands, I take it the development would be valued in the hundreds of millions, if not billions; correct?

A Over a long period of time, yes.

Q And given the significant estimated value of development, Remington would have buried or relocated the transmission lines if it was going ahead with development; correct?

A We would have, yes.

[147] ENMAX points to these questions and answers as an admission by Mr. Remington that the presence of the Transmission Lines was not really an obstacle to development, and if Remington really wanted to develop the Interlink Lands, it simply would have removed the Transmission Lines. That argument relates to the issue of causation, which I will address below. But regarding the present question of whether a developer like Remington would remove the Transmission Lines before developing the Interlink Lands, this evidence from Mr. Remington supports that this would certainly be the case.

[148] While I have discounted the weight of Mr. Remington’s subjective statements about Remington’s rationale, I consider the evidence about what Remington actually did with the Interlink Lands to be more telling. Remington is a sophisticated developer, and it bought the Interlink Lands to develop them. By the Effective Date, it had owned the bulk of the Interlink Lands for about 15 years, and the entirety of them for 7 years. It had not partially sold or partially developed any of the Interlink Lands located outside the ROE Lands where the Transmission Lines stood. In other words, it had not pursued anything like Mr. Clark’s scenario B or C. Rather, it had held the Interlink Lands as an aggregated whole, and had devoted significant efforts to trying to remove the Transmission Lines, although unsuccessfully. It had tried to create the conditions that would allow it to pursue something like scenario A.

[149] The fact that Remington created a high-level “Rail Town” concept or visioning document in 2006 also corroborates that Remington intended to develop the Interlink Lands as a whole, but only after the removal of the Transmission Lines. That Rail Town document set out a conceptual vision for a high-density mixed-use development of the Interlink Lands, together with the 9th Avenue Lands that Remington bought from CP, and the 10th Avenue Lands that it had contracted

to purchase before CP sold them to the Province. The Rail Town document assumed the removal of the Transmission Lines and showed a number of point towers along the northern perimeter of the Interlink Lands (which would not have been possible with the Transmission Lines still in place).

[150] While not determinative on the issue of what would happen with the Transmission Lines, the City’s public statements prior to the Effective Date also supported the view that they might need to be removed to accommodate the high-density development for which the City had zoned the Interlink Lands. The City published the Rivers District Community Revitalization Plan (**Rivers District CRP**), a statutory planning document, in 2007. The City said this about the Transmission Lines on the Interlink Lands:

The existing overhead powerline paralleling 10 Avenue is a visual constraint within the Beltline and is considered incompatible with high density residential development. Redevelopment in the Beltline, new LRT right-of-way requirements and open space initiatives along the CPR corridor provide an opportunity for the powerline to be placed underground. While development could proceed without burying the powerline the magnitude of redevelopment in the area and changes to other infrastructure provide an opportunity to consider relocation of this overhead powerline.

[151] ENMAX does not contest the fact that as at the Effective Date, the future removal of the Transmission Lines would likely precede the development of the Interlink Lands. In fact, ENMAX emphasized this point in its closing submissions, to support its argument that Remington could have resolved the issue by submitting formal development plans in an application to the AUC. ENMAX’s expert witness Mr. Parsons assumed, by way of an extraordinary assumption in his primary expert report, that the AUC would approve the removal of the Transmission Lines “in conjunction with substantial advancement of intensive development of the Interlink Lands.” In his rebuttal report, he described the positions taken in his primary report as reflecting “the likelihood of future relocation” of the Transmission Lines.

[152] In summary, based on the evidence in the appeals that I have discussed above, I find that:

- (a) neither Remington nor any other developer would develop the Interlink Lands except to their highest and best use;
- (b) neither Remington nor any other developer would develop the Interlink Lands without developing the Subject Properties (including the ROE Lands) at the same time; and
- (c) neither Remington nor any other developer would develop the Interlink Lands until the Transmission Lines were removed.

My Fact Finding That The Transmission Lines Would Be Removed Sometime After The Effective Date, After Which The Interlink Lands Would Be Developed

[153] This finding is merely the logical extension of the three findings discussed above, and it can be inferred from the same evidence that I have described above.

[154] The main point here is that the evidence in these appeals established that, sometime after the Effective Date, the Transmission Lines would be removed, after which Interlink Lands will be developed in line with their highest and best use. ENMAX agreed that this would be the

ultimate fate of the Interlink Lands. Its expert Mr. Parsons criticized Remington’s expert Mr. Gettel, correctly in my view, for assuming that the Transmission Lines would remain on the Interlink Lands in perpetuity.

Specific Error 1: The LPRT’s Unreasonable Error in Limiting its Award to the “Titled Units”

[155] Having explained my key findings of fact regarding the future development of the Interlink Lands as at the Effective Date, I will now turn to explain the first of what I have called the LPRT’s four specific errors.

[156] The LPRT decided that, because subsection 25(1)(b) restricts the LPRT to considering only the per acre value of the “titled units” (in this case, the Subject Properties), the SRA did not authorize it to “award compensation **beyond the titled unit**” [emphasis added].³¹ This finding was an unreasonable error, which contributed to the LPRT awarding compensation that did not reflect Remington’s actual loss. By limiting its own authority under subsection 25(1)(b) to only granting compensation for the Subject Properties, the LPRT prevented itself from awarding compensation for Remington’s actual loss: the delay in developing the **entirety** of the Interlink Lands.

[157] There are three reasons why the LPRT’s finding that it could not award compensation beyond the titled unit was an unreasonable error. First, the SRA does not actually say that. Subsection 25(1)(b) simply lists, as one of a number of permissive, non-exhaustive factors that the LPRT may consider:

the per acre value, on the date the right of entry order was made, of the titled unit in which the land granted to the operator is located, based on the highest approved use of the land;

[158] Thus, the only limitation in the subsection is about the parcels whose “per acre value” can be considered: the only per acre value expressly mentioned is that of the titled units. However, that express mention is not a prohibition on looking outside the titled units. It does not prevent the LPRT from considering the per acre value, or value on any other measure for that matter, of land located outside the titled units. As I noted above in paragraph 37 of this Judgment, the factors in subsections 25(1)(a) – (d) are merely permissive, and subsection 25(1)(f) authorizes the LPRT to consider any other factors that it considers proper under the circumstances.

[159] The second reason that this finding by the LPRT was an unreasonable error is that the LPRT applied it in a way that, on the specific facts of this case, undermined the entire scheme of section 25: to compensate the owner for the loss it actually suffered. This may have been an instance of the LPRT applying practices that it has developed over time, and which make sense in the context of the typical rural land scenarios that come before it in section 25 compensation cases. This possible explanation is suggested in para 88 of the LPRT Decision:

Both parties argued for using the method described in Section 25 (1)(b), often referred to as the *en bloc* method, where the value of the titled unit in which the land taken is located is determined based on the highest approved use of the land and the award is prorated to the percentage of the titled unit taken.

[160] Nowhere does subsection 25(1)(b) mandate, or even suggest, this *en bloc* method. The *en bloc* method makes sense where an owner can continue to use all the portions of its lands not

³¹ LPRT Decision at para 88.

included in the taking in the same way it did before the taking, but it is permanently unable to use the taken lands. However, applying that customary approach in this case caused the LPRT to unreasonably fail to compensate Remington for its actual loss. Compensation awarded under section 25 of the *SRA* must always be driven by a principled application of compensatory damages law, to ensure the owner is made whole for its actual loss. That is even more important in a case like this, with unprecedented facts. Just because something is “usually” done a certain way does, not make it right: *Zubick v Corridor Pipeline Limited*, 2002 ABQB 452 at paras 81 – 84.

[161] The LPRT’s third unreasonable error on this point was its misapplication of this Court’s decision in *Sabo QB*. *Sabo QB* and *Sabo CA*³² addressed the proper interpretation only of subsection 25(1)(d) of the *SRA*. Those cases did not impose any limitation on the LPRT’s authority to award compensation under subsection 25(1)(b), and the Courts in those cases did not even mention the phrase “titled units” that appears in subsection 25(1)(b).

[162] The LPRT stated at para 93 of the LPRT Decision:

While the Panel acknowledges that the [*Sabo QB*] decision is subject to appeal, it nonetheless subscribes to the reasoning that its authority to award compensation when a ROE order has been granted, is limited to awarding compensation with respect to the land included in each certificate of title or “titled unit” affected by the ROE order.

[163] In *Sabo*, a utility operator had constructed power transmission lines on public road allowances. The owners’ rural properties were located beside these road allowances. Therefore, other than one minor exception, the transmission lines were not physically located on the owners’ lands. The only encroachment onto the owners’ lands was by the towers’ aerial cross-arms, which protruded 1.5 – 2 metres in the air over their lands. Despite the power lines being located off their lands, the LPRT had granted right of entry orders over some of their lands, to permit the transmission line operator to access narrow strips of their lands, adjacent to the road allowances where the transmission lines were located.

[164] The LPRT awarded compensation to the owners under section 25, based on the market value of the lands covered by the right of entry orders, but it decided that it did not have jurisdiction to award compensation under subsection 25(1)(d) for injurious affection, because the transmission lines and towers were not located on their lands that were covered by the right of entry orders.

[165] Thus, the issue was the LPRT’s interpretation of its authority to grant compensation under subsection 25(1)(d), which sets out the following permissive factor:

the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator

[166] The disputed issue was therefore the meaning of “the remaining land of the owner or occupant” and how that limited the LPRT’s authority to award compensation for adverse effects.

[167] In *Sabo QB*, Henderson J of this Court reviewed the legislative history of the *SRA* compensation scheme. He noted that the granting of a right of entry order is the prerequisite that

³² Our Court of Appeal decided *Sabo CA* after the LPRT released the LPRT Decision.

triggers the LPRT’s jurisdiction to grant compensation, but that once that prerequisite is satisfied, the LPRT has a “broad discretion” as to how to assess compensation.³³ He overturned the LPRT’s decision and concluded that, properly interpreted, subsection 25(1)(d) gave the LPRT jurisdiction to award compensation for “injurious affection,”³⁴ even where the power lines had been constructed on public lands, and not in the right of way on the owners’ lands that were covered by the right of entry orders.

[168] Henderson J then went on to assess the injurious affection damages that the presence of the transmission lines had caused to the entirety of the owners’ parcels of lands, which were partially covered by the right of entry orders. He assessed damages to the entirety of the owners’ parcels, not just the small portions covered by the right of entry orders. However, he concluded that he could not award compensation for losses that the transmission lines caused to adjacent parcels of land owned by the same owners, but over which no right of entry order had been granted.

[169] In *Sabo CA*, the Court of Appeal upheld Henderson J’s conclusion about the scope of the LPRT’s authority to award damages for adverse effect under subsection 25(1)(d), but it arrived at that conclusion using different reasoning. The Court of Appeal found that the phrase “of the area granted to the operator on the remaining land of the owner or occupant” in subsection 25(1)(d) applied only to the first type of loss described in the subsection (“adverse effect”) but not to the second type of loss (“nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator”). Therefore, the LPRT’s authority to grant compensation for “nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator” was not restricted to nuisance, inconvenience or noise attributable to the area granted to the operator.

[170] The Court of Appeal also stated that a “neighbouring property that is not the subject of a right of entry order is not entitled to a compensation order from the Board.”³⁵ However, it did not make this statement in specific reference to Henderson J’s finding that he could not award compensation for losses that the transmission lines caused to adjacent parcels of land owned by the same owners, but over which no right of entry order had been granted. The Court of Appeal did not analyze in any detail Henderson J’s specific compensation awards, instead finding that he erred in the manner in which he awarded compensation by applying the common law principles of nuisance, and ordering that the matter be returned to the LPRT to calculate compensation.

[171] It is therefore not clear what the Court of Appeal meant by the phrase a “neighbouring property”: did it mean other parcels owned by the same person who owns the parcel over which the right of entry order is granted? Or did it mean properties owned by other parties, who had no right of entry order granted over their land at all? Whatever it meant, I am satisfied that the statement was *obiter dictum* as it was not necessary to the Court of Appeal’s decision on the proper interpretation of subsection 25(1)(d). There is nothing in the non-exhaustive and permissive section 25(1) factors that says compensation can be granted only in reference to the parcels on which right of entry orders have been granted.

³³ *Sabo QB* at paras 49 – 51.

³⁴ Henderson J accepted that, pursuant to the LPRT’s jurisprudence, “injurious affection” was a subset of the term “adverse effect” that is specifically mentioned in subsection 25(1)(d).

³⁵ *Sabo CA* at para 52.

[172] In conclusion, I find that *Sabo QB* and *Sabo CA* are distinguishable from this case, as they considered only the LPRT's authority to grant compensation with respect to the adverse effect factor under subsection 25(1)(d). They did not consider the LPRT's jurisdiction to award compensation under subsection 25(1)(b). Even if the comments that Henderson J and the Court of Appeal made about "adjacent parcels" and "neighbouring properties" could be taken as statements of general application about the LPRT's jurisdiction, I find that those statements did not restrict the LPRT in this case to awarding compensation only with respect to the market value of the ROE Lands. The *SRA* is remedial legislation that must be given a fair, large and liberal interpretation (*Sabo QB* at para 98). The overarching principle that the owner is to be made whole for its actual loss must govern, to the full extent permitted by the wording in the statute. Nothing in the *SRA* says that when a right of entry order is granted with respect to one or more parcels that are part of a larger aggregation of parcels owned by the same owner, and those parcels will all be developed together, that the owner's compensation cannot take into account the loss caused with reference to all the aggregated parcels.

[173] Remington's actual loss was the delay caused to the development of the entirety of the Interlink Lands. The *SRA* demands compensation for that actual loss, and it must be given a large and liberal interpretation. The fact that the ROE Orders are located only on the Subject Properties cannot prevent me from awarding compensation for Remington's actual loss. That would subvert the purpose of the legislation.

C. Causation Analysis

Overview

[174] Having identified that the true nature of Remington's potential loss is the delay in recovering the market value of the Interlink Lands, I now turn to the issue of causation. Did the ROE Orders and the presence of the Transmission Lines on the Interlink Lands as at the Effective Date cause such a delay, and if so, to what extent? Stated differently, the question I must answer is: "but for the ROE Orders and the presence of the Transmission Lines on the Interlink Lands as at the Effective Date, what position would Remington have been in?"

[175] For the reasons that follow, I find that the evidence in the appeals proved that, but for the ROE Orders and the presence of the Transmission Lines on the Interlink Lands on the Effective Date, Remington would have been in a position to recover the market value of the entire Interlink Lands (by developing or selling them) 10 years sooner. In other words, the ROE Orders and the presence of the Transmission Lines on the Interlink Lands caused a 10-year delay, viewed from the Effective Date, to Remington's realization of the market value of the entire Interlink Lands.

Specific Error 2: The LPRT'S Unreasonable Error Regarding Reversionary Value

[176] The LPRT unreasonably erred in its consideration of the issue of reversionary value, in two ways. First, it failed to recognize that Remington would enjoy the reversionary value of the ROE Lands, because it would ultimately develop or sell them. Second, it applied the wrong standard of proof to the evidence about reversionary value.

[177] Section 25(2) of the *SRA* permits the LPRT, in determining the compensation payable to an owner, to "ignore the residual and reversionary value to the owner or occupant of the land granted to the operator." So the LPRT had the discretion to ignore Remington's reversionary

value in the ROE Lands. Given the evidence entered in the appeals, I find that ignoring that reversionary value was an unreasonable error.

[178] The LPRT accepted that the ultimate fate of the Interlink Lands (including the ROE Lands) would be development to their highest and best use, “in the medium term.”³⁶ As I have noted above, this finding does not align with the LPRT’s decision to compensate Remington by awarding it the market value of the ROE Lands. Remington’s ultimate development of the Interlink Lands (or sale of them for market value to someone else who would do that) necessarily implies that Remington will receive the market value of the Interlink Lands, including the market value of the ROE Lands. Therefore, Remington will realize the reversionary value of the ROE Lands.

[179] The LPRT explained its decision on reversionary value as follows:³⁷

[181] Citing *Mobil-GC Canada Ltd v Mackey*, (1987), 78 AR 318 (**Mackey**) at para 14 (ABQB), Remington argued that in cases involving takings of indeterminate duration, such as the case here, the Tribunal requires “clear, usable evidence” in order to consider the reversionary or residual value of the land - assumptions will not suffice. The fact ENMAX admits the indeterminate timing of removal, if ever, not to mention the fact that the Transmission Lines have been there since 1948, support the conclusion that the Tribunal should ignore any unproven and highly uncertain “reversionary value” of the Interlink Lands.

...

[185] The Panel finds that the evidence regarding reversionary value is uncertain and speculative. The decision to remove the Transmission Lines is within the authority of the AUC and subject to any applications made to it. Any such application would likely require the participation of both parties and the timing and form of the application and its consideration by the AUC is uncertain. Accordingly, the Tribunal will not consider the reversionary value in its compensation award due to the lack of clear and usable evidence.

[180] It is unclear from these portions of the LPRT Decision if the LPRT accepted the proposition apparently put forward by Remington, that in cases of indeterminate taking, evidence about reversionary or residual value must meet a standard of being “clear and usable.” It might have. But it also might have simply looked at the evidence put before it, and concluded that this evidence was not sufficiently credible or reliable to prove residual value. Whichever interpretation of these excerpts is correct, the LPRT unreasonably erred.

[181] **Mackey** did not establish any principle about the kind of evidence required to prove residual value or reversionary value. It was a 1987 appeal to this Court of an LPRT compensation decision under the *SRA*, involving the operator’s taking of agricultural land to construct a subsurface pipeline. In a short, six-page decision, Trussler J allowed the appeal and awarded total compensation of \$2,233.50.

[182] In awarding compensation to the owner, the LPRT had not considered the value of the land taken or the other factors under section 25, but instead followed the “reliable methodology”

³⁶ LPRT Decision at para 120.

³⁷ LPRT Decision at paras 181 and 185.

of choosing an amount based on the “recent practice of operators and landowners of arriving at a composite figure”.

[183] Trussler J found the evidence before her in the appeal to be lacking. The owner introduced evidence of other agreements in the area, but there was no pattern to these agreements and it was not possible to tell from the evidence whether those agreements covered circumstances similar to the case under appeal. The operator introduced evidence from its landman who explained that he had negotiated settlements with six other owners under which the operator paid 25% of the market value of the land, but also paid the remaining 75% as an “incentive for settlement.” The operator also called an appraiser, Mr. Berrien, who gave evidence about the market value of the land, its residual value, loss of use and adverse effect.

[184] Because the taking was for a pipeline and the owner could therefore farm the land after the construction was completed, Trussler J had to address the issue of residual value. However, she found Mr. Berrien’s evidence on residual value to be “confusing and based on some broad unacceptable assumptions” and as a result, she was “not prepared to accept his evidence on this issue.” She found that \$350 per acre was the market value of the land. She then stated at paras 14 and 15:

I am not prepared to deduct anything from residual value given lack of clear, usable evidence on the subject. ... There was evidence by [the owner] that he had some long-term subdivision hopes for the quarter section. Those plans are sufficiently remote so as not to affect the value of the land.

[185] Thus, the proposition that Remington and/or the LPRT attributed to *Mackey* (“in cases involving takings of indeterminate duration, such as the case here, the Tribunal requires ‘clear, usable evidence’ in order to consider the reversionary or residual value of the land”) is not supported by a careful reading of that case.

[186] First, nothing in *Mackey* suggests that it was, or was not, a taking of “indeterminate duration.” That phrase appears nowhere in Trussler J’s judgment.

[187] Also, while Trussler J expressly considered the issue of residual value, she did not mention reversionary value. The two concepts are distinct: residual value means that value to the landowner which remains in his hands because of his ability to make some economic use of the land involved in the “taking” during the term of the “taking”; and reversionary value means some value to the landowner which will accrue to him once the “taking” has served its use.³⁸ The case said nothing about reversionary value, and therefore it cannot be said to have established any proposition about what type of evidence is required to prove reversionary value.

[188] Finally, and most importantly, the case does not and does not purport to, establish any exceptional principle about the type of evidence that must be presented to prove residual value or reversionary value. It is simply a case in which the evidence proffered about residual value was unreliable, and was therefore properly ignored by the judge. There is no indication that Trussler J’s use of the phrase “lack of clear, usable evidence” was an attempt to set a new standard. She referred to no authorities on evidential standards. I find that the most accurate reading of the case is that Trussler J chose those words simply because they described the specific lack of evidence in the record before her: the evidence of Mr. Berrien on reversionary was not clear, and it was not usable. In other words, “clear and usable” was just the shorthand that Trussler J chose

³⁸ *Dome Petroleum Ltd v Grekul et al*, (1983), 49 AR 256 (QB) at para 28 (*Dome v Grekul*).

in that case, based on the specific evidence she reviewed, to explain why the evidence was not sufficiently credible or reliable to be relied on.

[189] So, if the LPRT took *Mackey* as establishing a test for evidence about residual or reversionary value, that was an unreasonable error. The test that the LPRT was required to apply is the test articulated in *Athey* about future facts: was it a “real and substantial possibility and not mere speculation” that Remington would enjoy reversionary value of the ROE Lands?

[190] If, on the other hand, the LPRT simply reviewed the evidence before it and concluded that the evidence on reversionary value was not sufficiently credible and reliable to prove reversionary value (assuming that the LPRT intended the terms “uncertain and speculative” and not “clear and usable” evidence in paragraph 185 to be synonyms), I find that conclusion to be an unreasonable error, based on the evidence I heard in these appeals.

[191] There was a great deal of evidence in the appeals about reversionary value. Many of the witnesses testified about the future development of the Interlink Lands, judged from the Effective Date: what kind of development would be possible; what it would cost; what environmental remediation would have to be undertaken to allow it to proceed; and what external factors would influence the timing and nature of that development? In the face of all that evidence, the LPRT’s reasoning about why it would not recognize reversionary value (set out in para 185 of the LPRT Decision, reproduced above) was relatively cursory, and an unreasonable error. Its conclusion that Remington would not realize any reversionary value was also an unreasonable error.

[192] As I have described above, I find that the evidence established that, as at the Effective Date, the Transmission Lines would be removed in the future, after which the Interlink Lands would be developed in their entirety. It follows from those findings that Remington would realize the reversionary value of the Interlink Lands, including the ROE Lands.

Specific Error 3: The LPRT’S Unreasonable Error Regarding the Causation of the Development Delay

[193] Related to its error about reversionary value, the LPRT unreasonably erred in its finding about the future timeline of the development of the Interlink Lands and the role the taking would play in that delay. Addressing delay, the LPRT said:³⁹

The Panel finds the development horizon adopted by Remington is optimistic, for a number of reasons other than the existence of the Transmission Lines. Given the uncertainties surrounding the Calgary economy as reasonably perceived at the Effective Date, the unresolved decisions regarding the 5th Street underpass and the LRT green line development, a reasonable timeline for development of the Interlink Lands including the ROE Lands would more realistically be around 10 years from the Effective Date. The Panel finds that until that time, the current use as a parking lot will likely continue and any loss of use award should be based upon that function.

[194] I infer from its statement about “a number of reasons other than the existence of the Transmission Lines” that the LPRT concluded that the taking did not cause any delay in the development of the Interlink Lands. However, this is something the reader of the LPRT

³⁹ LPRT Decision, para 218.

Decision must infer, because as I have noted above the LPRT did not identify Remington's actual loss, nor how the taking caused that loss, nor how its award would keep Remington whole for that loss.

[195] As I will explain below, I generally agree with the LPRT's conclusion that the Interlink Lands would not be developed for 10 years after the Effective Date, but I find that the LPRT unreasonably erred in failing to find that this development delay was caused by the ROE Orders and the presence of the Transmission Lines.

The Expert Evidence on the Development Timeline for the Interlink Lands

[196] Mr. Wagar's and Mr. Parsons' expert appraisal reports both assumed that the Transmission Lines would be removed sometime after the Effective Date, after which the Interlink Lands would be developed. Their opinions of market value using the direct comparison approach valued the Interlink Lands in the absence of the Transmission Lines.

[197] While they agreed on that, they adopted extremely opposed positions about when that future development would proceed, and what would cause its delay.

[198] ENMAX took the position that the Interlink Lands would not be developed for 10 years after the Effective Date, because the final location of "foundational" infrastructure in the surrounding area would not be decided until then, and no development could precede those decisions. ENMAX also argued that Remington could cause the AUC to approve the removal of the Transmission Lines by advancing a detailed development plan. Because Remington would have plenty of time to do that in the 10 years before the development could proceed, ENMAX argued that the presence of the Transmission Lines would not cause any development delay.

[199] Remington argued that the Transmission Lines were the real obstacle to development and but for their presence, the Interlink Lands could be developed promptly. Remington asserted that the foundational infrastructure issues could be relatively easily and quickly sorted out in negotiations between the developer and the City.

The Impact of the Infrastructure Decisions on the Development Timing of the Interlink Lands

[200] The best evidence about what was likely to happen in the future, judged from the Effective Date, came from the parties' expert planning witnesses. Remington called Greg Brown, whom I qualified to give expert opinion evidence in general area of urban planning and the specific areas of municipal approval processes and land-use planning in the City. ENMAX called Patricia Maloney, whom I qualified to give expert opinion evidence in the areas of land use planning and approval processes.

[201] Ms. Maloney is a very experienced planning professional. She worked in planning roles in the public sector for 13 years at the start of her career, but very little of that involved work in Calgary: her only involvement with the City was as a member of the City of Calgary Planning Commission from 2004 to 2006. The role of that Commission was to review planning applications to the City and make recommendations on approvals. On some types of applications, the Commission was the approving authority. One of the things the Commission did during her tenure was review the Beltline ARP. After 2006, she moved into the private sector. Her private work has involved numerous planning projects involving municipalities in Alberta and British Columbia.

[202] Like Ms. Maloney, Mr. Brown was an experienced planning professional. What distinguishes his career from Ms. Maloney's is that the vast majority of his work was in the private sector in Calgary, making development applications, often in a lead role, to the City. He did this for six years as a land development planning consultant at an engineering firm, from 1980 – 1986. Then, from 1989 until his retirement in June 2017, he did this as a partner at a planning consulting firm he founded with one other person. In the course of doing this work for over 45 years, he lead teams of planners, engineers and architects and was directly involved in working with City administration, the City of Calgary Planning Commission and City Council, to achieve the development approvals sought by his clients. He was the lead planner on some large and high-profile developments, such as Canada Lands Corporation's development of the former Currie Barracks site as the Garrison community from 1998 to 2016. Another was his work for RoyOp in developing a plan in 1999 – 2001 for the East Village area that is a short distance north of the Interlink Lands in downtown Calgary.

[203] Ms. Maloney testified that development of the Interlink Lands would likely occur in a phased manner, over a 10 to 30 year period after the Effective Date. In her view, no development of the Interlink Lands could proceed without final decisions having been made about two large infrastructure projects: where the underpass connecting 9th Avenue SE and 10th Avenue SE would be located (either on 5th Street SE, transecting the Interlink Lands roughly in the middle, or on 6th Street SE, transecting the eastern end of the Interlink Lands); and where the Green Line LRT station would be located.

[204] A possible Green Line LRT line connecting downtown and east Calgary had been under discussion for many years prior to the Effective Date, including possibly locating a Green Line LRT station somewhere near the Interlink Lands. The Beltline ARP showed a station located north of 10th Avenue SE, to the north of the Interlink Lands. In contrast, the issue of a roadway underpass transecting the Interlink Lands on 5th Street or 6th Street SE did not appear in any planning documents published before the Effective Date. That concept first appeared in the 2019 Rivers District Master Plan (the **Master Plan**).

[205] The Master Plan was published by Calgary Municipal Land Corporation in 2019, after the Effective Date. However, both Ms. Maloney and Mr. Brown testified that consultations for the Master Plan began in 2015, and that Remington was a participating stakeholder. No drafts of the Master Plan pre-dating the Effective Date were put into evidence, and no witness could say definitively what parts of the Master Plan might have been publicized before the Effective Date. As a result, I find that I cannot consider the contents of the Master Plan to help me decide the likely future development of the Interlink Lands, as at the Effective Date. That would be improperly using *post facto* evidence.

[206] Ms. Maloney's estimate for the timing of the development of the Interlink Lands relied heavily on the Master Plan, which is the only planning document that set development timelines for the East Beltline/Rivers District in which the Interlink Lands are located. In Phase 1 of the Master Plan, from years 1 – 10, the area infrastructure would be completed, including the 5th Street SE underpass. Development of the Interlink Lands was projected to occur only in Phase 2, being years 10 – 20. Ms. Maloney's rationale for why the Interlink Lands could not be developed prior to the locations of the LRT station and the underpass being finally decided, was that the City would not approve any development on the Interlink Lands that might reduce its flexibility in finalizing those infrastructure plans. Ms. Maloney did admit however that a

developer could make a development permit application at any time, regardless of the phasing set out in a document like the Master Plan.

[207] Mr. Brown explained that the City was very interested in stimulating high-density, mixed-use development in the East Beltline/Rivers District area and that this interest was apparent from a number of planning documents that were published before the Effective Date: the 2006 Beltline ARP, the 2007 Rivers District CRP, the 2007 City Centre Plan, the 2007 Land Use Bylaw (which implemented the CC-X District), and the 2010 City of Calgary Municipal Development Plan. He also explained that the City was especially keen to stimulate private development of properties in this area, because it derives valuable future tax revenue from these kinds of properties. Remington was one the largest private landowners in the Rivers District.

[208] Mr. Brown disagreed with Ms. Maloney's view that the Interlink Lands could not be developed for at least 10 years after the Effective Date. In his opinion, the absence of final decisions about the location of the underpass and Green Line LRT station would not have slowed down the approval of a development permit application for the Interlink Lands. Rather, he believed that the City and the developer of the Interlink Lands would be able to negotiate any necessary accommodations to allow the development to proceed. He explained that the City's motivation to resolve any issues like that increases once a developer commences a development permit application. One possibility (which is consistent with the fact that the development of a large, aggregated parcel like the Interlink Lands would occur in phases) would be that the City would allow one phase of the development to commence, pending final decisions about infrastructure like the Green Line LRT station and an underpass. He said that these types of issues are commonly resolved by negotiation with the City during development permit applications.

[209] Both Ms. Maloney and Mr. Brown were fully conversant with and knowledgeable about development principles and the processes required to obtain the approval of development applications. However, Mr. Brown has far more extensive experience successfully negotiating development applications with the City, which he did full-time for almost 30 years until his retirement in 2017. In contrast, Ms. Maloney had never submitted a development permit application to the City. I found Mr. Brown's evidence about how a developer of the Interlink Lands could interact with the City, how the City would address the proposed development in the context of all the other "moving parts" in the vicinity of the Interlink Lands, and the likely path of the development of the Interlink Lands to be more reliable than Ms. Maloney's, and I give it more weight than Ms. Maloney's evidence.

[210] Both of these expert witnesses relied on the Master Plan. Ms. Maloney did so in support of her estimate for the development timeline for the Interlink Lands. Mr. Brown did so to support his opinion that a much higher FAR than the 5/7 FAR permitted in the Beltline ARP on the Effective Date could be achieved on the Interlink Lands.⁴⁰ As I have described above, the Master Plan is irrelevant *post facto* evidence. Both these witnesses were wrong to rely on the Master Plan in their opinions about development timing, from the perspective of the Effective Date.

[211] Having carefully considered the expert planning evidence I find that, at and after the Effective Date, Remington or another developer would have been able to advance a development

⁴⁰ Mr. Brown opined that the developer of the Interlink Lands would be able to negotiate a FAR of 10 with the City.

permit application for the Interlink Lands to approval, prior to final decisions being made about the location of a Green Line LRT station and an underpass. Given that the development of the Interlink Lands would have had to occur in phases in any event, I find that the City and the developer would have been able to reach an accommodation to allow at least an initial phase or phases to proceed without any unusual delay. In summary, I find that the LRT station and underpass infrastructure issues would not have prevented or delayed the approval of the development of the Interlink Lands.

The Impact on Development Timing of the AUC Approval Requirement

[212] Because the Transmission Lines could not be removed without an order of the AUC, the facts regarding the AUC's past and future involvement with the Transmission Lines, viewed as at the Effective Date, is a very important consideration in determining the future development timeline. For the reasons I set out below, I find that the evidence establishes that the delay in obtaining an AUC order permitting removal of the Transmission Lines was the primary cause of the likely development delay of the Interlink Lands, judged from the Effective Date.

[213] As I have noted above in paragraph 21 of this Judgment, the parties blame each other for the fact that the AUC Application in 2015 did not result in the removal of the Transmission Lines. As I have stated there, I am unable to decide what are the parties' respective shares of blame for this failure.

[214] Instead, the more important takeaway from the failure of the AUC Application was that removal of the Transmission Lines from the Interlink Lands was not something that the parties themselves could cause to happen with any degree of certainty. The AUC, an independent tribunal outside the control of the parties, had significant discretion to decide whether or not to approve the removal, and if so, when and in what manner. The evidence satisfies me that both parties wanted the AUC Application to succeed in 2014, and that they both proceeded in good faith to try to make that happen. ENMAX was a large and sophisticated utility operator with considerable experience in making these applications, and despite its best efforts (described by its witness Mr. Hanna, a long-time ENMAX employee who was its manager of engineering at the time of the AUC Application, as "going above and beyond"), it could not secure approval of the AUC Application.

[215] The other thing that both parties would have known after the failed AUC Application was that the removal of the Transmission Lines, if and when the AUC might approve it, was not something that could happen easily, quickly or cheaply. In the AUC Application materials, the physical removal process was estimated to take up to one year, and to cost approximately \$13.3 million. The process of applying to the AUC again would also take some time – ENMAX filed the AUC Application on August 7, 2014 and the AUC Order was issued on May 14, 2015.

[216] The uncontested facts about what had occurred prior to the Effective Date, and the circumstances in which Remington found itself on the Effective Date, can be summarized as follows:

- Remington was in the business of developing property, had expertise in doing that, and had a long history of doing it successfully;
- in 2002, Remington had purchased the bulk of the Interlink Lands, with the intention of developing them (adding the final small parcel to the assemblage in 2010);

- Remington had purchased the Interlink Lands knowing the Transmission Lines were present, but also believing that it was acquiring from CP what appeared to be a clear contractual right to terminate ENMAX's right to occupy the Interlink Lands, and to force ENMAX to remove the Transmission Lines at ENMAX's expense;
- in 2005, Remington triggered what it believed to be this clear contractual right;
- despite the apparent termination of its contractual permission to have the Transmission Lines on the Interlink Lands, ENMAX refused to remove the Transmission Lines, and Remington had to litigate to try to enforce its contractual termination;
- in November 2011, this Court confirmed what Remington believed to have been the case all along: its contractual right to cause ENMAX to remove the Transmission Lines from the Interlink Lands by notice was valid and enforceable. Despite ENMAX's wrongful resistance of its obligation to remove the Transmission Lines, another obstacle awaited: the AUC had to approve removal;
- the litigation continued while ENMAX exercised all its appeal rights, ultimately unsuccessfully;
- then in 2014, after its appeal rights were exhausted, ENMAX initiated the AUC Application to obtain approval to remove the Transmission Lines. Despite both parties saying they wanted the Transmission Lines removed, the AUC declined to grant that relief. Remington's attempts to have the AUC Decision reversed were unsuccessful; and
- in May 2018, the LPRT granted the ROE Orders, thereby legally authorizing ENMAX to continue to have the Transmission Lines present on the Interlink Lands.

[217] In essence, Remington acquired lands in 2002 that it intended to develop, along with a clear contractual right to have the Transmission Lines, a serious obstacle to that development, removed. It exercised that contractual right relatively promptly. However, its enforcement of that contractual right was repeatedly resisted, and substantially thwarted. On the Effective Date, Remington found itself facing new regulatory orders that yet again authorized the presence of the Transmission Lines.

[218] The evidence does not support ENMAX's assertion (testified to by Mr. Parsons and Ms. Maloney) that the Transmission Lines did not pose a meaningful obstacle to the development of the Interlink Lands at the Effective Date, because Remington could simply put forward a detailed development plan and thereby easily obtain an order from the AUC removing the Transmission Lines. That suggestion ignores the 13 years of history I have recounted above. During most of that time, Remington was actively trying to get the Transmission Lines removed, and ENMAX was actively resisting those efforts.

[219] ENMAX's argument greatly oversimplifies the AUC Decision. As I summarized in paragraph 17 of this Judgment, the AUC cited many reasons for its refusal to order the removal of the Transmission Lines. It was not just the lack of detailed development plans that caused the AUC to deny the AUC Application. The evidence does not establish that a second application to the AUC, supported by a more detailed development plan from Remington would have succeeded, nor that it would have succeeded easily or quickly.

[220] ENMAX's argument is also not persuasive because of what the AUC actually said about the kind of development plan it said was lacking. The AUC did not say (as ENMAX suggests)

“we just lacked a detailed development plan from Remington, and if we had that, we would approve the removal of the Transmission Lines.” Rather, the AUC stated in the AUC Decision that *per* its previous decisions, its practice was to consider only developments plans that “have received approval or are in the process of obtaining approval” In the context of the Interlink Lands, that stage of approval would be reached only upon the submission of a full development permit and building permit application.

[221] It is necessary to take a short detour at this point, to explain the difference between a full development permit / building permit application and a pre-application. This is something that all the witnesses generally agreed about. A pre-application is a preliminary process by which a developer can present to the City a high-level proposal for a property development, to inform the City about the type and scale of development it is considering, and to get the City’s view on whether the proposed development is generally approvable. The City circulates a pre-application to all the relevant internal departments, who provide feedback and pose questions. Unlike a development permit application, a pre-application is not submitted for any kind of formal approval. Accordingly, the City’s evaluation of a pre-application is high-level and preliminary in nature, and is not as intensive as a full-scale review of a development permit application and building permit application would be.

[222] In contrast, a development permit application and a building permit application are submitted for formal approval by the City, and must be approved before the developer can begin construction. They are intensive and detailed, and among other things, they require detailed drawings of the structures to be built.

[223] Mr. Remington explained that a pre-application is a relatively low-cost exercise for a developer: its primary expenses are the costs of its architect. Mr. Clark said that his invoice to Remington for his preparation of the drawings that comprised Remington’s 2021 pre-application for the Interlink Lands was about \$40,000. The evidence also proved that the cost of a full development permit application would be substantially higher. Mr. Remington testified that the cost to Remington of preparing a building permit application was approximately \$3,000 per unit. Based on the 1900 units contemplated in Remington’s pre-application (Mr. Clark’s Scenario A), that would equate to around \$5.4 million. When the costs of the development permit application were added, he estimated that the total cost of development permit and building permit applications to develop the Interlink Lands would come to \$9 or \$10 million. Even reducing that number by half to equate to the number of units that could be built using a FAR of 5, it is clear that the cost of making a full development permit and building permit application for the Interlink Lands would be many millions of dollars.

[224] I have already explained above my finding that no developer would start to develop the Interlink Lands until the Transmission Lines were removed. I also find it very unlikely that Remington or any other developer would proceed with full-blown development permit and building permit applications, given all the costs and resources that would entail, before receiving an AUC order removing the Transmission Lines.

[225] Therefore, ENMAX’s suggestion that Remington could easily have made an application with a detailed development plan that would have succeeded in achieving the removal of the Transmission is not realistic, and is contrary to the evidence.

[226] Another important consideration is that the AUC as a decision-maker is very different from the City. As established by the evidence of Mr. Brown, developers can negotiate with the

City to partially or fully solve problems such as future infrastructure location. The City is incentivized to work with developers, because it wants development to proceed. In contrast, there was no evidence presented in the appeals suggesting that any kind of negotiation is possible with the AUC. ENMAX, a sophisticated utility operator that must appear before the AUC often, wanted the Transmission Lines removed in 2015, and the AUC refused.

[227] It is also extremely unrealistic to assume that ENMAX would have fully and actively supported an AUC application by Remington, even if it included a more detailed development plan. The history of this dispute demonstrates that ENMAX has consistently considered the continuation of the *status quo* – the Transmission Lines remaining in place on the Interlink Lands – to be in its best interests. Any AUC application brought by Remington after the Effective Date would have played out with the Civil Action pending in the background. ENMAX would therefore have continued to have an incentive to downplay the negative impacts of the Transmission Lines, and to argue (as it did in these appeals) that the Interlink Lands could be developed to their highest and best use without requiring the removal of the Transmission Lines.⁴¹

[228] Ultimately, the AUC granted an order to remove the Transmission Lines from the Interlink Lands in 2023. However, that did not occur because someone presented the AUC with more detailed development plans for the Interlink Lands. It occurred because the location of the Green Line LRT and the location of the underpass (on 6th Street SE) had been decided, and those decisions necessitated the removal of the Transmission Lines. Notably, the LRT line and the underpass were not factors that had not been mentioned at all in the AUC Decision 8 years earlier. These were external developments that had nothing to do with Remington and ENMAX.

[229] The 2023 AUC removal order is not a fact that was known at the Effective Date, and therefore it cannot be considered in deciding what the future development timeline looked like at that time. However, it does reinforce a fact that I find was proven by the facts that were known at the Effective Date: that the decision of the AUC to approve or disapprove the removal of the Transmission Lines was not something that could be easily predicted, nor meaningfully influenced, by the parties.

[230] For all these reasons, I find that the necessity of obtaining AUC approval to remove the Transmission Lines was a major cause of delay for the development of the Interlink Lands as at the Effective Date. Later in this Judgment I will explain why I have concluded that the duration of that delay would be 10 years, judged from the Effective Date.

Impact of Contamination on the Development Timeline

[231] The parties both acknowledged that there is subsurface contamination on the Interlink Lands.

[232] In the LPRT Decision, the LPRT stated at para 150 that:

Regarding potential environmental contamination, as discussed earlier, the Panel finds that contamination is not a significant factor in the timing and cost of development and the value of the Subject Properties.

⁴¹ Nothing that I have said in this paragraph should be taken as any finding of bad faith or ill intent on the part of ENMAX. There was no evidence of that. ENMAX has strenuously advanced its self-interest throughout this long-running dispute, and it was and remains fully entitled to do that.

[233] I find that conclusion to be reasonable, based on the evidence that appears to have been before the LPRT. I heard additional evidence in the appeals, and that new evidence only further reinforced the inference that contamination of the Interlink Lands is a non-issue in respect of the timing of their development, and their market value.

[234] I will now summarize how that evidence lead me to that conclusion.

[235] Remington called two expert witnesses on this issue:

- (a) Mark Bowles. I qualified Mr. Bowles as an expert witness in the general field of environmental matters and in the specific fields of hydrogeology and environmental assessments; and
- (b) Dr. James Sevigny. I qualified Dr. Sevigny as an expert witness in the areas of environmental quality guidelines and environmental remediation and costing.

[236] ENMAX called Margaret Allen, whom I qualified as an expert witness in environmental engineering, geoscience, contaminated site assessment, contaminated site risk assessment, and contaminated site remediation.

[237] Ms. Allen conducted a phase 1 environmental site assessment (**ESA**) on the Interlink Lands in 2019, which she then refreshed in 2024. Mr. Bowles conducted a phase 2 ESA on the Interlink Lands in August 2024, which itself relied on a phase 1 ESA conducted by Environmental Diagnostics Inc. in January 2024.

[238] A phase 1 ESA involves a document search of the historical and current uses of a site, along with a site visit. A phase 2 ESA involves intrusive subsurface testing, often by drilling boreholes, to obtain samples of material that are then analyzed.

[239] The Interlink Lands and the area around them have been tested exhaustively for environmental contamination over a long period of time. Mr. Bowles reviewed 17 separate environmental reports created between 1995 and 2012, including both phase 1 and phase 2 ESAs. Prior to 2003, the Interlink Lands contained substantial environmental contamination, primarily hydrocarbons that had leaked from underground storage tanks on the site, and buried cinders (the remains of coal that had been burnt in locomotive engines). In 2003, a large remediation program was carried out, in which 37,000 tonnes of cinders and 39 tonnes of hydrocarbon-impacted soils were removed from the Interlink Lands.

[240] Mr. Bowles' phase 2 ESA proved that the 2003 remediation had been very successful. Virtually no cinders remained. Only two soil samples out of 90 contained petroleum hydrocarbons above the applicable Alberta Environment and Protected Areas Guidelines (the **EPA Guidelines**), and no groundwater samples had such "exceedances." Of 34 soil samples, only one contained a volatile organic compound (tetrachloroethylene) above the EPA Guidelines. Soil pH was above guidelines in only four of 77 soil samples. Four groundwater wells contained nitrogen above the EPA Guidelines. Three of 79 groundwater wells contained hexavalent chromium above the EPA Guidelines and 79 metal analyses contained none. All of these "exceedances" above the EPA Guidelines were relatively small in magnitude.

[241] I find that Mr. Bowles' phase 2 ESA was prudently designed to test and monitor soil and groundwater at the most likely locations of historical contamination. The testing program was also well executed, and I am satisfied that it provided a comprehensive and accurate picture of the subsurface contamination on the Interlink Lands. ENMAX's criticisms that Mr. Bowles'

phase 2 ESA failed to drill wells in the proper locations and to the proper depths with the wrong equipment and at the wrong time of year, are not reasonably supported by the evidence.

[242] Ms. Allan's opinion that the presence of chloroform was most likely explained by the presence of a large plume of tetrachloroethylene (or **PERC**) was speculative and not supported by the evidence. The evidence established that the most likely source of the chloroform was leaking drinking water infrastructure located near the perimeter of the Interlink Lands. Mr. Bowles and Mr. Sevigny's evidence satisfied me that chloroform is a byproduct of water chlorination, which explains its presence under the Interlink Lands. If the large plume of PERC that Ms. Allan hypothesized about was actually present, its presence would probably have been detected in many other boreholes and in higher concentrations, and PERC's more common degradation product, trichloroethylene (**TCE**), would likely have been present as well. Neither of these things was true.

[243] I find as a fact that the subsurface contamination of the Interlink Lands is relatively limited, located in isolated areas, and well-understood. I prefer Dr. Sevigny's evidence about the cost and time required to remediate that contamination over Ms. Allan's. Dr. Sevigny estimated a total remediation and monitoring cost of \$2.6 million. Ms. Allan's median estimate was \$46.8 million.

[244] To estimate the costs of removal and monitoring, Dr. Sevigny used an empirical approach, in which he estimated the costs of remediation based on the likely magnitude and types of contamination revealed by Mr. Bowles' phase 2 ESA, estimated the volume and type of work that will be required to remediate that contamination, and then applied actual prices and rates to derive a total cost. Ms. Allen used a theoretical "Monte Carlo" model to generate her remediation cost estimate. While that kind of theoretical model can provide useful data in some circumstances, it was shown in this case to be far less accurate than Dr. Sevigny's methodology. Ms. Allan prepared her cost estimate before having the benefit of seeing Mr. Bowles' phase 2 ESA, and once she saw it, she (to her credit) admitted that her theoretical model was incorrect in a number of important respects.

[245] Ms. Allan's and Dr. Sevigny's estimates of the time required to complete the remediation program (around 2 years for soil remediation and 3-5 years for monitoring and reporting) did not differ significantly, and I accept them. However, I prefer Dr. Sevigny's evidence that, after about 1 to 1.5 years of initial remediation work, the remainder of the remediation program could be completed while development occurred. Ms. Allan suggested that the entire remediation program would have to be completed before any development could commence, and I do not accept that as reasonable.

[246] For all these reasons, I find that the environmental contamination of the Interlink Lands would not have delayed their development, judged from the Effective Date.

Market Conditions

[247] The LPRT found that uncertainty about the Calgary economy as at the Effective Date was one of the factors that would contribute to the development of the Interlink Lands being delayed until approximately 10 years after the Effective Date.

[248] The appraisal experts testified about the state of Calgary's economy as at the Effective Date. Mr. Gettel opined that, after a downturn in Calgary in 2015 – 2016 caused by extremely low oil prices in late 2014, the market for apartments in Calgary was strengthening, as

demonstrated by declining vacancy rates in 2017 and 2018. In Mr. Parsons' opinion, the market for apartment sales in Calgary was weakening considerably in the spring of 2018. He admitted that this weakness was not affecting the apartment rental market, however. Mr. Remington testified that Remington's plan for the Interlink Lands was always that the apartment units it built would be for rent, not sale.

[249] This evidence was relevant to the question of the market value of the Interlink Lands, but it does not assist me in determining the causes of delay for the development of the Interlink Lands. There was no evidence about what the future long-term prospects were, as at the Effective Date, for the high-rise apartment market in the Beltline. Given my finding that the AUC decision-making process would have caused a 10-year delay in the development of the Interlink Lands, the lack of evidence on this point means that I cannot make any finding about how the state of the economy in Calgary contributed to the anticipated development delay.

Other Potential Causes of Development Delay, According to ENMAX

[250] In addition to the evidence I have discussed in paras 196 – 249 of this Judgment, ENMAX also argued that there were a number of other factors that would cause the delay of the development of the Interlink Lands as at the Effective Date, rather than the ROE Orders and the presence of the Transmission Lines. I find that the evidence in the appeals established that, as at the Effective Date, none of those things was a cause of the future development delay. I will now address each of them, to explain why I have reached that conclusion.

[251] ENMAX pointed out, correctly, that the 2006 Rail Town plan and the 2021 plan created by Mr. Clark of SAI for use in Remington's pre-application were only notional, high-level concept plans, and that Remington never pursued them for actual development, or submitted them for approval to the City. It says this shows that Remington's own inactivity caused delay.

[252] In my view, ENMAX misses the point with this argument. The fact that Remington did not submit these plans for formal approval is explained by the circumstances in which it created the plans, and the times when it did so. When the Rail Town plan was created in 2006, Remington had (validly, it would later be established by this Court in 2011) terminated the ROW Agreements, but ENMAX was refusing to remove the Transmission Lines. The 2021 SAI plan was also created when the Transmission Lines remained on the Interlink Lands, by then under the authority of the ROE Orders. The parties had just finished the hearing before the LPRT and were awaiting its decision on compensation.

[253] As I have already noted, both the Rail Town plan and the SAI plan were created for purposes other than submission as part of a development permit application. The fact that Remington did not proceed with a full-blown development permit and building permit application with these documents in 2006 or 2021 is fully consistent with my finding that neither it, nor any other prudent developer, would do so while the Transmission Lines remained on the Interlink Lands. Mr. Remington testified, without being challenged or contradicted by any other evidence, that to pursue a development permit and building permit application for the Interlink Lands would cost approximately \$9 - 10 million. The fact that Remington did not submit the 2006 Rail Town plan or the 2021 SAI plan for formal approval by the City merely shows that Remington acted reasonably, in the circumstances. Remington's non-submission of those documents to the City for approval was not, as at the Effective Date, a cause of development delay. Also, the evidence about what Remington did with the 2021 SAI plan is *post facto*

evidence that is irrelevant to my determination of the causes of development delay, judged as at the Effective Date.

[254] ENMAX points to the following things Mr. Remington said in his testimony:

- (a) that Remington never itself applied to the AUC for an order to have the Transmission Lines removed;
- (b) that Remington never approached ENMAX to ask it to remove the Transmission Lines;
- (c) that the cost of removing the Transmission Lines was only \$2 million to \$4 million in 2003/2004; and
- (d) acknowledging that, given the significant value of the development, Remington “would have buried or relocated the [Transmission Lines] if it was going ahead with development.”

[255] ENMAX asked me to make two inferences from this testimony: the removal of the Transmission Lines “was not an obstacle to development;” and that Remington did not try hard enough to remove the Transmission Lines prior to the Effective Date.

[256] This evidence does not reasonably support these two inferences.

[257] Regarding the first inference, I have already explained why I have found that the Transmission Lines were not only an obstacle to development, but the primary obstacle and cause of delay. The evidence highlighted by ENMAX cannot displace this conclusion. Mr. Remington’s statements were just another way of saying that Remington would not have proceeded with the development until the Transmission Lines were removed. I agree.

[258] The second inference completely ignores the reality of what occurred in the 13 years prior to the Effective Date. It would be accurate to say that during those years, Remington did almost nothing but attempt to have the Transmission Lines removed. And at least until it had exhausted all its appeal rights of the Park Decision, ENMAX did almost nothing but resist Remington’s efforts. The evidence is entirely contrary to the inference sought by ENMAX.

[259] ENMAX next argued that Remington’s desire to wait for the outcome of the CP Action before starting to develop the Interlink Lands caused a delay in development, as at the Effective Date. Mr. Remington’s evidence on this point was:

Q: And, sir, Remington sued CP over the sale of the 10th Avenue [Lands] to the Government of Alberta in the CP [Action]; correct?

A: Yes.

Q: And Remington didn't proceed in -- with developing the 9th Avenue [Lands] or the [Interlink Lands] until you knew what was happening with the litigation outcome with CP on the 10th Avenue [Lands]; correct?

A: We didn't -- we didn't proceed.

Q: And because -- because of that litigation; correct?

A: Well, we wanted to -- we wanted to see an outcome of what was going to happen on the 10th Avenue [Lands]. At the same time, we knew the power lines were there.

Q: Okay. A So ...

Q: And I'll get to that, sir. And your understanding is that a judgment in the [CP Action] was rendered in about October of 2022; right, sir?

A: Yes.

Q: And your commercial understanding is that the judgment did not give Remington any ownership of the 10th Avenue [Lands]; correct?

A: That's correct.

Q: Okay. So after the judgment in the CP Action was given in about October of 2022, Remington came to the realization that the original concept of Rail Town using the three parcels was not even possible at that point; correct?

A: You -- can you ask that again? I'm sorry.

Q: So after the judgment in the CP -- okay?

A: Yes.

Q: And that -- that judgment did not give any ownership interest in the -- in the 10th Avenue lands to Remington; correct?

A: That's correct.

Q: Okay. So after that occurred, after you read the judgment, Remington came to the conclusion that the original plan of Rail Town using the three parcels, including 10th avenue, could not proceed in that fashion; correct?

A: That's -- that's correct.

[260] This evidence does not reasonably give rise to the inference sought by ENMAX: that as at the Effective Date, the CP Action caused a delay in the development of the Interlink Lands because Remington would not have developed the Interlink Lands until the CP Action was resolved.

[261] There are a number of reasons related specifically to this exchange of questions and answers that lead me to this conclusion:

- (a) in these questions, Mr. Remington never said that Remington would not develop **the Interlink Lands** until the CP Action was resolved. He was not asked about Remington's plans to develop the Interlink Lands. He was asked about its plan to develop the "9th Avenue Lands or the Interlink Lands." This was not a question that could have yielded a clear or clean admission about the Interlink Lands alone;
- (b) in these questions, Mr. Remington was not asked about what Remington's intention was regarding the development of the Interlink Lands **as at the Effective Date**. He was merely asked to confirm that Remington had not proceeded to develop the 9th Avenue Lands or the Interlink Lands, with no reference whatsoever to a specific timeframe (other than, implicitly, the time the question was asked in October 2024);
- (c) in Mr. Remington's answer, he referred to **two** causes of delay: the CP Action **and** the presence of the Transmission Lines. Despite counsel's statement that the

cross-examination would return to the issue of delay caused by the Transmission Lines, it did not. Mr. Remington's compound answer was never clarified and he therefore did not make the admission respecting the Interlink Lands that ENMAX asserts; and

- (d) the final question and answer in this exchange introduce yet another complication that weakens the weight of the admissions that ENMAX tries to rely on. While Mr. Remington admitted that Remington knew after the trial decision in the CP Action that it could not proceed with the **Rail Town concept** from 2006, that says nothing about the development of the **Interlink Lands** on their own. The Rail Town concept included all of the 9th Avenue Lands, the 10th Avenue Lands and the Interlink Lands. It simply does not follow from the fact that the trial decision in the CP Action did not award ownership of the 10th Avenue Lands to Remington, that the CP Action would have delayed Remington's development of the **Interlink Lands**. Counsel did not follow up with questions that would have clarified this discrepancy.

[262] Finally, even if the evidence showed that Remington would not have developed the Interlink Lands without first having a decision in the CP Action (which it did not), I would not have concluded that this was a cause of development delay, as at the Effective Date.

[263] As the evidence of Mr. Clark and the appraisal experts demonstrated, the Interlink Lands could be developed on their own, not just in combination with the 9th Avenue Lands and the 10th Avenue Lands. Even if the result of the CP Action had been that Remington was not entitled to recover the 10th Avenue Lands, as turned out to be the case, it could still have developed the Interlink Lands separately.

[264] Also, judged from the Effective Date, I would if necessary have found that the CP Action would have been concluded before the 10-year time frame that it would have taken for the AUC to order the removal of the Transmission Lines. Remington had commenced the CP Action in 2008, so the CP Action had already been proceeding for a decade by the Effective Date. Neither party entered any evidence about the status of the CP Action as at the Effective Date. However, based on the uncontested evidence about Remington's conduct of the Civil Action against ENMAX, I infer that these were important issues to it, and it was a reasonably diligent plaintiff. Therefore, looking forward from the Effective Date, I would have concluded that the CP Action would have been finished before the AUC would have ordered the removal of the Transmission Lines. The CP Action was a dispute about specific performance of a contract. There is nothing in the pleadings that would lead me to conclude that this Court, and if necessary the Court of Appeal, could not decide that issue conclusively once it came before them.

[265] In contrast, as at the Effective Date, Remington was essentially back at square one with the AUC, and the AUC Decision coupled with the very challenging circumstances posed by the continued presence of the Transmission Lines would not have inspired similar confidence about a clear and prompt AUC order for removal of the Transmission Lines.

[266] In his examination in chief, Mr. Remington testified that this was Remington's subjective view as well:

Q: Now, how did the litigation with Canadian Pacific impact development of the [Interlink Lands]?

A: Well, I think our -- our lawsuit with the -- with the Province and with CP didn't really involve the [Interlink Lands]. We made no claims for any damages on the 9th Avenue or the 11th Avenue lands, only for -- for the development losses on the 10th Avenue lands. Does that answer your question?

Q: Were you waiting for conclusion of the Canadian Pacific litigation to consider development of the [Interlink Lands]?

A: Well, I guess in context, I felt that the -- the ENMAX issue was going to be there long after we'd sorted out the issues with the -- the Province and with CP. So we basically were not going to build anything until the -- on the lands until the 10th Avenue land decision landed. And we were right. We found out two years ago that the Province got the lands, and at the same time, we still got ENMAX on the property.

[267] While I discount the weight of that evidence to some extent because it is subjective and to an extent *post facto*, it corroborates the other evidence about the circumstances that existed on the Effective Date, from which I have concluded that the CP Action would have been expected to be resolved before the removal of the Transmission Lines.

[268] ENMAX points to the following evidence of Mr. Remington, which it calls a “stark admission”:

THE COURT: (as read)

Now, sir, if the AUC had ordered the transmission lines removed and that was done in 2015, you can't say whether Remington would have started to develop the interlink lands; correct?

A Correct.

THE COURT: So you can go ahead and answer that question.

A That's correct.

[269] This was not a definitive statement to the effect that Remington had no intention to develop the Interlink Lands once the Transmission Lines were removed. Mr. Remington essentially admitted that Remington may have proceeded, or it may have not proceeded. There may have been many reasons why Mr. Remington may not have been sure about this. None of these reasons were explored in follow-up questions. But, among other things, as I have noted above, there was evidence that the economy in Calgary was weak in 2015 because of the precipitous drop in oil prices in 2014. Also, this was a hypothetical question about a circumstance that might have come into being in 2015 (before the Effective Date), but did not. This evidence is of little weight. It does not prove that Remington did not intend to develop the Interlink Lands after the Transmission Lines were removed.

[270] ENMAX also points to this evidence from Mr. Remington:

Q: Okay. So we also talked about consolidation, and we spoke about the consolidation of the Interlink Lands in 2021. You recall that, sir?

A: Yes.

Q: And you said that the City won't approve a building situated on two titles; correct?

A: That's correct.

Q: And so that was a reason for the consolidation; correct?

A: Well, the reason for the consolidation was that we were submitting -- in the process of submitting a pre-application assessment to the City, and we knew that would certainly be a requirement, but it was certainly easier for us to put the buildings in context to property lines.

Q: Thank you, sir. And the reason Remington didn't consolidate earlier than 2021 is because it had not decided to proceed with the development at that point; correct?

A: I think that we hadn't proceeded because I believe that with having the titles, it provided us with a certain amount of flexibility on -- if we had to deal with the City on underpasses.

Q: Right. And that's maybe a good reason for deciding, but you agree that Remington hadn't decided prior to at least 2021 to proceed with development; correct?

A: That's correct.

[271] Again, the fact that Remington had not decided to proceed with the development of the Interlink Lands prior to 2021 does not prove that Remington did not want to develop the Interlink Lands. The Transmission Lines remained in place in 2021, and the evidence shows that Remington would, entirely reasonably, not develop the Interlink Lands until they were removed.

Summary on the Cause and Duration of Development Delay

[272] Based on my consideration of the evidence about the factual circumstances in existence at the time, I find that as at the Effective Date, the best estimate of the time that would have been needed to have the Transmission Lines removed from the Interlink Lands, is 10 years. This is necessarily an estimate, but I find that it is the best estimate possible, based on the evidence. Some of the most important evidence that leads me to this conclusion is:

- (a) by the Effective Date, Remington had been trying to get the Transmission Lines removed for 13 years;
- (b) after those 13 years of effort, the previous legal authority for the Transmission Lines' presence (the ROW Agreements) had been removed, but it was replaced by a fresh legal authority, the ROE Orders;
- (c) ENMAX had actively resisted Remington's efforts to remove the Transmission Lines, and there is no evidence to suggest that ENMAX would not continue to do so after the Effective Date, if it continued to believe that removal was not in its best interests;
- (d) one form of resistance previously open to ENMAX had finally been foreclosed, as a result of the Park Decision and ENMAX exhausting its appeal rights. This is

one reason that the go-forward time estimate should be shorter than the previous period of delay (13 years). However, it cannot be assumed that ENMAX would have actively assisted or supported an application to the AUC by Remington. It quite likely would have continued to oppose removal of the Transmission Lines in some way;

- (e) the AUC Decision did not provide a clear or definitive path to succeed in a future removal application;
- (f) the parties could not negotiate with the AUC, and the AUC has broad discretion to make whatever decision it thinks correct – even if that decision is contrary to the common position taken by the owner and operator, as was the case here;
- (g) given my previous findings, no developer would proceed with a full development permit application for the Interlink Lands at least until an AUC Order for the removal of the Transmission Lines was in place, and was no longer subject to appeal;
- (h) given the lack of clarity about a successful path forward in the AUC Decision, it is possible that more than one additional application to the AUC would be required. Each such application would be followed by potential applications for reconsideration and then appeals, on leave, to the Alberta Court of Appeal and the Supreme Court of Canada; and
- (i) ENMAX did not enter any evidence explaining how long it actually took to physically remove the Transmission Lines once approval to do so was granted by the AUC in 2023. However, in the AUC Application, ENMAX estimated that the work would take 12 months to complete.

[273] As I have explained above, the evidence establishes that, as at the Effective Date, this 10-year development delay was caused by the ROE Orders and the presence of the Transmission Lines. The main driver of this likely delay was the time needed to obtain AUC authorization to remove the Transmission Lines. The other factors I have discussed (final decisions about the location of the Green Line and the underpass, market conditions, environmental contamination and Remington’s intentions and conduct) did not cause the 10-year delay.

Could Remington Have Shortened the 10-Year Delay?

[274] Viewed from the Effective Date, could Remington have shortened the 10 years that I estimate it would have taken to obtain an AUC order permitting removal of the Transmission Lines, and then to then physically remove them? Essentially, this is a question of mitigation.

[275] Parties claiming damages have a duty to take all reasonable steps to avoid or minimize their losses: *Southcott v Toronto Catholic School Board*, 2012 SCC 51 at paras 23 – 24.

[276] ENMAX argued that Remington failed to mitigate any losses caused by the ROE Orders and the presence of the Transmission Lines by:

- (a) not applying promptly to the AUC to have the Transmission Lines removed (ENMAX suggests that Remington could have done this, and this would have caused the AUC to order the removal of the Transmission Lines prior to their actual removal in 2023); or

(b) developing the Interlink Lands with the Transmission Lines present.

[277] I have already addressed both these points, but I will analyze them again in the context of ENMAX's mitigation argument.

[278] Based on the history of ENMAX's resistance to the removal of the Transmission Lines and the disappointing failure to have the AUC order their removal in 2015, I find that Remington could not reasonably have obtained an AUC order and achieved physical removal of the Transmission Lines, earlier than 10 years after the Effective Date. I have also concluded that neither Remington nor any other reasonable developer would have developed the Interlink Lands until the Transmission Lines had been removed. Therefore, Remington did not fail to mitigate its losses for the reasons alleged by ENMAX.

[279] However, there was also other evidence in the appeals touching on possible mitigation efforts. Even if Remington could not have achieved removal of the Transmission Lines until 10 years after the Effective Date, could it have reasonably taken steps during those 10 years that would have shortened the development delay? The evidence suggested two possible things that could have been started early: carrying out the required environmental remediation prior to starting the actual development; and/or commencing the development permit application process with the City earlier.

[280] Ms. Maloney testified that it would take a minimum of three years to obtain development permit approval for the Interlink Lands. Mr. Brown said this would take 18 – 24 months. Given Mr. Brown's far greater experience in obtaining development approvals from the City, I find that his evidence is more reliable than Ms. Maloney's, and I accept it as accurate. The question is therefore whether it would have been reasonable for Remington to begin this 18 – 24 month approval process before the Transmission Lines were removed. I find that it would not. As I have already described, Mr. Remington's unchallenged estimate is that it would cost \$9 million - \$10 million for a full development permit and building permit application. Once granted, a development permit is valid only for two years. Given ENMAX's historical intransigence and the numerous other complications, I find that it would not have been reasonable for Remington to commence undertaking the development permit application, and devoting the very substantial financial and other resources required to do so, until the Transmission Lines had actually been removed.

[281] With respect to the necessary environmental remediation work, I accept as correct Dr. Sevigny's opinion that this work would take about two years to complete. Ms. Allan's opinion about this did not differ greatly – she said this would take two years and three months (including remediation reporting).

[282] I also accept Dr. Sevigny's evidence that this work could have been undertaken concurrently with the development of the site. Given the significant amount of excavation that would be required for the underground parkade, this would have been a reasonable and cost-effective approach. It would have been more costly, and unreasonable, for Remington to undertake the remediation work before the Transmission Lines were removed.

[283] For these reasons, I find that, judged from the Effective Date, Remington could not have shortened the 10-year development delay by taking any reasonable mitigation steps.

Conclusion on Development Delay

[284] In conclusion, I find that:

- (a) if the Transmission Lines and the ROE Orders had not been present on the Interlink Lands as at the Effective Date, Remington would have been in a position to promptly start the development of the Interlink Lands at that time. This does not mean that Remington would have had “shovels in the ground” the day after the Effective Date. The process would have required development permit and building permit applications, and the actual physical development would have been phased over a number of years. Alternatively, Remington could have sold the Interlink Lands on the Effective Date for their market value, based on their highest and best use. Doing either of these things would have enabled Remington to receive the market value of the Interlink Lands, as at the Effective Date;⁴² but
- (b) the presence of the Transmission Lines and the ROE Orders as at the Effective Date would have delayed Remington from being able to do either of those things, by 10 years. There is nothing that Remington could have reasonably done in those 10 years to shorten that delay.

[285] I recognize that, as time has passed, actual events have shown that this 10-year estimate is, like almost all estimates, inaccurate. In 2023, the AUC approved the removal of the Transmission Lines and Mr. Hanna stated that their removal was completed sometime in 2024. However, I cannot use that evidence to determine the likely duration of the development delay as at the Effective Date - that would be impermissible use of *post facto* evidence. My decision can only be based on the facts that existed on the Effective Date. I am satisfied that the evidence about those facts established a development delay of 10 years, looking forward from the Effective Date.

iv. What is the Proper Amount of Compensation for Remington’s Loss?

Per Acre Value of the Interlink Lands

[286] Remington’s loss was a 10-year delay in realizing the market value of the entirety of the Interlink Lands, by either developing them or selling them. I must therefore begin my assessment of the proper amount of that loss by first determining the market value of the Interlink Lands, as at the Effective Date.

[287] The evidence about market value came from Mr. Wagar and Mr. Gettel for Remington, and Mr. Parsons for ENMAX. While Mr. Wagar and Mr. Gettel both testified at the LPRT Hearing, Mr. Parsons did not - ENMAX’s valuation expert at the LPRT Hearing had been Mr. Wasmuth. The LPRT generally accepted the valuation opinion of Mr. Wagar, coming to the conclusion I have described above in paragraph 10 of this Judgment. For the reasons that follow,

⁴² As I have explained above, inherent in the definition of market value is the concept that the net present value of the profit that a developer would earn over the course of the development is equivalent to the price that an informed, knowledgeable arm’s length purchaser would have paid for the property. Therefore, the time that would have been required to apply for and obtain a development permit and a building permit after the Effective Date, and the subsequent phasing of the development, are all “priced into” the market value of the Interlink Lands as at the Effective Date.

I find that the LPRT's findings about the market value of the Interlink Lands were reasonable. The new evidence I heard in the appeals did not make the LPRT's findings unreasonable.

The Valuation Opinion Evidence in these Appeals

[288] I have already described why I rejected Mr. Parsons' income approach valuation of the Interlink Lands as unsupported by the evidence, and unreasonable. However, Mr. Parsons also provided an alternative opinion, in which he used the direct comparison approach. Mr. Wagar also used the direct comparison approach.⁴³

[289] Mr. Wagar and Mr. Parsons followed the same general process to create their direct comparison valuation opinions of the market value of the Interlink Lands, by:

- (a) selecting what they considered to be recent and relevant comparable property sales;
- (b) analyzing those comparable properties to extract a common unit of comparison;
- (c) making what they considered to be appropriate adjustments to the prices of the comparable properties, using either a "qualitative" or a "quantitative" method;⁴⁴ and
- (d) applying those adjusted prices to the Interlink Lands, to determine the market value of the Interlink Lands.

[290] I am satisfied that the direct comparison approach is the best method to determine the market value of the Interlink Lands, given that there was good data from a reasonably large number of comparable property sales before the Effective Date.

[291] Mr. Wagar and Mr. Parsons agreed on many points:

- (a) they both stated that their valuations relied only on information that was known or knowable as at the Effective Date;
- (b) they both valued the Interlink Lands assuming that the Transmission Lines were not present;
- (c) they both agreed that the highest and best use of the Interlink Lands was for high-density mixed-use development; and
- (d) they both used "price per buildable square foot" as the unit of comparison between properties, agreeing that it was the most relevant unit for urban development properties like the Interlink Lands.⁴⁵

[292] The major differences between Mr. Wagar's and Mr. Parsons' approaches were:

⁴³ In the direct comparison approach, appraisers derive the value of the subject property by comparing it to similar properties that have recently been sold (**comparable properties** or **comparables**), using appropriate units of comparison, and making appropriate adjustments to the sale prices of the comparables.

⁴⁴ Qualitative adjustments involve characterizing a comparable property as superior, equal or inferior to the subject property and applying a corresponding directional price adjustment. In the quantitative method, a percentage or dollar value increase or decrease is used. Both matters rely on the subjective opinion of the valuator.

⁴⁵ Price per buildable square foot is derived by taking the total selling price for the property, dividing that price by the total area of the property (in square feet), and then dividing that per square foot price by the applicable FAR. Mr. Wagar testified that buyers and sellers use this unit of measurement to list and sell development properties.

- (a) Mr. Parsons disagreed that Mr. Wagar’s comparable properties #3 and #5 were sufficiently relevant to be included in the analysis. In his view, their much smaller area and development scale meant that the economics of developing those properties made them too dissimilar from the Interlink Lands. Also, while comparable property #5 was downtown, it was located north of the Bow River in an area that Mr. Parsons said was dissimilar to the Beltline;
- (b) Mr. Wagar used a FAR of 7 for the Interlink Lands. At the Effective Date, the base FAR for the Interlink Lands was 5 and the maximum (or “bonus”) FAR was 7. Mr. Parsons said that only the base FAR of 5 could be used;
- (c) Mr. Wagar disagreed that Mr. Parsons’ comparable property #4 was sufficiently relevant to be included in the analysis. In his view, its suburban setting, outside downtown Calgary and about 4.8 km from the Interlink Lands, made it too dissimilar. He also noted that the sale of this property was not a private market transaction, as it was sold by the City in a bid process; and
- (d) they took different views of the importance of “development scale.” The Interlink Lands are much larger in area than all the comparable properties that the valuation experts reviewed. This greater “development scale” means that the Interlink Lands will be developed over a longer period of time, and in phases. Therefore, the cashflow that the developer anticipates earning will be received over a longer period of time. This could justify discounting the value of a large development property like the Interlink Lands when comparing it to smaller comparable properties that can be developed more quickly and generate a quicker return. In other words, buyers may pay less because it will take them longer to develop a large property. Mr. Wagar recognized this principle, but he did not discount the market value of the Interlink Lands based on its large scale. He took this approach because interest rates as at the Effective Date were near historic lows, and because the City was charging no property tax for the Interlink Lands while they were leased to the Stampede. Thus, Mr. Wagar reasoned, Remington’s carrying costs of the Interlink Lands were so low that a development scale discount was not warranted. Mr. Parsons disagreed and opined that such a discount was required.

[293] After making his quantitative adjustments and removing comparable properties #3 and #5 as “outliers” (they had per buildable square foot prices many times higher than the other comparable properties), Mr. Wagar’s comparable properties had per buildable square foot prices between \$30.25 and \$44.00. He determined the appropriate per buildable square foot price for the Interlink Lands to be \$40.00. His calculation of market value was:

$$9.02 \text{ acres} \times 43,560 \text{ sq. ft.}^{46} \times 7.0 \text{ FAR} \times \$40.00 \text{ per sq. ft.} = \$110,015,136^{47}$$

and

⁴⁶ This is the number of square feet per acre.

⁴⁷ For the contiguous parcels located west of 6th Street S.E.

$$2.25 \text{ acres} \times 43,560 \text{ sq. ft.} \times 6.0 \text{ FAR} \times \$37.00 \text{ per sq. ft.} = \$21,758,220^{48}$$

for a total market value of \$131,773,356, which Mr. Wagar rounded to \$130,000,000.

[294] Mr. Parsons's comparable properties had per square foot buildable prices between \$28.00 and \$43.00. He adjusted those prices qualitatively rather than quantitatively, and determined a post-adjustment per square foot buildable price range of between \$25 and \$30. His adjustments included development scale. He used a FAR of 5.0 and chose the mid-point of \$27.50 as the appropriate per buildable square foot price for the Interlink Lands. His calculation of their market value was:

$$\$27.50 \times 267,894 \text{ buildable square feet} = \$7,367,085.$$

[295] I will now analyze the primary differences between the two valuator's opinions.

Comparable Properties

[296] Five of the comparable properties used by Mr. Wagar and Mr. Parsons were the same. The only ones not in common were Mr. Wagar's #3 and #5, and Mr. Parsons's #4.

[297] Mr. Wagar's comparable properties #3 and #5 are indeed outliers: their per square foot buildable prices were \$111.87 and \$97.34, several times greater than all the others. However, Mr. Wagar recognized this in his primary expert report (before Mr. Parsons had commented on them), and discarded them from his analysis, which was appropriate.

[298] Mr. Parsons' comparable property #4 is the most different of all the comparable properties considered by the valuator. It is located in a suburban district, far from the Beltline and downtown Calgary. It was sold by the City in a bid process that involved the City imposing unique terms on the bidders, requiring the property to include some non-market housing. Its price per buildable square foot was \$22, significantly lower than the other comparable properties Mr. Parsons used (between \$28 and \$43). I agree with Mr. Wagar that Mr. Parsons's inclusion of this comparable property was unreasonable. It was not sufficiently similar to the Interlink Lands to be included.

FAR

[299] Mr. Wagar used a FAR of 7, rather than the base FAR of 5 as at the Effective Date. He said that he did so not because 7 was the maximum FAR at the Effective Date, but because the publicly available information at that time showed that nearby properties had higher base FARs, and buyers and sellers would have anticipated that the future base FAR of the Interlink Lands would be 7 or higher. In April 2019, almost a year after the Effective Date, the City published the 2019 Beltline Area Redevelopment Plan (the **2019 ARP**). The 2019 ARP increased the FAR for the Interlink Lands to base 8 / maximum 12 (for the portion west of 6th Street S.E.) and to base 7 / maximum 9 (for the portion east of 6th Street S.E.). A number of witnesses testified that prior to the Effective Date, the City had been conducting public consultations on the 2019 ARP. However, no one could describe whether those consultations included information about anticipated increased FAR for the Interlink Lands. No one entered into evidence any documents showing the contents or substance of these consultations.

⁴⁸ For the oddly shaped and isolated parcels located east of 6th Street S.E. Mr. Wagar felt that the developability of this portion of the Interlink Lands would be lower, justifying a lower FAR and a lower per buildable square foot price.

[300] The valuation experts Mr. Wagar and Mr. Parsons and the development experts Mr. Brown and Ms. Maloney all generally agreed that owners and developers of property have no control over whether bonus FAR will be approved by the City. All they can do is try to negotiate. Approving anything above the base FAR is entirely within the discretion of the City.

[301] I find that it was unreasonable for Mr. Wagar to use a FAR of 7 for the Interlink Lands as at the Effective Date. While buyers of the Interlink Lands, as at the Effective Date, may have anticipated that the City might increase the FAR on the Interlink Lands, that would have been speculation. There was no guarantee that the City would do so, when it would do so, nor the magnitude of any increase. They could also not count on successfully negotiating for a higher FAR. As a result, I find that on the Effective Date an informed buyer would not have paid for the Interlink Lands using more than FAR 5. Mr. Parsons' criticism of Mr. Wagar's approach is valid, and the LPRT's decision on this point was reasonable.

Development Scale Adjustment

[302] I agree with Mr. Wagar's rationale for not reducing the market value of the Interlink Lands on the basis of development scale. The cost of holding the Interlink Lands was relatively modest. And it must be remembered that the valuers were determining the market value of the Interlink Lands as at the Effective Date, assuming that the Transmission Lines had been removed. With the Transmission Lines gone, Remington or a purchaser could have avoided at least part of the cashflow delay resulting from the large scale of the property, by commencing development on the first phase of the Interlink Lands, and selling other portions for their market value to other parties. The LPRT did not unreasonably err by not reducing the market value of the Interlink Lands based on development scale.

Overall Conclusion on Market Value

[303] It was apparent from the valuation experts' evidence that property valuation involves a high degree of subjective judgment, much of which is difficult to explain in minute detail. Both Mr. Wagar and Mr. Parsons are well-qualified in this field, and both were intelligent, articulate witnesses. Overall however, I accept Mr. Wagar's opinion as being more objective and accurate. I find that Mr. Parsons's credibility was somewhat diminished by his unreasonable preferring of the income approach for valuing the Interlink Lands. Also, his inclusion of his comparable property #4 was not reasonable.

[304] I therefore accept Mr. Wagar's calculation, subject only to reducing the FAR on the entirety of the Interlink Lands to 5. Therefore, I conclude that the market value of the Interlink Lands as at the Effective Date was:

$$9.02 \text{ acres} \times 43,560 \text{ sq. ft.} \times 5.0 \text{ FAR} \times \$40.00 \text{ per sq. ft.} = \$78,582,240$$

and

$$2.25 \text{ acres} \times 43,560 \text{ sq. ft.} \times 5.0 \text{ FAR} \times \$37.00 \text{ per sq. ft.} = \$15,541,589$$

for a total market value of \$94,123,829.

Calculating the Proper Compensation for Remington's Loss With Reference to Subsection 25(1)(b)

[305] As noted above, I have concluded that Remington's actual loss was a 10-year delay in receiving the market value of the Interlink Lands, namely \$94,123,829. Remington would ultimately receive that market value, but only 10 years after the Effective Date.

[306] How is the compensation for that loss properly assessed?

[307] One method would be to determine the net present value as at the Effective Date of the delayed income that Remington would earn from developing the Interlink Lands. However, I cannot use that approach in this case because the parties entered no evidence in the appeals about the net income that Remington would earn from developing the Interlink Lands.

[308] A second method would be to utilize the market value of the Interlink Lands 10 years after the Effective and determine its net present value as at the Effective Date. However, I cannot do that either. While there was ample evidence in the appeals about the market value of the Interlink Lands as at the Effective Date, there was no evidence about what the market value would be in the 10 years in the future.

[309] Based on the available evidence, I find that the appropriate measure of damages is to calculate interest on the market value of the Interlink Lands. As noted by Professor Waddams:⁴⁹

One way of measuring the value of the use of property is by allowing interest on the capital value. In *British Columbia Saw-Mill Co. v. Nettleship*, Bovill C.J. said that compensation for delay in obtaining the use of goods might take the form of "interest on the value of the goods". This suggestion has been implemented in Canadian cases. In *Prime Potash Corp. v. Bison Petroleum & Minerals Ltd.*, [*Prime Potash*] where the defendant had caused a delay in the plaintiff's obtaining a potash mining interest, the court considered that the primary measure of damages would be the decline in the market value of the interest, but in the absence of evidence of the value on the date the interest was finally transferred, interest was awarded on the earlier value for the period of delay.

[310] In *Prime Potash*,⁵⁰ Johnson J stated:

As to the value of the permit at the time of trial in 1968, there is no evidence whatsoever. ... The fact that I cannot determine with accuracy the market value of the permit today does not relieve the defendant of the liability for paying for its breach of contract. ... When, as in the instant case, no evidence is advanced as to the later market value of the property, nor is any evidence led to serve as a guide in calculating this value, no matter how difficult calculations may be, I do not think the Court can provide this lack and therefore on the basis of difference in values I am unable to make an award of damages. This, however, does not dispose of the question of damages entirely. The fact is that the defendant's breach of contract has delayed the plaintiff for two and one-half years from obtaining a very valuable asset valued at \$2,148,000, which it might have developed, sold or used. In my view the plaintiff is entitled to compensation for this loss of use: "... where there has been

⁴⁹ Waddams at para 1:22.

⁵⁰ 1968 CanLII 546 (Sask QB) at para 37.

non-delivery or delayed delivery of land under a contract of sale or lease, the value of the loss of use or loss of profits has been awarded as damages in some cases." See *Mayne and McGregor on Damages*, 12th ed., para. 283, pp. 270-1, where reference is made to *Jaques v. Millar* (1877), 6 Ch. D. 153, and *Royal Bristol Permanent Building Society v. Bomash* (1887), 35 Ch. D. 390. Also see *British Columbia Saw Mill Co. v. Nettleship* (1868), L.R. 3 C.P. 499, where Bovill, C.J., regarded the value of the use of lost goods as interest. Because of the lack of evidence as to the rate of return on invested funds since 1966, I allow interest at the rate of 5%.

[311] In *Alberta (Minister of Public Works, Supply & Services) v Nilsson*, 2002 ABCA 283 at para 213, our Court of Appeal recognized "growing authority for a broad discretion to award interest as damages", citing *Prime Potash* and other cases.

[312] I find that this method of calculating damages allows me to make an award that keeps Remington whole. Notionally, to replace the market value of the Interlink Lands that Remington would have enjoyed on the Effective Date but for the ROE Orders and the presence of the Transmission Lines, Remington could have borrowed the same sum. It would have had to pay interest on that sum for 10 years, at which time it would receive the market value of the Interlink Lands (and could then have notionally repaid the principal sum borrowed on the Effective Date). Remington would be kept whole during the delay, but it would not recover the interest it had paid.

[313] Mr. Remington's uncontested evidence was that, as at the Effective Date, Remington's cost of borrowing was 4.5% per year. Therefore, Remington's annual interest cost during the delay period would be:

$$\begin{aligned} & \$94,123,829 \text{ (market value of the Interlink Lands)} \times 4.5\% \text{ (annual interest rate)} = \\ & \qquad \qquad \qquad \$4,235,572 \end{aligned}$$

[314] However, during that 10-year period, Remington would also receive an annual benefit that it would not have continued to receive, if it had recovered the market value of the Interlink Lands (by selling or developing the Interlink Lands) on the Effective Date: the savings of tax that it did not have to pay on the Interlink Lands, because of the special arrangement with the City. The exact mechanism of this saving was not clearly established on the evidence. Mr. Remington testified that the Stampede agreed to pay the property taxes on the Interlink Lands during the term of the lease, but the lease does not mention taxes. Mr. Wagar testified that the City exempted the Interlink Lands from tax while Remington leased it to the City. Regardless of the exact nature of this tax savings mechanism, I am satisfied that this benefit would terminate when development of the Interlink Lands started, which would be inconsistent with the continuation of the Stampede lease.

[315] As for the amount of the tax saving, Mr. Wagar calculated the property tax that would have been payable on the Interlink Lands as at the Effective Date, if it was not exempt, as \$1,070,394.64. He derived that amount from the 2018 tax assessment value of the Interlink Lands - \$55,100,000 - and the applicable non-residential mill rate for 2018 (1.94264%). Mr. Parsons testified that the tax savings was \$1.5 million per year, and the LPRT cited that same number.⁵¹ However, the LPRT did not clarify whether that was the tax savings amount as at the Effective Date, or at the time of the LPRT Decision. The context of the LPRT's discussion (its

⁵¹ LPRT Decision at paras 14 and 205.

use of the present tense to describe the tax benefit that “Remington **receives**” and its reference to the current extension of the Stampede lease to 2025) suggests that it was speaking about the current tax saving, not the tax saving on the Effective Date. The LPRT did not explain its source for that finding. In contrast, Mr. Wagar’s calculation was based on the actual property assessment for the Interlink Lands in 2018, and the actual 2018 mill rate. He was not challenged on this calculation in cross-examination.⁵² Mr. Wagar’s calculation was the best evidence about the tax saving as at the Effective Date in the appeals, and I accept his calculation as correct.

[316] Therefore, deducting the annual tax savings, the net annual cost to Remington during the development delay would be:

$$\begin{aligned} & \$4,235,572 \text{ (annual interest cost)} - \$1,070,394 \text{ (annual tax saving)} = \\ & \qquad \qquad \qquad \$3,165,178 \end{aligned}$$

[317] This net annual cost can be multiplied by 10 to determine the total net cost to Remington over the entire 10 years of development delay:

$$\begin{aligned} & \$3,165,178 \text{ (net annual cost)} \times 10 \text{ (number of years of delay)} = \\ & \qquad \qquad \qquad \$31,651,780 \end{aligned}$$

[318] This assessment of damages does not factor in residual value, which I will now address.

Specific Error 4: The LPRT’s Unreasonable Error Regarding Residual Value

[319] As I have noted above, in the context of its subsection 25(1)(b) award compensating Remington for the loss of the market value of the ROE Lands, the LPRT considered the issue of residual value. It found that Remington retained residual value in the Interlink Lands, despite the ROE Orders and the presence of the Transmission Lines. That residual value included the ability to transfer density among the different parcels in the Interlink Lands, the tax benefit associated with the interim lease to the Stampede and the ability to use the Subject Properties as collateral to obtain financing). The LPRT quantified this residual value as 25% of its calculated value of the ROE Lands, and reduced its subsection 25(1)(b) compensation award by that percentage.

[320] Given my overall finding that the LPRT unreasonably characterized the nature of Remington’s actual loss, this ancillary finding about residual value was also an unreasonable error.

[321] However, pursuant to subsection 25(2), I must consider afresh whether, in the context of what I have found to be Remington’s actual loss, Remington retained residual value in the Interlink Lands. Residual value is the value that remains in the owner’s hands during the taking, such as the ability of a farmer to continue to farm part of their land despite the presence of power lines: *Dome v Grekul* at para 28.

[322] Thus, the question is: during the 10 years that Remington would be delayed from realizing the market value of the Interlink Lands, would it continue to enjoy the value of the Interlink Lands? I find that it would. Unlike *Prime Potash*, this is not a case where the wronged party was delayed in receiving any ownership or possession of the property to which it was entitled. Remington was the owner of the Interlink Lands and in full possession of them on the

⁵² The only cross-examination question for Mr. Wagar on this point was whether his \$1,070,394.64 was an aggregation of the tax assessment values for the 13 separate parcels comprising the Interlink Lands at the Effective Date. Mr. Wagar confirmed that was true.

Effective Date, and that ownership and possession was not anticipated to change over the following 10 years. Rather, Remington would be prevented during those 10 years from realizing the full market value of the Interlink Lands. Despite that delay, the Interlink Lands would continue to have value during this 10-year delay period, although that value would be less than their market value in the absence of the ROE Orders and the Transmission Lines.

[323] The evidence about this diminished value came from Mr. Gettel and Jennifer Pitts. Mr. Gettel is an appraiser who has frequently given testimony in LPRT compensation hearings. I have already described my qualification of him above. ENMAX called Ms. Pitts as an expert witness. She is also an appraiser. I qualified her to give expert evidence in the area of the methodology used to quantify the impact of overhead power transmission infrastructure on the market value of land, including adverse effects and injurious affection.

[324] Mr. Gettel completed a report in which he opined about the adverse effect that the presence of the Transmission Lines would have on the value of the balance of the Interlink Lands (excluding the ROE Lands). This opinion was provided with reference to subsection 25(1)(d) of the *SRA*, but the observations in it also apply to the question of reversionary value. Mr. Gettel reviewed the values of a number of urban and rural properties located near electric transmission line infrastructure. In summary, he opined that:

- his case studies showed that there is a wide range of potential impacts from nearby electric transmission infrastructure (including visual, perceived health and safety, site planning, sound and stigma impacts);
- the data did not give rise to any standardized formula of general application that would accurately predict the impact of transmission infrastructure on property value;
- rather, each individual circumstance must be assessed independently, considering all the unique factors that could influence property value; and
- the presence of the Transmission Lines would diminish the value of the balance of the Interlink Lands by between 10% and 20%.

[325] Mr. Gettel acknowledged that he was unable to find any case studies that were similar to this case: high-voltage power transmission lines located on / directly abutting an urban high-density mixed use development property.

[326] Ms. Pitts provided a critique of Mr. Gettel's opinion. She concluded that the literature and case studies he relied on did not provide a sufficient basis for his opinion. While she did not state her own opinion as to the diminution of value, she stated that any diminution of value on the remainder of the Interlink Lands resulting from the Transmission Lines would be very low, and perhaps non-existent.

[327] I am satisfied that both Mr. Gettel and Ms. Pitts were well-qualified to opine on this issue. I generally accept the validity of Mr. Gettel's opinion on this issue, and prefer his opinion to that of Ms. Pitts. I found that some of Ms. Pitts' evidence was less than objective. For example, she repeatedly resisted admitting that a buyer of the Interlink Lands would pay less if the Transmission Lines were present, than if they were not. That was a basic proposition that was shared or assumed by all the other experts, and on the facts of this case, it was not reasonably deniable.

[328] I therefore accept the general proposition stated by Mr. Gettel, that the presence of the Transmission Lines would reduce the market value of the Interlink Lands. However, upon considering the specific characteristics of the Interlink Lands, I find that his estimate of 10 – 20% is an underestimate. The scope and scale of the Transmission Lines are large, and they are extremely close to the Interlink Lands. Their rights of way occupy over 10% of the total area of the Interlink Lands. The Transmission Lines are also a very pervasive presence, as they are relatively close to every part of the Interlink Lands: they run along the entire northern boundary, and they also transect the aggregated parcels from south to north. No point on the Interlink Lands is further than 100 meters from the Transmission Lines, and about half of the area of the Interlink Lands is at least that close to two separate branches of the Transmission Lines. The Transmission Lines are also extremely tall, large and imposing.

[329] As I have already explained above, the impact of the Transmission Lines is so significant that no developer would develop the Interlink Lands until the Transmission Lines were removed. This finding implies a discount from the market value based on highest and best use of the Interlink Lands that is materially larger than 10 – 20%. A knowledgeable buyer would know that the development of the Interlink Lands would be effectively sterilized while the Transmission Lines were present. I find that the proper discount is 35%.

[330] Reducing the market value of the Interlink Lands by 35% as at the Effective Date due to the presence of the Transmission Lines yields a residual value of \$61,180,488 (\$94,123,829 X 0.65). There was other independent evidence in the appeals suggesting that this estimate of residual value is not unreasonable: as pointed out by Mr. Wagar, the 2018 assessed value of the Interlink Lands was \$55,100,000.

[331] For all these reasons, I find that during the 10 years after the Effective Date during which Remington would be delayed from receiving the market value of the Interlink Lands based on their highest and best use, Remington continued to retain 65% of that market value.

[332] While I have found that it would not have been reasonable for Remington to sell the Interlink Lands for such a depressed price, it retained the ability to do so. For example, had Remington found itself in urgent need of ready cash to deal with some other business exigency, it could have sold the Interlink Lands and recovered this residual value. To not recognize that residual value in assessing compensation under subsection 25(1)(b) would be to overcompensate Remington.

Final Assessment of Subsection 25(1)(b) Compensation

[333] For the foregoing reasons, I find that Remington is entitled to a one-time award of compensation under subsection 25(1)(b) calculated as follows:

$$\begin{aligned} & \$31,651,780 \text{ (net cost to Remington over the 10-year delay period) - } \$20,573,657 \\ & \text{(a 65\% reduction, correlating to the percentage residual value retained by} \\ & \text{Remington during the 10-year delay period) =} \\ & \qquad \qquad \qquad \$11,078,123 \end{aligned}$$

v. Is Remington's Loss Too Remote?

[334] Remington's loss that was caused by the ROE Orders and the presence of the Transmission Lines as at the Effective Date, namely the delay in Remington's ability to recover the market value of the entire Interlink Lands through development or sale, was not only

reasonably foreseeable to ENMAX, it was patently obvious. ENMAX knew that Remington wanted to develop the Interlink Lands and that for 13 years it had been actively trying to remove the Transmission Lines to further that goal. ENMAX had been a central participant in that history at all the relevant times. At first, it actively resisted Remington's efforts to remove the Transmission Lines. Then, after it lost its appeal of the Park Decision, it took the lead in advancing the issue at the AUC. It applied for the ROE Orders fully knowing, as a sophisticated utility operator, their legal and practical effect.

[335] Remington's loss was not too remote to permit the compensation I have assessed.

vi. Is My Subsection 25(1)(b) Compensation Award Barred by the Release Entered into by the Parties?

[336] On September 7, 2010, Remington and ENMAX executed a letter agreement, through their counsel (the **Letter Agreement**). On December 13, 2010, Remington and ENMAX executed a Release (the **Release**). In these two documents, the parties made certain agreements about how the Civil Action (which Remington had commenced in November 2008) would proceed. It was under this agreed procedure that they made the application that resulted in the Park Decision and all that followed it, as I have described above in paragraphs 11 – 20 of this Judgment.

[337] For the reasons that follow, I find that the compensation award I have made under subsection 25(1)(b) is not a claim that Remington released in the Release.

[338] At a high level, the parties agreed as follows in the Letter Agreement:

- (a) the liability issue in the Civil Action (whether Remington's termination of the ROW Agreements was valid) would be determined summarily (it is this summary procedure that resulted in the November 2011 Park Decision);
- (b) if Remington succeeded on the liability issue, ENMAX would apply to the AUC for removal of the Transmission Lines;
- (c) other than exercising its right to appeal any court decision on liability, ENMAX agreed not to "take any steps to circumvent [the Park Decision] or attempt to reacquire any right of way or right of entry through Remington-owned lands pursuant to governmental or regulatory order or otherwise";
- (d) the only damages Remington would seek in the Civil Action would be an annual rent claim calculated at 8% of the value of the Interlink Lands, and it would sign a release; and
- (e) Remington's damages claim would be stayed, pending determination of the liability issue.

[339] The Release is the "proposed release" referred to in the Letter Agreement. In it, Remington agreed to release:

for or by reason of or arising out of or in any manner related to the following damages claims made or asserted in the [Civil Action] and anything filed in connection therewith (the "Action"):

- a. damages in an amount to be determined at trial but expected to exceed \$200 million reflecting claimed losses

suffered by Remington because of its inability to develop the Interlink Lands ... as planned, and the delays to development allegedly caused by ENMAX's breaches which claimed damages include Remington's expected loss of profits and interest on this amount in accordance with the *Judgment Interest Act*.

[340] Other terms in the Release made it clear that Remington retained the right to bring an action against ENMAX for any breach of the Letter Agreement, and also that it was not releasing its claim for compensation for unauthorized use of the Interlink Lands, calculated at 8% of the value of the land per year.

[341] Before interpreting the language in the Release, I pause to make a drafting point. Nowhere in the Release have the parties used a word (such as "claims") to identify the "things" that Remington agreed to release. However, applying the principle described by our Court of Appeal in *Benfield Corporate Risk Canada Ltd v Beaufort International Insurance Inc*, 2013 ABCA 200 at para 106, I imply that the parties intended to insert the word "claims" at the beginning of the excerpt I have reproduced above, so that it starts "**claims** for or by reason of..." The addition of the missing word "claims" is in my view so obvious that it does not need mentioning – any objective and reasonable observer would immediately recognize that what Remington had intended to release in the Release was claims.

[342] What claims did Remington agree to release? To answer that question, I must determine the objective intent of the parties at the time the Release was signed. In other words, what would a reasonable person objectively have understood the parties to have intended, from the words of the Release read as a whole, and from the factual matrix existing at the time: *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at para 79.

[343] I interpret the Release as follows.

[344] I begin with the phrase "for or by reason of or arising out of or in any manner related to the following damages claims made or asserted [in the Civil Action]". The first part of the phrase ("for or by reason of or arising out of or in any manner related to") uses words that are extremely broad in scope, but the second part of the phrase ("the following damages claims made or asserted") is much more narrow. I find that the objective intention of that entire phrase, when read together, is that the only claims Remington is releasing are the ones that it has made or asserted in the Civil Action, but that the release covers any claims that are related to those made or asserted claims.

[345] Based on the words "the following damages claims" and the separation of the remaining words into a single subparagraph [a], I find that the parties' objective intention was merely to use those remaining words to identify the claims made or asserted by Remington in the Civil Action. In other words, the lengthy subparagraph [a] is just descriptive.

[346] Based on the words and the grammar used in that descriptive subparagraph [a] I find that the parties intended to describe three things there: a single damages claim; two alleged causes of that single claim; and then two conceptual components included in that single damages claim (lost profits and statutory interest). Reformatting and paraphrasing the subparagraph clearly demonstrates what I find is its objective meaning, as follows:

- (a) a damages claim expected to exceed \$200 million reflecting claimed losses suffered by Remington because of:
 - (i) its inability to develop the Interlink Lands as planned; and
 - (ii) the delays to development allegedly caused by ENMAX's breaches which claimed damages include Remington's expected loss of profits, and the interest on this amount, in accordance with the *Judgment Interest Act*.

[347] I find that this interpretation of the Release is corroborated by the surrounding circumstances, namely the Statement of Claim that Remington filed in the Civil Action on November 19, 2008. The relevant portions of that Statement of Claim read as follows:

Enmax's Breaches of Contract

15. Enmax has breached the terms of the [ROW Agreements]⁵³ by refusing to remove the Transmission Line from the Interlink Lands, restore the Interlink Lands and make good any damage caused.

16. As a direct result of Enmax's breaches of contract, Remington has suffered loss and damage from being unable to develop the Interlink Lands. Remington estimates that damages exceed \$200,000,000.00.

17. In addition, Enmax has continued to occupy the Interlink Lands without paying any consideration. Remington seeks to recover lost rent calculated at 8 per cent of the value of the Interlink Lands *per annum*.

Enmax's Trespass

18. Remington expressly revoked the permission granted to Enmax to allow it to operate the Transmission Line on the Interlink Lands. In spite of this, Enmax has refused to vacate the Interlink Lands by refusing to remove the Transmission Line and continuing to direct its employees or agents to enter onto the lands to service or otherwise operate the Transmission Line.

19. Remington pleads that it is entitled to compensation for Enmax's unauthorized use of the Interlink Lands in the amount of 8 per cent of the value of the land until such time as the Transmission Line is removed from the Interlink Land.

[348] From this Statement of Claim, it is clear that Remington made or asserted two different damages claims in the Statement of Claim.

[349] The first damages claim was for breach of contract. In that claim, Remington alleged that ENMAX had breached the ROW Agreements, that those breaches prevented Remington from developing the Interlink Lands, as a result of which Remington suffered damages estimated at \$200 million. I will refer to this claim as the "**Breach of Contract Claim.**"

[350] The second damages claim was founded in breach of contract and trespass. In that claim, Remington alleged that ENMAX had continued to occupy the Interlink Lands without authority

⁵³ In the Statement of Claim, Remington defined the ROW Agreements as the "Transmission Agreements." It is clear from the dates and descriptions used to describe these agreements in the Statement of Claim that they are the ROW Agreements, so I have continued to describe them by the term I earlier defined in this Judgment.

and for no consideration. Remington claimed compensation for that unauthorized occupation in the amount of 8% of the value of the Interlink Lands per year. I will refer to this claim as the “**Rent Claim.**”

[351] I find that the Statement of Claim, a surrounding circumstance existing when the Release was signed, supports the interpretation of the Release that I have described above. The parties’ objective intention was that Remington would release the Breach of Contract claim, but not the Rent Claim.

[352] This conclusion is also supported by what happened after the Release was signed. On August 8, 2016 Remington filed an Amended Statement of Claim, pleading in the relevant amended paragraphs as follows:

Enmax's Breaches of Contract

15. Enmax has breached the terms of the Transmission Agreements by refusing to remove the Transmission Line from the Interlink Lands, restore the Interlink Lands and make good any damage caused. ^

16. As a direct result of Enmax's breaches of contract, Remington has been ^ unable to develop the Interlink Lands. ^

17. ^ Enmax has continued to occupy the Interlink Lands without paying any consideration. Remington seeks to recover lost rent calculated at 8 per cent of the value of the Interlink Lands per annum or other market rental value of the Interlink Lands.

Enmax's Trespass

18. Remington expressly revoked the permission granted to Enmax to allow it to operate the Transmission Line on the Interlink Lands. In spite of this, Enmax has refused to vacate the Interlink Lands by refusing to remove the Transmission Line and continuing to direct its employees or agents to enter onto the lands to service or otherwise operate the Transmission Line.

19. Remington pleads that it is entitled to compensation for Enmax's unauthorized use of the Interlink Lands, including-for loss of rentable value of the Interlink Lands at market rates. Such market rates will be proved at trial, but are in the amount of 8 per cent of the value of the land per annum from June 30, 2005 until such time as the Transmission Line is removed from the Interlink Land [sic].

[353] In this Amended Statement of Claim, Remington removed the Breach of Contract Claim but maintained the Rent Claim, as the parties had agreed in the Release.

[354] I am satisfied that the parties’ intention in the Release was clear and unambiguous: the only claim Remington released was the Breach of Contract Claim. My compensation award in this Judgment is distinct from the Breach of Contract Claim.

[355] I am not compensating Remington for any breaches of the ROW Agreements alleged to have been committed by ENMAX. Rather, I am ordering compensation to Remington pursuant to the mandatory statutory scheme in the *SRA*. My subsection 25(1)(b) award compensates Remington on the basis of development delay. The mere fact that development delay was one of the ways (but not the only way) that Remington alleged that ENMAX’s breaches of the ROW

Agreements had caused it harm, does not transform my compensation award into a damages award for breach of contract. I have simply assessed compensation in a manner similar to the way Remington alleged that its breach of contract damages should be assessed.

[356] Had they wanted to, the parties could have drafted the Release more broadly, to cover any and all compensation that might be awarded to Remington on the basis of development delay, wheresoever and howsoever arising. They did not. They drafted the Release to cover only the Breach of Contract Claim pleaded in the Civil Action, in which Remington had merely alleged development delay as one consequence of ENMAX's alleged breaches of the ROW Agreements.

[357] Further, the Release expressly covered only claims that Remington had actively advanced. Remington did not trigger or instigate the current SRA compensation process. Rather, ENMAX did that, by applying for and obtaining the ROE Orders. Remington is an involuntary, (and obviously unhappy) participant in this process. That is apparent from its later Amended Amended Statement of Claim filed in the Civil Action on June 30, 2021. In that pleading, Remington added an allegation that ENMAX's application for the ROE Orders constituted a breach of the Letter Agreement. It would be inappropriate for me to decide the merits of that allegation in this Judgment, and it is also unnecessary. However, to assist in my interpretation of the Release, I can consider the Letter Agreement as part of the surrounding circumstances. The Letter Agreement was executed three months before the Release, and the two documents are obviously closely linked. Given that the parties had agreed in the Letter Agreement that ENMAX would not "attempt to reacquire any right of way or right of entry through Remington-owned lands pursuant to governmental or regulatory order or otherwise" I find that they cannot reasonably have intended in the Release, only three months later, that Remington was releasing any compensation awards under the mandatory SRA scheme that would be triggered if ENMAX took the step expressly contemplated in the Letter Agreement: reacquiring a right of way on the Interlink Lands through a regulatory order.

The Limitations of this Judgment

[358] I feel that it is important that I expressly state a limitation on the use that the parties can make of this Judgment. Obviously, this Judgment is being made in the context of the section 25 SRA compensation scheme. That was the context in which the parties entered evidence and made submissions in these appeals. That is the context in which I have made the specific findings in this Judgment.

[359] My findings herein therefore do not bind the parties, or this Court, in the ongoing Civil Action (unless the parties agree otherwise). While that is a statement that applies generally, I am thinking specifically about Remington's claim for annual rent in the Civil Action, that it says should be quantified at 8% of the value of the Interlink Lands. This Judgment should not be taken as a pre-judgment of any of the issues in that dispute. In this Judgment, I did not consider or decide any issues related to an alleged breach of the ROW Agreements by ENMAX, nor an alleged trespass by ENMAX. Presumably, at the trial of the Civil Action, the parties will enter a great deal of evidence about those issues and about quantifying the lease-based compensation claimed by Remington; that was not before me in these appeals.

4. Was the LPRT Decision Respecting Subsection 25(1)(c) Reasonable?

a. The LPRT's Decision and Reasoning

[360] The LPRT awarded annual compensation of \$3,000 to Remington under subsection 25(1)(c), which references the “loss of use by the owner or occupant of the area granted to the operator”. I have summarized the LPRT’s reasons for this award in paragraph 10(c) of this Judgment.

[361] The LPRT calculated the \$3,000 award by awarding \$500 per year for each of the six Transmission Line towers located on the Interlink Lands. The LPRT chose this amount because it is similar to what the LPRT had awarded in other cases, such as *Pratch* and *AltaLink Management Ltd v Robertson*, 2016 CanLII 71667 (AB SRB) (*Robertson*).

b. Considering the Evidence in the Appeal, was the LPRT's Decision or Rationale Reasonable?

[362] This award by the LPRT was an unreasonable error, for a number of reasons.

[363] First, the awards in *Pratch* and *Robertson* provide no logical basis for an award in this case. Both cases involved rural residential or agricultural lands. The awards were also based on evidence of agreements. In *Pratch*, the LPRT awarded compensation per transmission line tower based on a pattern of dealing between the utility and other owners along the same line. In *Robertson*, the parties had agreed on compensation of \$500 per transmission line tower.

[364] Therefore, those cases are entirely factually distinct from this case and they cannot be applied to this case. The overriding purpose of the *SRA* compensation scheme is to keep the owner whole by properly compensating it for its loss, and compensation can be awarded only if there is a loss. There was no evidence in the appeals that would support a finding that Remington suffered a loss of use because of the area occupied by the six Transmission Line towers. Remington is holding the Interlink Lands to develop them. During the 10 years in which it would be prevented from developing, Remington will receive the same consideration under the lease with the Stampede, regardless of the amount of space occupied by those towers. It is not losing any use because of the presence of the six towers.

[365] More fundamentally, no loss of use award can be made because of my finding that the true nature of the actual loss suffered by Remington is development delay. My compensation award under subsection 25(1)(b) essentially already recognizes a loss of use: Remington’s temporary loss of the ability to use the Interlink Lands to their highest and best use. Thus, any additional award for loss of use under subsection 25(1)(c) would constitute double counting, and would overcompensate Remington.

c. If the LPRT's Decision or Rationale was Unreasonable, What is my Judgment?

[366] Remington is not entitled to any compensation for loss of use under subsection 25(1)(c).

5. Was the LPRT Decision Respecting Subsection 25(1)(d) Reasonable?

a. The LPRT Decision and Reasoning

[367] Subsection 25(1)(d) of the *SRA* refers to “the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator.”

[368] The LPRT interpreted the phrase “remaining land of the owner” to mean the Subject Properties. It found that Remington was entitled to compensation for a 10 meter wide strip of land in the Subject Properties, adjacent to the ROE Lands. This strip was either included in the required setback from the Transmission Lines, or so close to Transmission Lines that development of it would be impossible. The LPRT used the same loss of value calculation it had employed in its subsection 25(1)(b) award (\$6,436,164 per acre, after considering residual value), to decide that the loss of value corresponding to this undevelopable 1.1 acre strip was \$7,079,780.

[369] However, rather than awarding this amount as a one-time payment, the LPRT awarded 5% of this amount annually, based on a yield rate of 5%. It did this because it found that the timing and form of the development of the Interlink Lands was too speculative as at the Effective Date, and it would therefore be appropriate to review this award every five years.

b. Considering the Evidence in the Appeal, was the LPRT’s Decision or Rationale Reasonable?

[370] The LPRT’s subsection 25(1)(d) award is unreasonable, given my findings that: (a) neither Remington nor any other reasonable developer would develop the Interlink Lands while the Transmission Lines remained in place; and (b) when they did, they would develop all of the Interlink Lands concurrently. This would include both the ROE Lands and the 1.1 acre strip identified by the LPRT.

[371] Those findings mean there is no reasonable basis for the LPRT’s subsection 25(1)(b) award, which notionally compensated Remington for the permanent loss of the market value of the ROE Lands. Similarly, there is no reasonable basis for awarding Remington annual compensation under subsection 25(1)(d), representing an annual yield based on the market value of the 1.1 acre strip.

[372] My compensation award under subsection 25(1)(b) already fully compensates Remington for the development delay affecting the entirety of the Interlink Lands. Any annual award for the temporary loss of market value of part of the Interlink Lands would therefore be duplicative, and would overcompensate Remington.

c. If the LPRT’s Decision or Rationale was Unreasonable, What is my Judgment?

[373] Remington is not entitled to any compensation under subsection 25(1)(d).

6. Was the LPRT’s Decision Respecting Interest Reasonable?

[374] Subsection 25(9) of the *SRA* authorizes the LPRT to order the operator to pay interest on any or all of the compensation payable on and from the date the right of entry order was made, at the Bank of Canada rate on the date the right of entry order was made. The LPRT ordered ENMAX to pay interest to Remington on all the compensation it awarded. I find that this decision was reasonable.

[375] I order ENMAX to pay interest to Remington on all the compensation awarded in this Judgment, from the Effective Date, at the Bank of Canada rate on the Effective Date.

V. Conclusion

[376] For the reasons set out above, I order that:

- (b) ENMAX must compensate Remington by making a one-time payment of \$11,078,123;
- (c) ENMAX must pay Remington interest on that amount, from the Effective Date, at the Bank of Canada rate on the Effective Date.

[377] If the parties are unable to agree on the costs of the appeals, they can provide me with written submissions on that issue, within 45 days of the date of this Judgment. Any written submissions shall be limited to 10 pages, excluding attachments and authorities.

Heard on October 7 – November 1, 2024 and February 27, 2025.

Dated at the City of Calgary, Alberta this 15th day of September, 2025.

C.D. Simard
J.C.K.B.A.

Appearances:

Grant Vogeli, KC
Alixandra Stoicheff
Rosemary Gregg
Shailaz Dhalla
for Remington Development Corporation

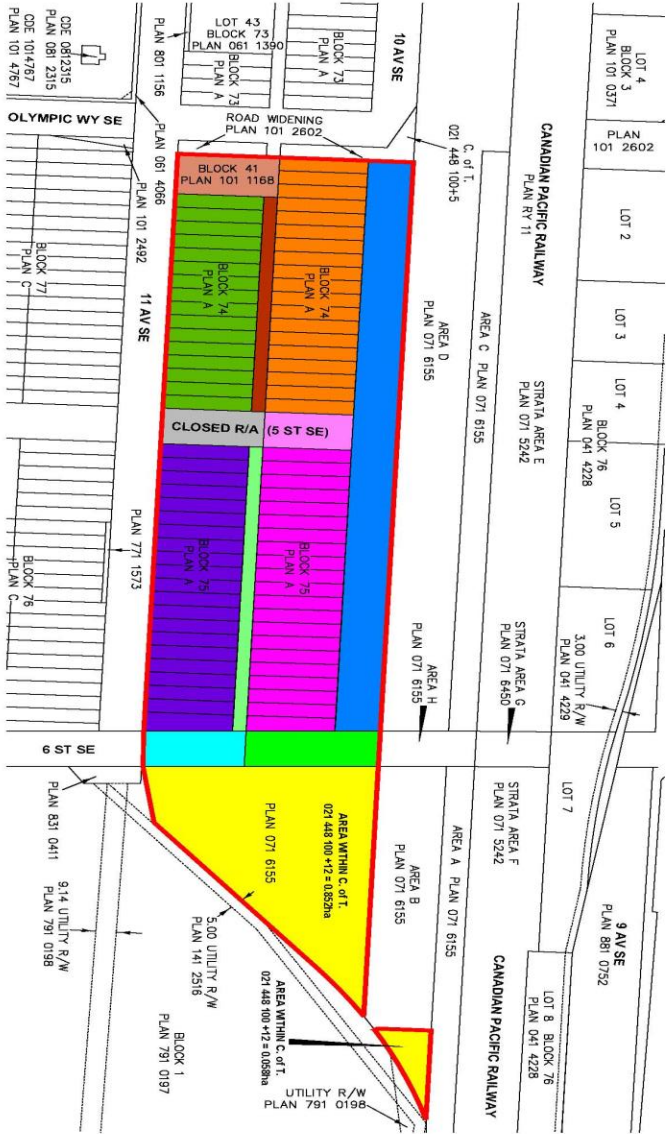
Dalton McGrath, KC
Lars Olthafer
Michael O'Brien
for ENMAX Power Corporation

**ENMAX CORPORATION
INDIVIDUAL OWNERSHIP PLAN**

Showing REMINGTON DEVELOPMENT CORPORATION LANDS
in the S.E. 1/4 Section 16 Township 24 Range 1 West of the 5 Meridian
and in the S.W. 1/4 Section 14 Township 24 Range 1 West of the 5 Meridian
MUNICIPALITY: CITY OF CALGARY
Scale : 1 : 2000

REVISION 0

C of T.	AREA (ha)
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101 193 535 +1	0.573
101 193 706	0.104
021 448 100 +1	0.074
021 448 100 +10	0.483
021 448 100 +4	0.080
021 448 100 +1 & 021 448 100 +3	0.092
021 448 100 +2	0.636
021 448 100 +12	0.098
021 448 100 +11	0.644
021 448 100 +13	0.121
021 448 100	0.092
021 448 100 +12	0.910



OWNER : REMINGTON DEVELOPMENT CORPORATION AREA REQUIRED : 4.561 ha 11.27 Ac
TITLE NUMBERS : 101 193 535, 101 193 535 +1,
101 193 706, 021 448 100 +1, 021 448 100 +10
021 448 100 +4, 021 448 100 +1, 021 448 100 +3
021 448 100 +9, 021 448 100 +2, 021 448 100 +11
081 029 381 +1, 021 448 100, 021 448 100 +12

FILE NO. _____
Certified Correct
PRELIMINARY
For Approval Only
ALS



REVISIONS:

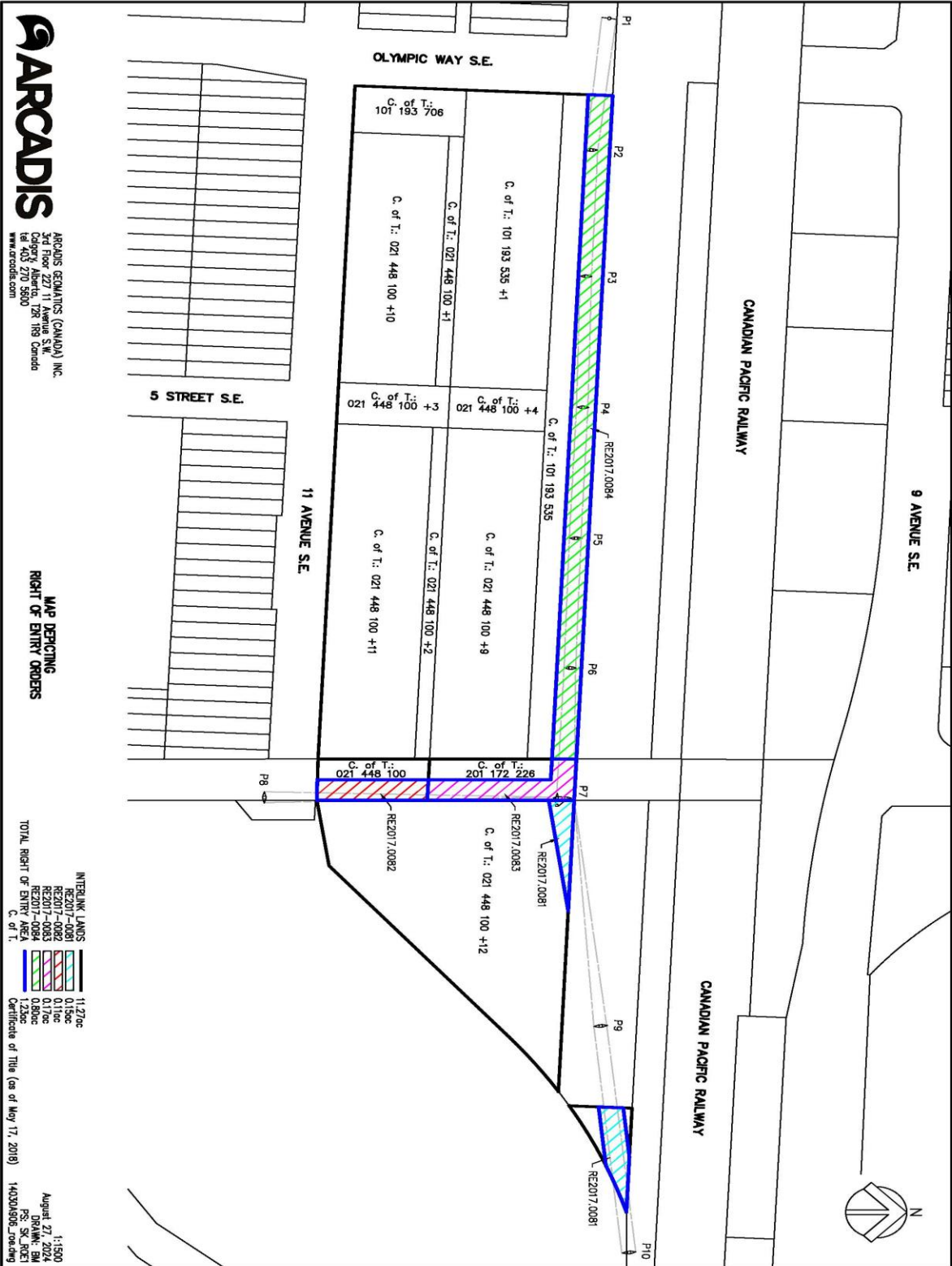
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		PC	DMN CKL CC DATE

Legend
Portion referred to outlined thus _____

ALL-CAN ENGINEERING & SURVEYS (1978) LTD.
JOB No. : 17-0234
DWG No. : 170234/010
PAGE : 1 of 1

Appendix "A"

Appendix "B"



Appendix “C”

REMINGTON INTERLINK LANDS



VIEW OF THE EAST PART OF THE LANDS



VIEW OF THE EAST PART OF THE LANDS

REMINGTON INTERLINK LANDS



VIEW OF THE WEST PART OF THE LANDS



VIEW OF THE WEST PART OF THE LANDS

REMINGTON INTERLINK LANDS



VIEW OF THE WEST PART OF THE LANDS



VIEW OF THE WEST PART OF THE LANDS

REMINGTON INTERLINK LANDS



VIEW OF THE NORTH/SOUTH PART OF THE LINE WITHIN THE EAST PORTIONS OF THE SITE



VIEW OF THE NORTH/SOUTH PART OF THE LINE EXTENDING SOUTH OF THE SUBJECT LANDS

REMINGTON INTERLINK LANDS



VIEW OF THE NORTH/SOUTH PART OF THE LINE WITHIN THE EAST PORTIONS OF THE SUBJECT LANDS