Court of King's Bench of Alberta

Citation: Remington Development Corporation v Canadian Pacific Railway Company, 2022 ABKB 692

Date: 20221020
Docket: 0801 03152
Registry: Calgary

Between:

Remington Development Corporation

Plaintiff

- and -

Canadian Pacific Railway Company and His Majesty the King in Right of Alberta, as represented by the Minister of Infrastructure and the Minister of Transportation

Defendants

Memorandum of Decision
of the
Honourable Justice A. Woolley

Headnote

In 2002 Remington and CPR entered into a conditional contract for Remington to purchase a parcel of land between the CPR main line and 10th Ave SE, the 10th Ave Lands ("10th Ave Agreement"). The 10th Ave Lands were between two other parcels Remington acquired from CPR, one between the CPR main line and 9th Ave SE, and the other spanning 10th Ave to 11th Ave SE.

In December 2006 CPR told Remington that it had decided to sell the 10th Ave Lands to the Province instead. In 2008 Remington sued CPR for breach of contract and, in 2009, sued the Province for inducing contract breach.

CPR breached the 10th Ave Agreement. Under the terms of the 10th Ave Agreement, the lands to be sold to Remington had to be declared surplus to operational requirements by CPR. CPR made that declaration in November 2004 when it submitted an application to subdivide the lands to the City of Calgary. As of December 2006, when it told Remington that it was selling the lands to the Province, the subdivision application (as revised in 2005) had been approved, and all other conditions of the contract had been satisfied. CPR repudiated and breached its contract with Remington when it told Remington it was selling the lands to the Province, and subsequently sold the lands to the Province.

The Province induced contract breach. It made an attractive offer to CPR for the 10th Ave Lands. It had clear and repeated information that Remington had a legal interest in the 10th Ave Lands, and it ignored that information. It made no inquiries to discover the nature of Remington's interests. It was wilfully blind to Remington's rights and interests under the 10th Ave Agreement.

CPR did not breach its duty of good faith, largely because it had, in fact, declared the 10th Ave Lands surplus to its operational requirements. Had CPR not declared the 10th Ave Lands surplus in 2004, the Court would have had serious concerns about whether its conduct was consistent with its duty of good faith, despite the "absolute" nature of CPR's contractual discretion to declare the 10th Ave Lands surplus.

Remington did not waive its interests in the 10th Ave Agreement, and it is not estopped from enforcing it. It did not indicate its willingness to change its legal situation or to forego reliance on its legal rights. Neither CPR nor the Province changed their position as a result of anything that Remington said or did after being told that CPR intended to sell the lands to the Province.

Remington is not entitled to specific performance. Its actions subsequent to December 2006, and in particular after June 2007, were in effect an acceptance of CPR's repudiation of the contract and an election to sue in damages. That was not Remington's subjective intention, but it was the effect of its conduct, including its acceptance of the return of its deposit, and its removal of its caveat on the 10th Ave Lands prior to their transfer from CPR to the Province. Had Remington not so elected, this case would have been suitable for specific performance due to the unique qualities of the 10th Ave Lands, and specifically the difficulty of quantifying Remington's loss.

Remington has proven that it has suffered lost profits as a result of the breach. The calculation of those lost profits by Remington's experts was accepted, subject to some adjustments. Those adjustments were to account for: 1) uncertainty, especially in relation to timing; 2) for relevant findings in this judgment about the size of the parcel declared surplus; and 3) for other line items that affected quantum, such as what it would have cost for Remington to acquire air rights over the CPR main line, and to remove the

ENMAX transmission line. The quantification of Remington's losses, prior to mitigation, is $192,707,836. That amount will need to be adjusted after determination of the purchase price Remington would have paid for the 10th Ave Lands.

Remington's lost profits are recoverable against the Defendants as losses that were reasonably foreseeable when Remington and CPR entered into the 10th Ave Agreement in 2002. They are not too remote. Reasonable foreseeability is established by: 1) the 2002 Altus appraisal, which set the price for the 10th Ave Lands, and which identified the highest and best use of the 10th Ave Lands as "commercial/office uses oriented to downtown service providers"; 2) the reference to development in the 10th Ave Agreement and the limits it placed on residential development; 3) the triggering events in the Interlink Participation Agreement, which the parties agreed would be the same for the 10th Ave Lands; 4) the information available to CPR at and prior to 2002 about development opportunities on the 10th Ave Lands; and, 5) who Remington was in 2002 and why it was acquiring the 10th Ave Lands. The lost profits from three 14-15 story buildings may not have been the only possible consequence of CPR's breach of the 10th Ave Agreement, but it was a probable consequence, flowing naturally from CPR's breach of the 10th Ave Agreement.

Remington's loss is reduced by $29,000,000 to account for mitigation. Mitigation was calculated based on the profits earned by Remington in purchasing the land and developing the Meredith block, which is found to be a suitable replacement property acquired after the contract breach for an amount comparable to the amount that would have been paid for the 10th Ave Lands.

Remington is not entitled to punitive damages. Assuming it could establish an actionable wrong in addition to CPR's contract breach, the conduct of CPR and the Province was not a marked departure from ordinary standards of decent behaviour. It was wrongful, and showed an improper disregard for Remington's legal interests, but it was not exceptionally so. The quantum of Remington's compensatory damages also weighs against an award of punitive damages.

Remington is not entitled to an elevated rate of interest, or to compound interest. It did not provide a sufficient evidentiary basis for that claim and, in any event, such an award does not bear a rational connection to the legal relationship and dispute between the parties. Interest is to be based on the Judgment Interest Act calculated from December 4, 2006.

Introduction

[1] In 1994 Randy Remington founded Remington Development Corporation ("Remington"), a privately held integrated real estate development company.

[2] In November 2002, Remington entered into three land purchase agreements with Canadian Pacific Railway ("CPR"). The agreements concerned three parcels of land between the East Village to the North and the Stampede to the South, with the CPR main line running through the northern side. I refer to the lands collectively as "B Yard Lands" (although acknowledging they extended beyond B Yard) or "Rail Town Lands".

[3] In the first contract, Remington agreed to purchase a 5.56 acre strip of land north of the CPR main line, adjacent to 9th Ave NE. An application to subdivide those lands from the larger parcel owned by CPR had been submitted to the City of Calgary but had not yet been approved. As a result, the precise amount of land for sale was not finalized; it was not, however, expected to materially change ("9th Ave Lands" and "9th Ave Agreement"). The 9th Ave Agreement contained a variety of conditions, including conditions related to obtaining subdivision approval, but none related to CPR declaring the lands to be surplus prior to sale.

[4] In the second contract, Remington agreed to purchase a strip of land on the south side of the CPR main line, between the main line and 10th Ave SE ("10th Ave Lands" and "10th Ave Agreement"). The amount of land subject to the 10th Ave Agreement is a matter of dispute between Remington and CPR but was in the range of 5.22 acres. Like the 9th Ave Agreement, the 10th Ave Agreement was a conditional agreement. Clause 2.02, the exact effect of which lies at the heart of this dispute, said that the "only portion" of the lands capable of being sold to Remington was "that portion" CPR determined "to be surplus to its operational requirements". The 10th Ave Lands had, at the time the 10th Ave Agreement was signed, not yet been submitted to the City for approval of subdivision and were actively used by CPR as a rail yard, called B Yard.

[5] In the third contract, Remington agreed to purchase 11.011 acres of land adjacent to the south side of the 10th Ave Lands, bordered by 11th Ave SE on the South, 4th St SE on the West, and the City of Calgary bus barns on the East. Remington further agreed to acquire a narrow strip extending north along 6th St SE continuing towards the CPR main line, across the 10th Ave Lands. (Collectively the "Interlink Lands" and "Interlink Agreement" – Interlink in reference to a previous user of the lands). The Interlink Lands were already subdivided, and while there were conditions in the Interlink Agreement, none related to subdivisioning or affected the size of the parcel for sale.

[6] Each of the three agreements set a purchase price to be paid by Remington at closing, but also provided for the parties to enter into a participation agreement that would be triggered at a later date, and through which CPR would be entitled to receive 50% of the increase in the value of the lands at that time.

[7] At the time it entered into the three agreements, Remington did not have a specific plan for developing the three parcels of land but did plan on developing them comprehensively. Mr. Remington had been shown an illustration of the lands developed in that way. An external consultant hired by CPR for advice on how to extract value from the lands, had recommended that the lands be developed as a mixed-use comprehensive development.

[8] That type of development required Remington to negotiate to acquire air rights from CPR. It did not do so at the time it entered into the three contracts. Once the contracts closed, however, Remington would be the landowner on both sides of the tracks, and it and CPR could be expected to be able to negotiate such an agreement. CPR would have an asset for which it could receive value from Remington and Remington would have an economic interest in acquiring that asset. Mr. Remington understood that it would be possible for Remington to negotiate for air rights in the future.

[9] The 9th Ave Agreement and Interlink Agreement closed without incident. The Interlink Agreement closed in early 2003. The 9th Ave Lands were subdivided in April 2003. The parties entered into an amending agreement with respect to the 9th Ave Agreement on December 31, 2004, to allow CPR to retain about an acre of the lands for railway purposes. In May 2005 the 9th Ave Agreement closed.

[10] From 2002-2007, and in fact up until 2010-2011 when it moved B Yard to Manchester, CPR continued to use the 10th Ave Lands as an active rail yard.

[11] CPR, through a third-party agent, IBI (then IBIWN, although I shall call it IBI throughout), and in cooperation with Remington, submitted an application to the City to subdivide the 10th Ave Lands in November 2004. IBI submitted two further subdivision applications for CPR, in February 2005, and in November 2005. The second subdivision application added a small sliver of land; the third subdivision application added an additional 40 foot strip of land adjacent to the CPR main line, widening much of the parcel to be subdivided from 100 feet to 140 feet.

[12] After extensive conversations and consultation, on November 3, 2006, the City signed the paperwork approving the subdivision application for the 10th Ave Lands.

[13] None of the subdivision applications, nor the subdivision approval, fell within the time limits contemplated by the 10th Ave Agreement; however, Remington and CPR agreed to numerous extensions. As of November 2006, the most recent extension was set to expire on June 15, 2007.

[14] Remington by this point had retained IBI as a consultant for its development project on the three parcels. Working with Remington and other stakeholders from the City and CPR, IBI created concept plans for Rail Town, a mixed-use development with high density commercial and residential buildings across the three parcels, integrated green space, and connection between the 9th Ave Lands and the 10th Ave Lands by way of two plus 30 bridges over the CPR main line. As noted, those connections would require Remington to acquire air rights from CPR. Remington and its experts described Rail Town as a “live-work-play” community. While different in density and style given its downtown location, this vision for Rail Town was not dissimilar to the vision for Remington’s Quarry Park development, which was beginning at around this same time.

[15] Unbeknownst to Remington, however, by early fall 2006, the Province had approached CPR about purchasing the 10th Ave Lands. It had obtained an appraisal of the lands from Altus Helyar in July 2006, and by late October 2006 had offered to purchase the lands for a higher price than Remington had agreed to pay in 2002. The Province sought the 10th Ave Lands, along with air rights over the CPR main line, as part of its ongoing long-term effort to acquire lands for the potential construction of a high-speed rail line between Edmonton and Calgary.

[16] By November 2006 the Province had indicated to CPR the price it was willing to pay for the lands and air rights, and in October-November they were exchanging drafts of a proposed memorandum of understanding.

[17] In early November 2006, following the subdivision application being approved, CPR told Remington that it needed to put the subdivision application for the 10th Ave Lands on hold. Ms. Gillian Lawrence, a former City employee who now worked for Remington as Director of Planning, assisted Mr. Walsh, CPR's Vice-President Real Estate, to draft a letter to the City with that request. Through the letter to the City, and a further letter sent by Mr. Walsh to the Mayor, CPR sought to advance a variety of issues or opportunities with the City, none of which related to the 10th Ave Lands.

[18] Ms. Lawrence says that at that time she had some suspicion that CPR might be talking to the Province about the 10th Ave Lands. However, neither she nor anyone at Remington had been told or understood that CPR and the Province were in the process of negotiating sale of the 10th Ave Lands to the Province. The Remington employees working on the subdivision approval, Sandy Menzies, who at the time was Remington's Vice President Land Development, and Ms. Lawrence, were upset and embarrassed by the request to put the subdivision application on hold given how hard they had pushed the City to approve it. Mr. Remington viewed Mr. Walsh's actions as inconsistent with CPR's obligations under the 10th Ave Agreement but was trying to work constructively with CPR given CPR and Remington's ongoing legal and practical relationship.

[19] On or about December 4, 2006, representatives of Remington met with Mr. Walsh, Mike Hyder, CPR's Manager of Real Estate and Marketing, and Mr. Brownlee, a representative of the Province, at the CPR offices. CPR had asked Remington to attend the meeting a few days earlier. Neither Mr. Brownlee nor the CPR employees recall whether Mr. Brownlee was at this meeting; however, I accept the evidence of Mr. Menzies, Ms. Lawrence and Mr. Remington that Mr. Brownlee, and his wife, who worked with him on these matters, were there.

[20] At the December 4 meeting, CPR advised Remington that it had decided to sell the 10th Ave Lands to the Province. Mr. Remington was angry and upset, and said to Mr. Walsh of CPR, "We have a contract". Mr. Walsh responded, "Get over it".

[21] Mr. Walsh and Mr. Remington had a further one on one conversation after the meeting. Mr. Walsh told Mr. Remington that it might be possible for CPR to make it up to Remington through another land transaction. In addition, through discussions at the meeting with Mr. Walsh and Mr. Brownlee, the Remington representatives understood that Remington might still be able to acquire parts of the 10th Ave Lands not needed by the Province for its high speed rail plans.

[22] Following this meeting, Remington did not take any active steps to pursue litigation against the Province or CPR. It had a caveat on the 10th Ave Lands, but it did not otherwise write to CPR or the Province to assert a contract breach by CPR, or object to the Province's dealings with the 10th Ave Lands. It instead made efforts to work with the Province in a visioning exercise to determine whether it would be possible for Remington to obtain residual lands, or otherwise incorporate the high speed rail into Remington's vision for Rail Town.

[23] On March 19, 2007, the Province and CPR signed a non-binding Memorandum of Understanding with respect to the 10th Ave Lands, and the acquisition of air rights over the CPR main line. They then entered into two binding agreements, dated April 9, 2007, one for the bulk

of the lands, and one for a small amount of the lands and air rights. The land agreement was scheduled to close on December 15, 2007.

[24] CPR said that the 10th Ave Agreement expired on June 15, 2007, with the expiry of the most recent extension. CPR returned Remington's deposit, which Remington accepted.

[25] CPR's stated position, which it maintains today, was that as of June 15, 2007, the 10th Ave Lands were still used for B Yard and were not surplus to operational requirements: "Canadian Pacific Railway Company has determined that no portion of the Existing Parcel is currently surplus to the Vendor's existing railroad operations nor is that situation to change in the immediate future". In its view, since the lands had not been declared surplus to operational requirements pursuant to Article 2.02 of the 10th Ave Agreement, the 10th Ave Agreement could not close, and CPR had no obligation to sell the lands to Remington.

[26] After June 15, 2007, Remington continued to participate in the visioning exercise with the Province. In late 2007, concerned about the potential for litigation, Remington also removed its caveat on the 10th Ave Lands. The contract for the 10th Ave Lands between the Province and CPR closed in December 2007.

[27] By late 2007/early 2008, Remington determined that it would not be able to reach a satisfactory outcome through working with the Province. On March 29, 2008, it filed its claim against CPR for breach of contract. On July 21, 2009, it amended that claim to add the Province as a defendant, alleging that the Province induced CPR to breach its contract, and adding a claim for specific performance.

[28] For the reasons explained below, I grant Remington's claim for damages against both CPR and the Province, and award Remington damages of $163,707,836, subject to an adjustment to determine the price Remington would have paid for the 10th Ave Lands given the findings herein. I reject Remington's claims for specific performance, punitive damages and elevated interest.

Issues

[29] This case raises the following issues for determination:

1. Did CPR breach the 10th Ave Agreement?

    (i) What was the extent of CPR's discretion to declare the 10th Ave. Lands surplus and through what process, if any, was that discretion to be exercised?
    (ii) Did CPR, for the purposes of the 10th Ave Agreement, declare the 10th Ave Lands surplus prior to November 2006 and, if so, what portion of the lands did it declare surplus??
    (iii) Had the other conditions of the 10th Ave Agreement been satisfied by November 2006?
    (iv) Given the foregoing, did CPR breach the 10th Ave Agreement?
    (v) Did CPR breach its contractual duty of good faith?

2. Did the Province induce CPR's contract breach?

3. Did Remington waive CPR's contract breach, or is it otherwise estopped from pursuing a remedy against CPR or the Province?
4. Did the Province and CPR engage in a civil conspiracy in relation to Remington?
5. What is the appropriate remedy in this case?

    (i) Is Remington entitled to specific performance?
    (ii) What type of losses were reasonably foreseeable when Remington and CPR entered into the 10th Ave Agreement?
    (iii) What losses has Remington proven, on the balance of probabilities, that it suffered as a result of losing the 10th Ave Lands?
    (iv) Given the analysis on remoteness, what proportion of Remington's proven losses can it claim from the Province and/or CPR?
    (v) Did Remington have a duty to mitigate? Should any deduction be made from its claimable losses in relation to mitigation?
    (vi) What deductions should be made from Remington's claimable losses to reflect land acquisition and holding costs?
    (vii) Is Remington entitled to punitive damages?
    (viii) What interest rate should apply to Remington's damages award, and should it be calculated on a simple or compound basis?

Credibility and Reliability of Fact Witnesses

[30] This case does not turn on the overall credibility or reliability of particular witnesses. Many of the central factual issues can be resolved through the contemporaneous documents and records which, in turn, can be used to assess the evidence of fact witnesses on specific points.

[31] Further, on key factual issues without documentary evidence – in particular, what was said by CPR and the Province to Remington at the December 4, 2006 meeting – the testimony of the witnesses was largely corroborative, not conflicting.

[32] That being said, I have assessed the credibility and reliability of the witnesses and that assessment guides my review of the evidence. I summarize the key aspects of that assessment here. I note that in doing so I refer to facts that are described and explained later in the judgment, in relation to the issues for which they are relevant. As such, this assessment should be read in conjunction with the reasons as a whole.

[33] Mr. Remington, Mr. Hyder, Mr. Nimmo and Mr. Walsh all testified with respect to the negotiation of the 10th Ave Agreement, and discussions between Remington and CPR in 2000-2002. In 2002 Mr. Nimmo was CPR's Director of Real Estate for Western Canada. As discussed below, I rely only minimally on that evidence. It has little to no legal relevance to the interpretation of the 10th Ave Agreement. Further, I doubt the reliability of testimony about events 20 years ago, the significance of which would not have been appreciated by any of the participants.

[34] In reviewing the credibility of the witnesses, I considered whether there is evidence that, on the record before me, I can be satisfied is untruthful or at least objectively false; whether there are internal inconsistencies or objectively implausible aspects to the testimony; whether there is consistency between the testimony and the contemporaneous record; whether the witness appears

to be advocating; and, whether a witness acknowledges weaknesses in their position when those weaknesses are objectively compelling.

[35] Considered in this way, I had no substantial concerns with the testimony of the Remington witnesses.

[36] CPR submitted that I ought, in general, to prefer the evidence of the CPR fact witnesses to those of Remington, given that the CPR witnesses no longer work for CPR, while the Remington fact witnesses, with the exception of Judy Lupton, all worked for Remington or had business relationships with Remington. It noted in particular Mr. Remington's personal financial stake in the litigation.

[37] CPR is correct to observe that a person's interest in the outcome of a proceeding is a relevant factor to assessing their credibility: ***R v Laboucan***, 2010 SCC 12 at para 11. At the same time, however, "[a] trier of fact…should not place undue weight on the status of a person in the proceedings as a factor going to credibility": ***Laboucan*** at para 11.

[38] With respect to the Remington witnesses, I do not view the fact that the other Remington witnesses work at or for Remington as a basis for disregarding their evidence or preferring the evidence to the CPR witnesses. It is too indirect an interest for me to view it as inherently likely to undermine the credibility or reliability of their evidence. And, assessed more generally, I did not have concerns with their credibility or reliability.

[39] With respect to Mr. Remington, his interest in the outcome of the proceedings is more significant, both monetarily and personally. It is relevant to my assessment of his credibility. Ultimately, however, I accept his testimony as credible. I observed in particular that on central points Mr. Remington's evidence was corroborated by documents or other witnesses. For example, Mr. Remington and Mr. Brownlee gave very similar accounts of their September 2006 meeting. Further, with respect to the December 2006 meeting, Mr. Walsh acknowledged that he told Mr. Remington to "get over it". In addition, Mr. Hyder acknowledged that Remington was told at the December meeting that there might be residual lands available from the Province. Those were the facts central to Mr. Remington's testimony about that meeting.

[40] While, as noted, I rely only minimally on Mr. Remington's evidence about the negotiation of the 10th Ave Agreement, and recognize the issues with its reliability given the passage of time, his evidence was also plausible given the materials he received, the drafts of the agreement and even the text to which the parties ultimately agreed. I do not view it as untruthful or dishonest.

[41] Finally, I note Mr. Remington's willingness to acknowledge things that might be unhelpful to Remington's claim – that he had no specific plan for how he would develop Rail Town in 2002 and that all development is flexible and depends on market conditions. That, too, reinforces my belief in his credibility. In sum, I accept Mr. Remington's testimony to the Court as credible and reliable, with the caveat of my earlier explained concern with the reliability of testimony about the negotiation of the 10th Ave Agreement given the passage of time.

[42] By contrast, I have concerns with the credibility of Mr. Hyder and Mr. Walsh, and in particular with respect to their account of what happened when they chose to enter into the contract with the Province for the 10th Ave Lands and the associated air rights. I do not view either witness as attempting to deceive the Court; however, I assess both witnesses as motivated by a desire to justify their conduct when they entered into the agreement with the Province. Their

testimony seemed intended to persuade the Court of the correctness of their perspective that the 10th Ave Lands were not surplus, and that they had no ongoing contractual obligation to Remington, rather than simply an account of their recollection of the events of 2006-2007.

[43] The following are examples from the testimony of the witnesses that support this analysis:

- Mr. Hyder's suggestion that Mr. Remington was willing to sell the 10th Ave Lands to the Province if the price was right, which was contradicted by the evidence of Mr. Brownlee and the contemporaneous record.
- The inconsistency between Mr. Walsh's acknowledgement that he said "get over it" to Mr. Remington, but both his and Mr. Hyder's claim that Mr. Remington raised no objection to CPR selling the land to the Province. As a matter of logic there must have been something that Mr. Remington needed to "get over".
- The tendency of both witnesses to interpret contemporaneous documents in a way supportive of their position, but not well supported by the contemporaneous record – for example, Mr. Walsh's interpretation of "road crossing" and Mr. Hyder's explanation for the reason for the third subdivision application in relation to the covering letter submitted with that application.
- The tendency of Mr. Walsh in particular to reiterate that the lands were not surplus, even when not especially relevant to the questions he was asked.
- Mr. Walsh's testimony that he recalled Remington knowing about the deal with the Province in November, 2006, when the contemporaneous record about the stage of the negotiations between CPR and the Province suggests that to have been unlikely.

[44] Credibility is not determinative in this case, and I do not reject the evidence of Mr. Hyder and Mr. Walsh in its entirety, or view either as deliberately dishonest. Nonetheless, where the evidence of the Remington witnesses differs from that of Mr. Hyder and Mr. Walsh, I prefer the evidence of the Remington witnesses.

Did CPR Breach the 10th Ave Agreement?

Introduction

[45] CPR claimed in 2006-2007 – and still claims – that it was entitled to enter into the contract with the Province because the 10th Ave Lands were never declared "surplus to its operational requirements". Until B Yard was relocated to Manchester in 2010-2011, the 10th Ave Lands were an active rail yard used by CPR. As a result, pursuant to Clause 2.02 of the 10th Ave Agreement, the lands had not been declared surplus and were not available to be sold to Remington. More specifically, CPR submits that the 10th Ave Agreement gave it the absolute discretion to determine whether the 10th Ave Lands were surplus to operational requirements. If it had not so determined prior to the expiry of the Agreement, then the Agreement would end on its terms. Because CPR never declared the 10th Ave Lands to be surplus pursuant to Clause 2.02, the Agreement ended on June 15, 2007, at the expiry of the final extension agreed to by the parties.

[46] CPR also claims that the maximum amount of land available to be sold to Remington was 5.22 acres; its surplussing discretion allowed it to sell an amount less than 5.22 acres, subject only to the restriction that the lands west of 4th Street SE could not end up being less than 100

feet in depth. CPR did not contract to sell to Remington any lands beyond that 5.22 acre maximum.

[47] Remington disputes CPR's interpretation of the 10th Ave Agreement. Remington says that, properly interpreted, CPR agreed to sell a minimum of 5.22 acres to Remington, and that CPR's power to declare lands surplus operated only for the sale of lands in excess of 5.22 acres. Further, Remington says that the 10th Ave Agreement created a mechanism for CPR to make its surplus declaration, which was the submission of the tentative plan of subdivision to the City for subdivision approval. Since CPR submitted a tentative plan of subdivision – and, in fact, did so on three occasions – it exercised its discretion to declare the 10th Ave Lands surplus, and cannot now reverse that decision. Once the subdivision approval was granted on November 3, 2006, there were no remaining conditions to be satisfied and the 10th Ave Agreement should have closed in due course. Instead, by selling the lands to the Province, CPR breached the Agreement.

[48] This section determines, first, the scope and process for CPR's surplus discretion under the 10th Ave Agreement and, second, the amount of lands potentially available for sale to Remington under the 10th Ave Agreement. It then determines whether, prior to December 2006, CPR made a surplus declaration and, if so, how much land CPR declared surplus. Finally, it considers whether, as a consequence, CPR breached the 10th Ave Agreement when it did not sell the lands to Remington and instead sold them to the Province.

[49] The focus of the analysis is on the terms of the 10th Ave Agreement, both the specific provisions in dispute and the contract as a whole. It also considers surrounding circumstances at the time the 10th Ave Agreement was negotiated, focussing in particular on: 1) CPR's use of B Yard as of 2002; 2) what CPR understood about the future use of B Yard in 2002, and what it communicated to Remington about the surplus status of the lands; and 3) how CPR marketed the lands to Remington.

The Law of Contract Interpretation

[50] Contract interpretation requires the Court to determine, objectively speaking, what the parties intended when they entered into an agreement. While it can be challenging and, in cases such as this one, of enormous importance to the parties, it is at its heart a "practical, common sense" exercise. The Court must read the contract and determine what it means based on the "ordinary and grammatical meaning" of the words the parties used considered in light of "the surrounding circumstances known to the parties at the time of the formation of their contract": ***Sattva Capital Corp v Creston Moly Corp,*** 2014 SCC 53 at para 47.

[51] The Court must consider any disputed contractual term in light of the contract as a whole: ***Tercon Contractors Ltd v British Columbia (Transportation and Highways)***, 2010 SCC 4 at para 64; ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 79; ***Western Irrigation District (Board of Directors) v Alberta***, 2002 ABCA 200 at para 29.

[52] The Court's focus is on determining the meaning of the contract and its terms, not the meaning of specific words in the contract: ***Sattva*** at para 48, quoting ***Investors Compensation Scheme Ltd v West Bromwich Building Society***, [1998] 1 All ER 98 at 115 (HL). This is why, in part, the Court considers not just the words in the contract, but also the context in which those words were used, including the purpose of the agreement and the relationship it created: ***Sattva Capital Corp v Creston Moly Corp,*** 2014 SCC 53 at para 48. As the Supreme Court has noted,

"words alone do not have an immutable or absolute meaning": ***Sattva*** at para 47. See also, e.g., ***Trico Development Corporation v El Condor Developments Ltd***, 2020 ABCA 132 at para 60.

[53] Surrounding circumstances assist the Court in determining the *objective* intention of the parties, not their *subjective* intention; they allow the Court to ensure that the "written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen": ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 81. It allows the Court to "consider what a reasonable observer would have thought was the aim of the transaction, if that person knew the facts available to both parties at or before the date of contracting": ***541788 Alberta Ltd v Bourgeois & Company Ltd***, 2018 ABCA 310 at para 34; ***Composite Technologies Inc v Shawcor Ltd***, 2017 ABCA 160 at para 105-106.

[54] Contractual ambiguity is not required for the surrounding circumstances to be considered: ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 82.

[55] Whether something was a surrounding circumstance relevant to discerning objective intention is a question of fact: ***Sattva Capital Corp v Creston Moly Corp,*** 2014 SCC 53 at para 58. Surrounding circumstances only include "facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting": ***Sattva*** at para 60. The Court of Appeal has suggested that relevant background facts include:

> (1) The genesis, aim or purpose of the contract; (2) the nature of the relationship created by the contract; and (3) the nature or custom of the market or industry in which the contract was executed…Ultimately, the surrounding circumstances can include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 83.

[56] As noted, in interpreting the contract in light of its surrounding circumstances, the Court must not consider the subjective intention of the parties, that is, what the people negotiating the contract personally thought it meant, or what problem they themselves thought it was designed to solve: ***Alberta Union of Provincial Employees v Alberta Health Services***, 2020 ABCA 4 at para 31; ***Knelsen Sand & Gravel Ltd v Harco Enterprises Ltd***, 2021 ABCA 385 at para 126. As a result, a Court must treat evidence with respect to contractual negotiations carefully; such evidence may be relevant to the extent it shows the parties' objective intentions. It is not, however, relevant or admissible as evidence of the parties' subjective intentions at the time they entered into the contract: ***AUPE v AHS*** at paras 27 and 32.

[57] The Court cannot use the surrounding circumstances to amend the contract. They are considered only to assist in identifying the objective intention revealed by the words of the agreement: ***Sattva Capital Corp v Creston Moly Corp,*** 2014 SCC 53 at para 57.

[58] Contractual interpretation requires consideration of the principle of commercial reasonableness and efficacy. Contracts ought to be interpreted "in accordance with sound commercial principles and good business sense": ***Resolute FP Canada Inc v Ontario (Attorney General)***, 2019 SCC 60 at para 79; see also, ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 88. Courts assume those that enter into

commercial contracts intend for those contracts to "work": ***Resolute*** at para 142, citing ***Humphries v. Lufkin Industries Canada Ltd***, 2011 ABCA 366 at para 15. Where there is a choice between an interpretation that allows the contract to function in furtherance of its commercial purpose, and one that does not, generally it is the former interpretation that should prevail: ***Resolute*** at para 144, citing ***Humphries*** at para 15.

What was the extent of CPR's discretion to declare the lands surplus, and through what process, if any, was that discretion to be exercised?

[59] Each of the three agreements entered into by CPR and Remington begins with a paragraph that defines the lands to be sold by CPR and acquired by Remington. These opening paragraphs are not numbered. Despite this, the parties agree, and I find, that each opening paragraph is a substantive part of the agreement, rather than a mere preamble ("Opening Paragraph").

[60] For the 10th Ave Agreement, the Opening Paragraph stated:

> **REMINGTON DEVELOPMENT CORPORATION** (herein called the "Purchaser") hereby offers to purchase a portion of those certain lands and premises of the Vendor situated in the City of Calgary, in the Province of Alberta, consisting of **5.22** acres, or such greater or lesser area as determined in accordance with Article 6.05 hereof, which portion is heavily outlined in red on Schedule "A" attached hereto and shaded or hatched on such sketch plan as referenced in Schedule "B" (herein called the "Subdivided Lands" or the "Lands") and which Lands are within those existing parcels of land legally described as set forth in Schedule "B" attached hereto (collectively, the "Existing Parcel"), on the terms and conditions herein set forth.

[61] Article 6.05, which the Opening Paragraph references ("or such greater or lesser area as determined in accordance with Article 6.05 hereof") sets out the process by which CPR will begin the subdivision application, and "determine the boundaries of the Subdivided Lands":

> **6.05** By March 31, 2003, the Vendor shall have determined that it is lawfully entitled to make application to subdivide the Subdivided Lands from the existing Parcel and shall have made a determination of the boundaries of Subdivided Lands such that the depth of Lot 2 shall be no less than one hundred (100) feet.

[62] In its language, and in particular its reference to being "lawfully entitled" to subdivide the land, and to determining "the boundaries of the Subdivided Lands", Article 6.05 references Article 2.02. Article 2.02 sets out CPR's power to determine which part of the Existing Parcel is surplus to its operational requirements. Article 2.02 also references Article 6.05:

> **2.02** …. The Purchaser acknowledges that the Existing Parcel is rail right-of-way lands and that the only portion of the Existing Parcel that the Vendor is capable of selling to the Purchaser is that portion of the Existing Parcel which the Vendor determines, in its discretion but in accordance with the *Railway Act*, to be surplus to its operational requirements. Upon the Vendor's determination of the area of the Lands in accordance with Article 6.05 hereof, the Vendor shall cause the Alberta land surveyor preparing the tentative subdivision plan for the Lands to certify as to the number of acres and fractions thereof correct to three (3) decimal places contained in each of Lot 1 and Lot 2 and the Purchase Price shall be

> adjusted to be: (i) the amount equal to the square footage of Lot 2 as certified by the surveyor multiplied by $25.00; and (ii) the amount equal to the square footage of Lot 1 as certified by the surveyor multiplied by $10.76, and the amount of the Mortgage as applicable to each of Lot 1 and Lot 2 shall be one-half of the adjusted Purchase Price as applicable to each such Lot, and the balance payable on the Closing Date in accordance with Article 2.01(c) shall be one-half of the adjusted Purchase Price less $50,000.00.

[63] Lot 1 and Lot 2, referenced in Article 2.02, are further explained in an earlier clause, Article 1.03, which sets out the different prices for the land within Lot 1 and Lot 2 respectively. Article 2.02 then contemplates the Purchase Price being adjusted on that basis following CPR's determination of which portion of the Existing Parcel is surplus to its operational requirements – i.e., based on the size of Lot 1 and Lot 2. Article 1.03 states:

> **1.03** The parties acknowledge that in the course of creating the Subdivided Lands, the plan of subdivision creating same or a subsequent plan of subdivision may create more than one parcel comprising the Subdivision Lands and each such separate parcel is hereafter referred to as a "Parcel". For the purposes of this agreement, the parties acknowledge that any parcel to the west of the most westerly production of Fourth Street S.E. shall be referred to as "Lot 2" and any parcel to the east of the westerly production of Fourth Street S.E. is hereinafter referred to as "Lot 1". For the purposes of allocation of the Purchase Price and the Mortgage, as hereinafter defined, the parties have assumed that Lot I has an area of 3.867 acres and have agreed that the Purchase Price as allocated to Lot I shall be at the rate of $10.76 per square foot, and the parties have assumed that Lot 2 has an area of 1.352 acres and have agreed that the Purchase Price as allocated to Lot 2 shall be at the rate of $25.00 per square foot. The parties further acknowledge that the principal amount of the Mortgage as allocated to Lot I shall be $906,300.00 and the principal amount of the Mortgage for Lot 2 shall be $736,200.00. It is acknowledged that one of the parcels that may be created by a subdivision of the Existing Parcel may, by the Closing Date, already be registered in the name of the Purchaser pursuant to the provisions of Article 16 of a purchase agreement between the parties dated as of even date hereof and known as the "Interlink Agreement".

[64] Article 6.05 and Article 2.02 are also substantively referenced in Article 6.08(c), which gives CPR "absolute discretion" in determining the lands surplus to operational requirements that can be included in the tentative plan of subdivision:

> **6.08** The conditions set forth in this Article 6 are for the benefit of both the Vendor and the Purchaser and are not capable of waiver. In respect of the subdivision process, the following provisions shall be applicable:
>
> (a) the Vendor shall be responsible for making the subdivision application and paying the application costs;
>
> (b) the Vendor is responsible for hiring the surveyor to prepare the subdivision plan and to pay for the surveyor's costs;

> (c) the determination of the area of the Lands included in the tentative plan of subdivision shall be in the Vendor's absolute discretion as it relates to which portion of the Existing Parcel is surplus to the Vendor's existing railroad operations…

Article 6.08(c) connects to Article 2.02 through its reference to "which portion of the Existing Parcel is surplus", and connects to Article 6.05 through its reference to the lands "included in the tentative plan of subdivision".

[65] Other conditions in the 10th Ave Agreement do not directly speak to the surplus declaration or the size of the land but provide useful context for the interpretation of the powers and obligations of the parties. This includes Articles 6.08(a) and (c), just excerpted, which place responsibility on CPR to make the subdivision application, and to hire the surveyor to prepare the subdivision application.

[66] Article 3.01 states that the closing date is within 30 days of the removal of the conditions, and receipt by CPR of "the tentative plan of subdivision and all ancillary documentation". Article 6.06 requires CPR to have obtained approval of the tentative plan of subdivision from the City, and for both parties to be satisfied as to the subdivision conditions. It also allows either party to extend the agreement for five months if the subdivision application has been brought and diligently pursued, but either a decision has not been made or the decision has been appealed.

[67] In Article 7.01 Remington acknowledges that the Lands are presently part of the Existing Parcel. It further requires CPR to apply for the subdivision "forthwith". Article 7.01 says as well that if Remington wants the land use designation to be amended then it is for Remington to make the application for land use redesignation.

[68] Article 11.02 places restrictions on the use of the 10th Ave Lands. If Remington seeks a subdivision application or land use redesignation incidental to its development of the lands, it must obtain CPR's approval. CPR covenants that, prior to closing, it will execute the land use redesignation and subdivision applications, and execute applications for permits (e.g., a development or building permit) incidental to Remington's proposed development of the lands. Article 11.02 provides that CPR will grant that approval provided that no application prior to the closing will result in a financial charge against title and, further, no application "shall authorize the development of all or any portion of the Lands for residential purposes".

[69] Finally, Article 13.03 is a whole agreement clause, and states that the Agreement may "only be amended by a further agreement in writing signed by both parties".

[70] Remington submits that, properly interpreted, the Agreement requires CPR to sell a minimum of 5.22 acres of land to Remington. It suggests that the surplus clause applied only to lands in excess of that amount, to increase the land sold from a depth of 100 feet to a depth of 140 feet. Remington relies on the reference to "the only portion…is that portion" in Article 2.02 as showing that the parties did not intend that CPR would sell *no* land to Remington. It also noted the reference in Article 6.05 to including a minimum of 100 feet in Lot 2. Remington further submits that once CPR surveys the land for the purpose of a subdivision application in Article 6.05, it has exercised its discretion to declare the lands surplus. Here, CPR surveyed the lands three times – prior to each subdivision application. Each time it did so increased the amount of land included for sale. As such, Remington submits that if CPR had discretion to

determine whether to sell any lands to Remington, it had already exercised that discretion prior to its decision to sell the lands to the Province.

[71] For its part, CPR suggested that the phrase in the opening paragraph, “which portion is heavily outlined in red on Schedule "A" attached hereto and shaded or hatched on such sketch plan as referenced in Schedule "B"” shows that the only lands available for sale are those in Schedule A, which is 5.22 acres. As such, 5.22 acres was the maximum amount available for sale, not the minimum. CPR also emphasized that Article 2.02 is a stand alone clause in the Agreement. It granted broad discretion to CPR (“absolute”). CPR emphasized that it needed to be able to make a surplussing decision in an unfettered manner given the active use of B Yard at the time it entered into the 10th Ave Agreement. CPR also suggested that Article 7, which requires the subdivision application to occur forthwith, shows that there was no necessary relationship between the subdivision process and the surplussing decision, given that the subdivision application in Article 6.05 did not need to occur for up to a year.

[72] In my view the language of the 10th Ave Agreement is relatively clear, although not fully consistent with either Remington or CPR’s interpretation.

[73] The central feature of the Agreement is how Article 6.05 connects the Opening Paragraph’s definition of the amount of land for sale, the surplus discretion in Article 2.02, and the nature of the discretion enjoyed by CPR in Article 6.08(c). All of those clauses refer to or rely on the subdivision application process.

[74] The Opening Paragraph states that the land for sale is 5.22 Acres or “such greater or lesser area as determined in accordance with Article 6.05 hereof”. Article 2.02 states that the only land for sale is that determined by CPR to be surplus to its operational requirements, and then references the Article 6.05 subdivision application, surveying the land, and preparation of a tentative subdivision plan. Article 6.08(c) says that CPR has “absolute discretion” to determine the area of lands included in the plan of subdivision.

[75] That connection suggests that the land actually for sale to Remington will be determined in this way: a) CPR determines in its absolute discretion how much land is surplus to its operational requirements (Article 2.02 and 6.08(c)); b) it surveys the land for preparation of a tentative subdivision plan based on that determination (Article 2.02); c) it brings the subdivision application, thereby showing that it has determined that it is lawfully entitled to make such an application (Article 6.05); d) the amount of land included in the subdivision application in Article 6.05 is the amount of land available for sale to Remington (Opening Paragraph).

[76] This interpretation means that CPR had no obligation to sell any of the lands to Remington. It did not have to determine that any lands were surplus to operating requirements under Article 2.02. It also meant, however, that CPR’s surplussing decision had a deadline and, by virtue of the subdivision application, a process for communicating that it had made that decision. Remington would not remain in uncertainty indefinitely.

[77] I note in this respect that the Opening Paragraph references Article 6.05 and CPR’s determination of the boundaries of the subdivided lands. It also references that CPR is lawfully entitled to make an application to subdivide the lands, not the approved plan of subdivision in Article 6.06. That is, the Opening Paragraph relies on and emphasizes CPR’s decision process, not what is ultimately approved by the City.

[78] I do not accept CPR's submission that the 5.22 acres in the Opening Paragraph was a maximum amount of land that could be sold; nor do I accept Remington's submission that 5.22 acres was a minimum amount of land that could be sold. I acknowledge that the phrasing "which portion is outlined" does support CPR's interpretation – that is, it suggests that the portion outlined in Schedule A is the maximum amount of land available for sale. However, the phrase "or such greater or lesser area as determined in accordance with Article 6.05 hereof" suggests variability in both directions as to how much land could be sold ("greater ***or*** lesser"). Further, I note that Article 2.02 does not reference the "Subdivided Lands" (i.e., the outlined lands). Rather, it references the larger "Existing Parcel" within which the Subdivided Lands fall. That is, pursuant to Article 2.02 what CPR can determine is surplus to operating requirements is the land within the Existing Parcel, not just the lands within the Subdivided Lands.

[79] Considering the Opening Paragraph as a whole, and the language of Article 2.02, it shows that the intention of the contract was to give CPR discretion to determine the size of the Subdivided Lands, whether more or less than 5.22 acres, by determining how much, if any, of the Existing Parcel was surplus to operational requirements. The phrasing of the Opening Paragraph in conjunction with the map at Schedule A creates some uncertainty but, in light of Article 2.02 and the incorporation of Article 6.05, I am satisfied that this flexibility in the size of the parcel for sale is what the parties intended.

[80] I do note that the 9th Ave Agreement, which does not have a surplussing provision, also uses the "greater or lesser area as determined in accordance with Article 6.05" language. In that context, as suggested by counsel for CPR, the "greater or lesser" language seems only to refer to the fact that through the subdivision and surveying process the actual lands available for sale may vary somewhat from the amount listed in the agreement. The Interlink Agreement has no similar provision, because in that case the lands had already been subdivided. However, I am satisfied that in the 10th Ave Agreement the connection between the Opening Paragraph, Article 2.02 and Article 6.05 means that, here, the "greater or lesser area as determined in accordance with Article 6.05" has a different meaning than it does in the 9th Ave Agreement. Even on CPR's interpretation, where 5.22 is the maximum amount of land available for sale, there has to be some way to incorporate the amount of land less than 5.22 into the Opening Paragraph, which would require using the "greater or lesser" language, but ignoring the word "greater", which is not the ordinary meaning of "greater or lesser".

[81] CPR's point may be that under the contract it would either sell Remington 5.22 acres, or it would sell nothing. That interpretation does not seem consistent with Article 2.02 providing for CPR's "determination of the area of the lands", or its reference to the portion for sale being "the only portion…is that portion". The lack of specificity in relation to the lands for sale in Article 2.02 suggests that CPR's discretion was to determine how much land it was going to sell, and that amount could be less than 5.22 acres, exactly 5.22 acres, or more than 5.22 acres. The only constraint was that it had to be land within the boundaries of the "Existing Parcel".

[82] I also do not view the language of Article 7 as sufficient to suggest that the surplus decision could not be attached to the subdivision approval. It is true that Article 7 directs CPR to make the subdivision application forthwith, and that could be seen as inconsistent with the need for CPR to have time to make its surplus determination. However, that generic reference does not override the specific language in Articles 2.02 and 6.05, including the specific deadline of March 31, 2003 in Article 6.05 which was relatively short, albeit extended by the parties on numerous occasions. As explained below, at the time the parties entered into the contract CPR

appears to have anticipated the surplus decision being made relatively quickly, and the language of both Article 7 and Article 6.05 is consistent with that expectation.

[83] For somewhat similar reasons, I also reject Remington's submission that 5.22 acres was a minimum amount, and that the surplus provision was only for lands in excess of that amount. That interpretation does not accord with the "greater or lesser" language in the Opening Paragraph. It also does not accord with the language of Article 2.02 which appears on its face to place all of the lands in the Existing Parcel within CPR's surplussing power. I do not think that the language of "the only portion…is that portion" in Article 2.02 dictates that 5.22 acres was a minimum amount, although Remington relied on that language to support its interpretation. I similarly do not see Article 6.05's reference to a 100 foot minimum as significant in defining the lands available for sale, given that Lot 2 covered only a part of the 10th Ave Lands, and was for reasons specific to that portion, namely, that because they did not abut the Interlink Lands they needed to be at least 100 feet deep to be developable.

[84] Remington relied in its submissions on earlier drafts of the agreement, which contemplated 6.11 acres being sold, and which did not contain the surplus provision. It also noted that the original language in Article 6.05 was for the land sold to be between two and eight acres. Remington submitted that this showed the history of the negotiations, and that the surplus clause was not intended to change the parties' intentions that a minimum amount of land be sold to Remington. I do not, however, view the prior versions of the Agreement as helpful or appropriately relied upon in interpreting the 10th Ave Agreement. Their meaning here is too ambiguous – I am not entirely certain what inference to draw from the reduction from 6.11 acres to 5.22 acres in the language of the Agreement – and risks confusing rather than clarifying the reading of the 10th Ave Agreement in light of the commercial circumstances in which it was negotiated.

[85] This reading of the language of the 10th Ave Agreement, in which CPR had discretion to declare the lands surplus or not, but was given a time constraint and process through which that was to occur, makes sense given the surrounding circumstances in which the contract was negotiated, and in light of what reasonable parties in the position of Remington and CPR would be expected to agree to regarding the sale of the 10th Ave Lands.

[86] In 2002, and through the end of the 10th Ave Agreement, the 10th Ave Lands were used as an active switching and rail yard. They contained tracks and storage facilities used for maintenance, cleaning train cars, switching and shunting rail cars to build trains, and to service CPR customers. Remington knew that CPR actively used the 10th Ave Lands at the time the 10th Ave Agreement was signed.

[87] On the other hand, by 2002 there was reason to believe that CPR was in the process of moving B Yard from its downtown location and that, in the relatively near future, it would be declaring all of the B Yard Lands surplus. In a report prepared for CPR by IBI on the lands in 2001, IBI stated, "Canadian Pacific Railway has identified lands surplus to operational requirements in the East Downtown Marshalling yard and intends to move forward with subdivision of this land". This hearsay evidence obviously does not prove that the B Yard Lands were surplus at that time, but it suggests that discussions about that possibility were being had within CPR and with its consultants.

[88] In September 2002 CPR compiled a document titled "East Downtown Calgary CPR Yard Property Information" ("property information summary"). The property information summary described the 10th Ave lands as:

> a large rectangular site; approximately 140 feet in depth stretching east for three city blocks from 3rd Street SE to 6th Street SE between 10th Avenue SE and the CPR main line. It would also include the portion of the 6th Street SE closed road allowance south of the main line right of way. The area of the parcel is 6.11 acres.

[89] It said further,

> The parcel is encumbered by several (4 or 5) active spur tracks used by CPR for storage, maintenance and shunting of rail cars. ***An alternative location for these activities must be found and the tracks related prior to development of the site. CPR has advised that a tentative schedule for this is the end of 2003***. The actual depth and area of the parcel will be determined according to the number of tracks that CPR removed. A cost estimate to remove the track materials has not been completed [emphasis added].

[90] The property information summary would have indicated to a reasonable person in Remington's position that, while the 10th Ave Lands were still in use, it was anticipated that a decision declaring them surplus would be forthcoming by the end of 2003. That reasonable reader would understand that the amount of land to be sold – the depth and area – would vary with the amount of tracks being removed, and that cost remained uncertain. Notably, the document does not state, or imply, that no tracks would be removed, only that it will take some time to find an alternative location and relocate the tracks, and that the total area and cost remain uncertain.

[91] As discussed further below, in March 2000, and also in November 2002, internal CPR documents (a "Surplus Land Form" and a "Surplus Land Inventory Sheet") suggest that CPR was assessing the surplus status of the entirety of the B Yard Lands. People within CPR were turning their mind to the issue.

[92] In his memo requesting approval of the three agreements Mr. Nimmo said of the 10th Ave Lands:

> Adjacent, and north of the Interlink lands, is a 5.219 acre parcel known as the **10th Avenue Lands**. It is yet to be made surplus. It is serviced to the lot line but not subdivided. To extract value, rezoning, subdivision and track removal is required. If rezoned, subdivided and serviced in conjunction with the Interlink Lands, the incremental costs would be insignificant. To replace the existing approximate mile of track and make the lands surplus an expenditure of $500,000 would be required and to subdivide $415,000 would be required. Remediation of these lands is captured in the Interlink Lands remediation processes and costs. The 10th Avenue Lands are appraised at $3,285,000 [emphasis in original].

[93] Mr. Nimmo's memo makes the case that the 10th Ave Agreement will make the relocation of B Yard economically desirable.

[94] Part of the context of CPR moving towards declaring the 10th Ave Lands surplus to operational requirements was the identification and assessment of the B Yard Lands as an asset that could be sold focussed on the site as a whole, rather than on the three distinct parcels.

Assessments that CPR obtained on the lands from IBI in 1996 and in 2001 show CPR requesting advice about the lands in their totality, and about what could be done with them as a single asset. The recommendation they received from IBI, both in 1996 and in 2001, envisioned developing the lands as a single, comprehensive, multi-use development.

[95] CPR approached Remington as a potential purchaser of all three pieces of land and structured each transaction to allow CPR to profit from some of the potential upside once Remington moved towards development. This was consistent with one of the recommendations of IBI in its 2001 assessment, in which it suggested that CPR could sell the land to a single builder and then, through becoming a joint venture partner, establish "a base price for the land, but also sharing in potential upside profits".

[96] Remington was, and has always been, a development company. While it occasionally buys land, services it, and then sells it, its standard practice is to build on land prior to sale. CPR knew Remington was a development company and, I infer, that was one of the reasons why it approached Remington as a potential purchaser of the B Yard Lands. CPR had been advised by IBI that there "may be several consortia of developers who were unsuccessful in their bid to secure the East Village land, but that may still be interested in securing a substantial block of developable land within the downtown."

[97] At the time it entered into the contracts for the B Yard Lands, Remington had no clear idea about what it was going to build there, but it did plan on developing the lands as a comprehensive development. In considering what it would or could do with the properties, Remington had the 2002 Altus appraisal on which the purchase price was based. Altus identified the highest and best use for the B Yard Lands to be, "commercial/office uses orientated to downtown service providers including office/medical, technology, business service and educational uses and secondary retail/commercial uses". Altus identified the land as having "multiple re-development options". It said that current land use designation was focused on "commercial, light industrial and residential uses" but noted that a "redesignation to a more appropriate land use is anticipated".

[98] Mr. Remington may also have seen the 2001 IBI concept document, although all he could remember seeing from that document was a visual showing a mixed use development on the B Yard Lands with connectivity between the 9th and 10th Ave Lands. Mr. Nimmo did not recall showing the visual to Mr. Remington, but I accept Mr. Remington's testimony that Mr. Nimmo did so. CPR had the IBI document, they were marketing the lands to Remington for sale, and it would be expected for them to have shown an attractive visual illustrating the lands' potential to their prospective purchaser, Remington. Seeing the photograph was also a fact liable to stick in a person's mind; the visual is striking and shows the promise of the lands in which Remington was looking to invest.

[99] This, then, is the context in which the 10th Ave Agreement was written. The 10th Ave Lands were not surplus and were still in use. CPR was moving towards making the lands surplus, anticipated that happening relatively soon and communicated that information to Remington in the property information summary. The 10th Ave Agreement created economic advantages to support declaring the lands surplus. The 10th Ave Lands were conceived of, and marketed as, part of a larger parcel of lands suitable for development and, in the original information document, were described as being 6.11 acres in size. Remington did not have a specific plan in

mind for the 10th Ave Lands, but did plan on developing them, and was approached by CPR because it was a developer.

[100] In that context, reasonable parties in the position of CPR and Remington would give CPR the ability to ensure the 10th Ave Lands were surplus prior to finalizing the sale but would expect CPR to make that decision in relatively short order. They would want to have clarity and a process by which Remington would have confidence that the decision had been made and be able to move forward with its plans for development. Remington entered into three contracts, but its intention was to acquire all three parcels of land. It accepted the risk that it might not be able to do so, but only in the context that it understood that CPR was moving towards declaring the 10th Ave Lands surplus. And, in actuality, CPR was assessing the lands to see if they could be declared surplus. In that light, Remington's risk that it would be left without the middle strip of land would not seem excessive.

[101] Reasonable parties would, in other words, have reached an agreement much like the one that CPR and Remington did reach: CPR had the discretion to determine if, or how much of, the lands in the Existing Parcel were surplus to operational requirements. Once it had done so it would survey the lands for a tentative plan of subdivision and submit the subdivision application for approval. Doing so would conclude the exercise of its surplussing discretion, and Remington could move forward with that understanding to begin the process of developing the lands.

[102] I received testimony from a number of witnesses from both sides about their understanding of the 10th Ave Agreement, and about what was said during negotiations. I have not relied on that testimony in my analysis. First, it was largely subjective and therefore not appropriately factored into the contractual interpretation. Second, as explained previously, I have reservations about the reliability of the evidence of the witnesses regarding the contract negotiation given that the contract was signed nearly 20 years ago and given that the parties did not end up in a dispute until 5 years after the contract was signed. As such, they would not have focussed on the negotiations in a time proximate so as to affix their memories on the point at issue.

[103] Having said that, I observe that my understanding of the 10th Ave Agreement does accord with the testimony of Mr. Nimmo, who at the time was CPR's Director of Real Estate for Western Canada, and who said this about the surplus requirement:

> So the purpose of this document, as was explained very clearly to Remington on more than one occasion, was to associate a value with the land and to put some dates in here that would create a framework – a chronological framework for a decision to be made such that the operations group couldn't dismiss something out of hand. They would have to – they were – this document put them in a place that they need to make a multimillion dollar decision within a period of time, and that was the purpose of the document.

[104] That is, Mr. Nimmo understood CPR had the discretion to declare the lands surplus to its operational requirements, but also that it had to make the decision within the time, and through the process, contemplated in the 10th Ave Agreement – i.e., through surveying the land for a tentative subdivision plan, and making a subdivision application to the City. While Mr. Nimmo does not explicitly reference the subdivision application process, this was the process which created the timeline within which CPR had to make its decision.

Did CPR, for the purposes of the 10th Ave Agreement, declare the 10th Ave Lands surplus prior to November 2006 and, if so, what portion of the lands did it declare surplus?

[105] To determine whether CPR had exercised its discretion under Article 2.02 to declare a portion of the 10th Ave Lands surplus to its operating requirements and, if so, what portion it declared surplus, this section reviews 1) the evidence regarding the subdivision applications submitted with respect to the 10th Ave Lands, and questions that remain after reviewing that evidence; 2) CPR's internal discussions and process in relation to declaring the 10th Ave Lands surplus; 3) conduct or communication between the parties that may negate or contradict the determination that CPR has exercised its discretion to declare the lands surplus; and 4) the effect of the second and third subdivision applications on CPR's surplus declaration, if any. It concludes by summarizing its analysis and conclusion on the question of whether CPR made a surplus declaration and, if so, what portion of the lands it declared surplus.

[106] To anticipate, I find that, in terms of CPR's surplussing process, and its own definition of "surplus to operating requirements", CPR had determined that the 10th Ave Lands were surplus to operational requirements by the time its agent IBI submitted the first subdivision application in November 2004. Further, nothing in the contemporaneous record changes my assessment that the first subdivision application was a determination, pursuant to Article 6.05 and Article 2.02 of the 10th Ave Agreement, that 5.1 acres of the 10th Ave Lands were surplus to operational requirements. I do not, however, find that either the second or third subdivision applications expanded the amount of lands determined to be surplus. In addition, the status of the Blue/Grey parcel east of 6th Street SE (lot 4) – i.e., whether CPR was contractually obligated to sell that land to Remington – remains unclear, and I reserve my decision on that issue.

Submission of the subdivision applications

Evidence

[107] Acting through an agent, and working with Remington, CPR submitted three different subdivision applications for the 10th Ave Lands.

[108] The first tentative plan of subdivision was submitted to the City on November 24, 2004 by IBI. It included approximately 5.1 acres, which was 140 feet at the west boundary of the lands, dropping to 100 feet at 4th St SE, and carrying on east only to 6th Street SE. No lands east of 6th Street SE were included in the application. The letter submitting the plan said that it was "for Remington Development Corporation to acquire surplus railway lands for use with their adjacent lands after further designs are complete".

[109] The subdivision application described the lands as "vacant, except for rail car storage", and identified the proposed use of the lands as "commercial and high rise". It also said, "rail tracks, sheds and trailer to be removed".

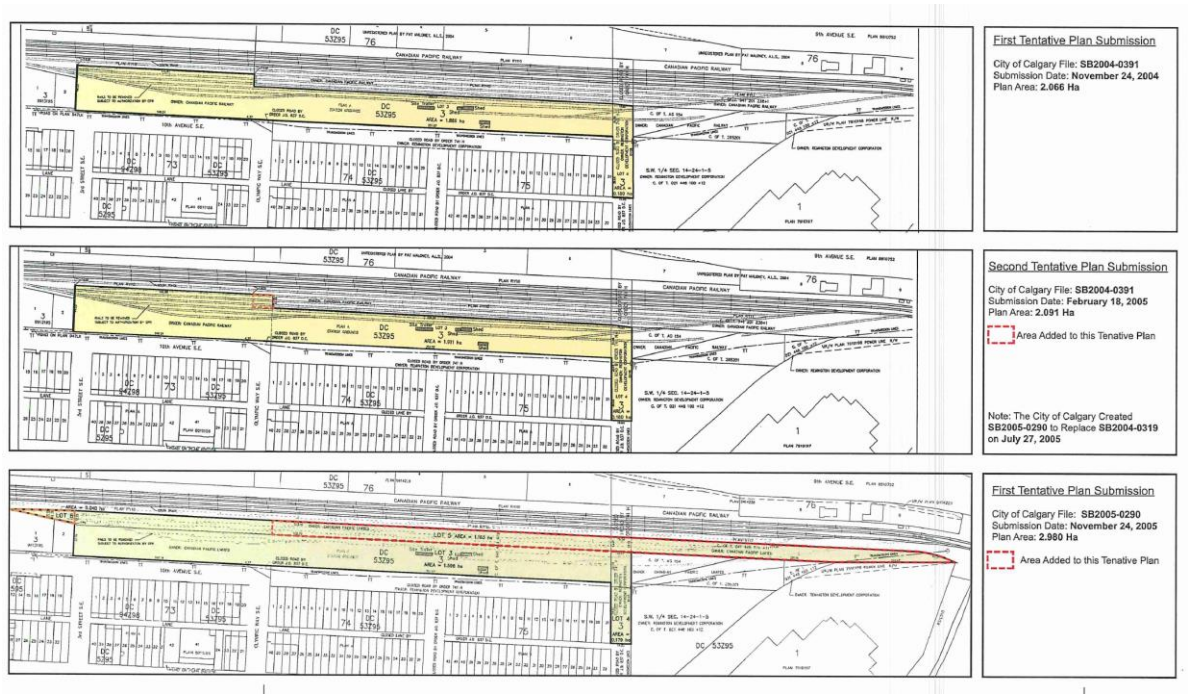
[110] In e-mails exchanged between CPR and Remington at the time of the application, Mike Hyder said that CPR had authorized IBI to submit the subdivision application on behalf of CPR but noted his "concern that CP operations has not given final approval to remove all of the tracks to leave just four main line tracks". Mr. Hyder said further that Mr. Wetter of IBI had advised him that "the plan could be amended if the final configuration had to be adjusted somewhat to allow for additional tracks".

[111] The subdivision application was revised on February 18, 2005. This application added a small piece of land related to proposed construction of the 4th Street underpass; it arose from an exchange of lands with the City to facilitate the development of the land. The cover letter stated that "Canadian Pacific Railway has notified us that they had intended to include a further portion of land which is surplus to their needs".

[112] A third subdivision plan was submitted on November 24, 2005. In an e-mail dated November 24, 2005, Mr. Hyder had told Mr. Wetter of IBI that "the plan and letter are OK to submit".

[113] The third subdivision plan increased the land submitted for subdivision by adding an extra 40 feet across the lands east of 4th St SE to nearly the Elbow River, described as Lot 5, and a small triangle of land west of 3rd Street SE. With respect to Lot 5 the IBI cover letter said that these lands covered "a portion of tracks which may become surplus to CPR's needs". It further said, "Lot 5 is intended to be transferred to Remington Development Corporation and a multi-year lease is to be registered for continued use by CPR until the tracks are not required".

[114] A trial exhibit illustrated the lands covered by the three applications for subdivision, with the new lands added to each application outlined in red:



[115] None of the subdivision applications included the part of the lands east of 6th Street SE illustrated on Schedule A of the 10th Ave Agreement as the Blue/Grey parcel. Based on an e-mail sent by Mr. Menzies to Mr. Hyder in February 2007, it is possible that the Blue/Grey parcel did not require subdivision. Mr. Menzies said:

> I have not mentioned lot 4 [the Blue/Grey parcel] as this lot does not require subdivision and I believe, under the terms of our agreement, could be transferred on notice from Remington to CPR and the required payment.

I understand Mr. Menzies to be saying that the Blue/Grey parcel was already subdivided – since already subdivided, the lands could be transferred on notice.

[116] The documents from the time of the contract suggest, however, that the parties did not know that the lands were already subdivided (if, in fact, they were). Mr. Nimmo's memo to Mr. Walsh refers to all of the 5.219 parcel as being "serviced to the lot line but not subdivided". The property information summary said of the 10th Ave Lands: "It would have to be subdivided to enable transfer".

[117] None of the lands added in the third subdivision application that extend east of 6th Street SE fall within the Existing Parcel legally described in Schedule B of the 10th Ave Agreement, and plotted during the trial by CPR's expert witness, Mr. Romanesky.

[118] At trial, the CPR and Remington witnesses gave evidence about the events surrounding the submission of the subdivision application.

[119] With respect to the first application, Mr. Hyder testified that he worked on the subdivision application as a matter of efficiency, to save time so that when the lands were declared surplus the subdivision process would already have been underway. He said CPR was trying to do the processes in a parallel manner. He acknowledged that he had seen the applications and had been kept informed about it.

[120] Mr. Cooper, Remington's Senior Vice-President, Land and Construction, described the e-mail from Mr. Hyder, in which Mr. Hyder noted that the Operations department ("Operations") had not given final approval with respect to how many tracks were being removed, as consistent with what Mr. Hyder had advised him of previously. That is, that Operations was going to be working on this, and Mr. Hyder was concerned that he could not control that process, and the application needed to contemplate the possibility of additional tracks beyond the four main line tracks needing to remain.

[121] Mr. Remington testified that CPR advised him that they were able to get an additional 40 feet of land west of 4th Street SE to include in the first subdivision application, which Remington was pleased with. He also said, with respect to the second application, that this change was supported by both Remington and CPR. No written documents in relation to this change were submitted in evidence, and Mr. Remington testified that there weren't any such communications. With respect to the third application, Mr. Remington testified that CPR advised Remington that they had obtained permission from operations to sell the other 40 feet of land. Mr. Remington said he was very pleased by this development. He was not aware of the lease-back discussion reference by IBI's cover letter and does not view it as accurately capturing what was contemplated.

[122] Mr. Hyder said that Remington initiated the expansion of the lands, but CPR was also part of this because it wanted some additional lands subdivided once it had made the surplus declaration. The main purpose of the third application was to create a lot adjacent to the tracks that could be used for the City's SE LRT at some point in the future. He emphasized, however, that CPR did not enter into an agreement to increase the lands sold to Remington.

[123] Mr. Menzies testified that the additional land was included in the third subdivision application after a meeting between himself, Mr. Remington, Mr. Hyder, Mr. Walsh and Mr. Zacharopoulos (who had taken over Mr. Nimmo's job at CPR); Mr. Menzies said that they discussed increasing the size of the subdivision to include Lot 5. He said that this was advantageous to both parties, giving more money to CPR, and allowing Remington to have a more comprehensive plan for development.

[124] Mr. Menzies said that the meeting was in CPR's office; he said that at the meeting CPR confirmed that Operations had resolved its issues around the lots being included. He understood that timing might be an issue, but that CPR was comfortable the lands could be sold. As Mr. Menzies understood it, the multi-year lease proposal in the IBI letter was a methodology for dealing with CPR's timing issues.

Analysis

[125] The contemporaneous documentary evidence shows that CPR participated in and authorized the original subdivision application with respect to the 10th Ave Lands. Specifically, in November 2004, CPR gave a surveyor the dimensions of land for surveying, and participated in the creation of a tentative plan of subdivision to be submitted to the City for approval – that is, the top of the three images illustrated above.

[126] This evidence *prima facie* demonstrates that the lands included in the first subdivision application had, in accordance with Articles 2.02, 6.05 and 6.08(c), been determined to be surplus to operating requirements by CPR and were available for sale to Remington once the subdivision approval had been granted. Contractually, those lands were surplus.

[127] Yet, Mr. Hyder's testimony was that the subdivision application process ought not to be understood in that way; he said that the parties knew the application was being submitted on a tentative basis, and for convenience only. Similarly, the other CPR witnesses firmly and consistently maintained that in 2004 and subsequently the 10th Ave Lands had not been declared surplus. They emphasized that at all times the B Yard lands were used for operational requirements and, until the City paid for the move of B Yard to Manchester as part of the 4th Street SE underpass construction, no suitable alternative to B Yard existed.

[128] For their part, the Remington witnesses asserted that the second and third subdivision applications increased the amount of land to be included in the 10th Ave Agreement.

[129] The testimony of the CPR and Remington witnesses raises questions about the legitimacy of viewing the first subdivision application as an exercise of CPR's contractual discretion to declare the 10th Ave Lands surplus, and also raises questions about the effect of the second and third subdivision applications.

[130] To answer these questions the next subsection begins by reviewing and assessing the trial evidence with respect to CPR's surplus decision-making on the 10th Ave Lands. In particular, it considers three questions: a) What was the process by which CPR declared lands to be surplus to operational requirements? b) What did it mean within CPR for land to be "surplus to operational requirements"? and c) Prior to 2004, had CPR in fact determined the 10th Ave Lands were surplus to operational requirements?

[131] The subsequent subsection then considers whether the evidence, including Mr. Hyder's e-mail at the time the subdivision application was submitted, shows that the November 2004 subdivision application did not amount to an exercise by CPR of its surplus discretion, despite the application being made, and despite Articles 6.05 and 2.02 of the 10th Ave Agreement.

[132] The subsection following that considers the effect of the second and third subdivision applications on the surplus declaration, if any.

[133] The final subsection returns to the general question with which this section began: did CPR, for the purposes of the 10th Ave Agreement, declare the 10th Ave Lands surplus prior to November 2006 and, if so, what portion of the lands did it declare surplus?

CPR's Surplus Process

[134] CPR provided the Court with a document dated September 30, 2003, which set out the process used by CPR to declare land surplus. CPR witnesses explained that this document formalized the process used by CPR prior to 2003.

[135] Based on that document, CPR's Real Estate department ("Real Estate") was required to prepare a Surplus Land Form describing the nature of the land and the operations on the land, and the proposed use of the land. That Surplus Land Form would then be circulated to relevant departments, including Operations, requesting their approval to declare the land surplus to CPR's needs. In the event that sign off was not received from those departments, Real Estate would then explore alternative solutions, communicating "with the appropriate group" to see if they could obtain the necessary sign off.

[136] Mr. Nimmo described the process as beginning with Real Estate identifying land for potential sales. Real Estate would then see if that land had already been declared surplus. If not, Real Estate would determine if it was abandoned. If it was not abandoned, Real Estate would gather together the attributes of the land, so that people could have a conversation using that information. Real Estate would then refer this to Operations, who would liaise with interested parties. Operations would then sign off on it being surplus or not. If it was surplus, there would be numerous signatures that had to be obtained. If Operations did not sign off, then there would be discussion of things that could be done to make it surplus.

[137] According to Mr. Nimmo, originally Real Estate would hear informally of lands that were available for sale and then, after reviewing them and identifying them, they would approach Operations to release the land. Later, they were directed to approach the issue more proactively, to see if pieces of land could be made surplus to operations on an ongoing basis.

[138] Mr. Nimmo testified that some tension existed between Real Estate and Operations on the issue of surplus: Operations generally wanted to hold on to land, while Real Estate wanted to sell the land to obtain cash for underused or unused assets.

[139] Mr. Walsh stated that, in order to avoid any adverse impact on operating or commercial activities at CPR, any potential assets for sale identified by Real Estate had to go through this process. Real Estate would initiate the process, but it could not itself determine the assets available for sale.

[140] Mr. Hyder, Mr. Nimmo and Mr. Campbell, the then Assistant Vice President of Operations Planning, all testified that the Real Estate group had no ability to declare land surplus and emphasized the importance of the surplussing process to CPR.

[141] Mr. Salmond, the then Manager of Rail Network Capacity, acknowledged that he never saw a copy of the formal process flow chart prior to this litigation. He also acknowledged that the Network Capacity group ("Network Capacity") was not listed as part of the surplus process, even though it was very involved in surplus decisions.

[142] Mr. Salmond explained that he provided his feedback on surplussing decisions through e-mails. He said that while the formal process lists a requirement to send a Surplus Land Form, he

would just get an e-mail request from Real Estate. He does not recall ever ticking a box on a form or sending a form. He understood the language "send SLF form" in the formal surplussing process to simply mean an e-mail that was sent from Real Estate to his department and other departments.

[143] Mr. Salmond testified that surplussing decisions involved Network Capacity, and that he was the person who signed off on those decisions for Network Capacity. He said that if Network Capacity was not certain about how the land was being used, they would consult with Operations or the Community Development Group. He said that the surplus process applied to both tracks and infrastructure.

[144] Mr. Campbell explained that the land surplus process could not be overruled by anyone at CPR; the core purpose of the company is to move freight, not sell the land under their feet. If the land was required, Mr. Campbell could refuse to sell it, and that would be the end of it.

[145] Mr. Campbell said that he was a gatekeeper to the surplussing process in 2002. He also acknowledged, however, that he did not play this role in relation to either the 9th Ave Lands or the Interlink Lands, not being aware of the agreements to sell those lands until years later.

[146] In its evidence at trial, CPR did not provide any examples of surplussing decisions made in accordance with the 2003 formal process (except for the unsigned documents related to the 10th Ave Lands, discussed below). They did not, for example, provide the Court with a signed Surplus Land Form or a declaration that land was made surplus for either the 9th Ave or Interlink Lands, or with respect to the 10th Ave Lands after their sale to the Province. It did not provide any examples of the numerous signatures that, according to Mr. Nimmo, would normally be obtained for land to be declared surplus.

[147] Indeed, while all CPR witnesses acknowledged that the 9th Ave Lands were sold to Remington in 2002 without any surplussing conditions, the lands had tracks and trains on them for a considerable period following the sale. Contemporaneous documents, discussed further below, indicate that in early 2003 CPR was still considering what to do with G Yard, which was located on the 9th Ave Lands.

[148] Viewed in its entirety, what this evidence reveals is that CPR had an internal policy that lands ought to be retained if they were not surplus, and that Operations and related departments were to be consulted and to sign off on a determination that lands were surplus. Real Estate did not have the power to unilaterally sell lands or infrastructure. The process set out in the 2003 flow chart was, however, more what CPR aimed to do, rather than what it did do. The actual process of determining that land was surplus could – and did – proceed less formally, so long as the relevant parties were consulted and involved in the decision.

[149] I reach this conclusion in part because of the absence of evidence showing that CPR followed this sort of formal process for the 9th Ave Lands, the Interlink Lands or – when they were eventually sold – the 10th Ave Lands. Further, I rely on Mr. Salmond's evidence that they dealt with surplussing through e-mails, providing information in that way, rather than through filling in the forms referred to in the process chart. I also note Mr. Salmond's evidence that he had never seen the process chart prior to this litigation, and that there was no CPR policy with respect to the definition of surplus. I also rely on Mr. Campbell's testimony that, while he was a "gatekeeper" in the surplus process in both 2002 and 2006, he did not know about the Interlink or 9th Ave Agreements until much later. Finally, I note that Network Capacity, which Mr.

Salmond's evidence showed was crucial for surplussing decisions, was not listed as part of the surplus process in the flowchart.

[150] In sum, the thrust of the CPR evidence was that there was a consultation process for making surplussing decisions, that it crucially involved both Operations and Network Capacity, but that it was not necessarily the formal process set out in the 2003 CPR flow chart.

The Definition of Surplus

[151] The surplus process document did not define the meaning of surplus land. Mr. Salmond confirmed that, to his knowledge, CPR did not have any policy defining the meaning of "surplus" or which established the criteria to be taken into account in making a surplussing decision. No such policy was provided to the Court. Mr. Salmond also confirmed that he did not receive any specific training on when an asset could be declared surplus.

[152] Mr. Salmond said that he made surplussing decisions based on his own experience, which he used to determine whether land was required for operations to continue, and what would be required for operations to continue in the future. In his experience, while sometimes errors were made, and land was sold when it ought not to have been, in general land was not sold where doing so could compromise railway operations then or in the future.

[153] Mr. Salmond said that one indicator of whether land was surplus was whether or not it had tracks on it; he said that CPR did not generally have tracks on land that was not being used. If land was not being used, they would generally remove them. If tracks were on the land, the party making the surplussing decision would need to know why they were there and what the land was being used for prior to signing off on the lands being declared surplus. They would have to make sure that an alternative was available.

[154] Mr. Salmond acknowledged, however, that tracks remained in G Yard on the 9th Ave. Lands after those lands were sold to Remington, which was confirmed in an e-mail he sent to Mr. Lee Berry (and others) on March 7, 2003, and in his risk assessment dated May 9, 2003. Mr. Berry was the Director of Network Capacity from 2002.

[155] Mr. Salmond also said that they would take into account legal and regulatory obligations when determining whether land was surplus.

[156] Mr. Walsh said that not surplus meant that the property was in use – B Yard was not surplus because it was an active yard. Mr. Walsh did not know if there were written policies and procedures in relation to declaring land surplus.

[157] Mr. Nimmo testified that surplus meant something that was not required for the operations of the railway. Similarly, Mr. Campbell said that ensuring the continuity of the railway's operations over time was the framework within which surplussing decisions were made; they would look at what was needed in terms of current and future demands, look at the business and whether it could be moved, and then they would determine whether or not it was truly surplus.

[158] In an e-mail exchange in February and March 2004, CPR employees discussed what ought to be done with B Yard, and whether it was possible to come up with a solution to allow them to accept the Remington offer – "a cash offer on table for some or all of that property". While not expressly discussing the meaning of "surplus", the e-mail exchange shows that, in deciding whether land could be sold, the various groups in CPR were concerned with three

questions: 1) the ability to maintain operational effectiveness and efficiency; 2) the costs associated with moving or relocating railway operations; and 3) the ability to maximize "value from assets so we finance needed initiatives". Mr. Berry said:

> The reality is that as the East Village and the Stampede continue to develop, there is going to be more and more pressure from the City to minimize our footprint in the downtown area. This is the same city that we're trying to stay onside with as they are helping us in other areas (e.g. Shepard.) Sooner or later, those tracks are going to have to go and we should make sure we have a clear plan of the impact of losing them and what, if any, alternatives are available.
>
> Bottom line is that regardless of the Operational value of those track, the need for cash and political pressure will eventually force us out. So, let's get prepared.
>
> Right now there is a cash offer on the table for some or all of that property. We need to articulate WHY we should refuse that cash and WHY all those tracks need to be retained and WHY that activity can't be relocated elsewhere. Just saying "No" isn't sufficient.
>
> Let's get together with Ike and work on this before the Company's need for cash outweighs your Operational concerns.

[159] Mr. Zacharopoulos perhaps put the factors involved in the decision most succinctly when he said, in an e-mail dated February 25, 2004:

> Gord, our infrastructure shortcomings is well understood ... ***we will not jeopardize operating requirements. We want to look for opportunities to improve them while maximizing value from assets*** so we finance needed initiatives such as Shepard & Ellerslie ... Since we didn't have a full compliment [sic] last Monday suggest we get together in GCS (since plans & files are there) first part of March and review options & opportunities. When can you find some time for this? [emphasis added; ellipsis in original]

[160] In his review of the risks associated with relocating B Yard, discussed below, Mr. Salmond focussed on operational impacts; however, he also noted in that review, and in his testimony, that a cost-benefit analysis was relevant to a decision with respect to declaring land surplus and finding operational alternatives – "if thinking of selling B yard in future, ensure representation of all stakeholders in decision (cost/benefit analysis)".

[161] In his evidence, Mr. Campbell similarly noted that surplussing decisions would be based on operational needs, the ability to meet those elsewhere, and the expenses associated with moving the operations. They would consider the business case – namely the costs and benefits associated with a move in operations, along with operating issues related to client service and future earnings. In effect, Mr. Campbell testified that CPR performed a cost-benefit analysis, taking into account the cost of moving operations like B Yard, and the impact on revenue of doing so.

[162] Mr. Campbell did add, however, that in general CPR would only relocate operations where they had direct government investment to provide replacement capacity elsewhere.

[163] Mr. Younger, CPR's Public Works Manager, similarly testified that, in assessing whether operations could be relocated, CPR would assess the cost and benefits of doing so, including

revenue that could be received from the sale of the land, and operational impacts, including public safety, convenience and regulation.

[164] Based on this evidence, I am satisfied that within CPR "surplus" meant that, on a cost-benefit basis, it had been determined that lands were no longer necessary for operational requirements. As explained by Mr. Zacharopoulos, CPR would not take steps that imposed an undue cost on operations – it looked for "opportunities to improve them" while also maximizing the value of its assets.

Did CPR Determine that B Yard was Surplus Prior to November 2004?

[165] Neither party produced any documents from prior to 2004 explicitly stating whether CPR had determined that B Yard was surplus or not.

[166] All of the CPR witnesses maintained that the 10th Ave Lands were not surplus at the time that the parties entered into the 10th Ave Agreement and did not become surplus at any time prior to CPR entering into the contract with Remington. In their view, the 10th Ave Lands only became surplus when B Yard moved to Manchester in 2010-11.

[167] The CPR witnesses' evidence in this respect suffered, however, from certain difficulties. First, the witnesses' responses used similar if not identical language to say "the lands were not surplus" and their answers had a rote quality – asserting that the lands were not surplus without, except when pushed on cross-examination, engaging with the complexity of the question: what does it mean for land to become surplus?

[168] As a result, the testamentary evidence of the witnesses is not especially helpful to my analysis, and the documentary evidence does not yield an easy or obvious answer to the question. Having said that, a careful review of the documentary evidence shows that CPR assessed whether the 10th Ave Lands were "surplus" prior to 2004 and made a determination at that point in time that the lands were surplus.

[169] In reviewing this evidence to answer the question, "Did CPR Determine that B Yard was surplus", I am considering that evidence both in relation to CPR's definition of "surplus" and in relation to CPR's process for determining whether lands are surplus. Whether, definitionally, CPR had in substance decided that the benefits of selling the 10th Ave Lands outweighed the costs of relocating B Yard, taking into account both direct costs (of removing and relocating track) and indirect costs (operational efficiency and effectiveness effects arising from the relocation of B yard). And whether, procedurally, CPR had reviewed, consulted about, considered and determined that the 10th Ave Lands were surplus.

[170] The point of this review ultimately is to assess whether it was plausible, in light of what had been said and done internally at CPR to that point, for someone in Real Estate to understand that they had a basis for taking the steps that would, contractually, declare the 10th Ave Lands surplus. That, substantively and procedurally, it was reasonable for someone in Real Estate to understand that CPR had determined that the 10th Ave Lands were surplus to operating requirements, so that the lands could be identified, surveyed and included in a tentative plan of subdivision.

Evidence at or prior to 2002

[171] As noted earlier, a 2001 review of the B Yard Lands by IBI began by stating, "Canadian Pacific Railway has identified lands surplus to operational requirements in the East Downtown Marshalling yard, and intends to move forward with subdivision of this land".

[172] The property information summary from September 2002 referenced the need for an alternative location for B Yard, with that being tentatively scheduled for the end of 2003. It also said the actual depth and area of the land was to be determined based on how many tracks CPR removed, with the cost of removal yet to be determined.

[173] While none of the CPR witnesses had knowledge of this document, or had prepared it, CPR produced a "Surplus Land Form" dated March 24, 2000 which dealt with "Mile 175.2 Brooks Subdivision". It further described the lands as including "G yard and Interlink site". It described the land as including 18.25 acres +/-. The form said that the G tracks and runaround track were to be "relocated to Ogden prior to dismantle". Mr. Salmond testified that some of the tracks listed in the document were in G Yard, and some were in B Yard.

[174] The Surplus Land Form further said that the land "as indicated by hatchmarks on the plan attached is surplus to operating requirements and available for sale". It said that if there was no objection, then approval was to be indicated "by returning this form from your Merlin/Notes ID to LAN0208 using the 'Approved' pass-on". It said that if there was an objection, then comments were to be provided "in the same fashion and time frame as the preceding". The Form had a line for the signature of the "Manager, Real Estate Support", but was unsigned.

[175] While, similarly, none of the CPR witnesses had prior knowledge of this document, CPR also provided a Surplus Land Inventory Sheet dated November 26, 2002 covering Brooks, Mileage 174.5-175.5. It was a 21.793 acre parcel, more or less, said to be described on an attached Schedule A, except no such Schedule was attached. It identified the present use as 17.198 acres of vacant land, and 4.595 acres of leased land.

[176] The evidence suggested that both the Surplus Land Form and the Surplus Land Inventory Sheet related to all or part of the B Yard Lands, including the 10th Ave Lands. The effect of those documents is, however, far from clear. They suggest that CPR had begun to turn its mind to the question of whether the 10th Ave Lands could be declared surplus. They do not, in and of themselves, show that the 10th Ave Lands had been declared surplus prior to 2002.

[177] In his testimony, Mr. Nimmo noted that to support a declaration that land was surplus, there would need to be an approval attached, and that normally a Surplus Land Form should have more pages, and a Surplus Land Inventory Sheet should have an associated Surplus Land Form. That is, Mr. Nimmo pointed out that the Surplus Land Form was unsigned and had no supporting approval; the Surplus Land Inventory Sheet had no Surplus Land Form associated with it (insofar as it was dated 2002, and the Land Form was dated 2000).

[178] The Sales Approval Request and memo provided by Mr. Nimmo to Mr. Walsh with respect to the three contracts, summarized earlier, make it clear that the 10th Ave Lands were viewed as not yet surplus, with a cost of track removal having been identified as $500,000, but a significant potential upside arising from the 10th Ave Agreement.

[179] In my view this Sales Approval Request memorandum shows that, whatever impression they may have given to Remington at the time of the Agreement, and despite the unsigned

Surplus Land Inventory Sheet and Sales Approval Form, the information internal to CPR was that the 10th Ave Lands had not yet been declared surplus as of November 2002.

[180] Remington pointed out that Real Estate generated a sales activity report each year, and did so for January 1-December 31, 2002, on January 21, 2003. In that sales activity report, Real Estate listed the transactions with Remington as status "2", which is surplus lands, "offers accepted with conditions". Given the weight of the other evidence, this accounting document is insufficient to show that at the time of the Remington sale, CPR had determined the 10th Ave Lands to be surplus.

[181] In sum, at the time the parties entered into the 10th Ave Agreement, CPR had begun to take steps to declare the 10th Ave Lands surplus, and anticipated that the lands would be determined to be surplus in the near future, but it had not yet declared the lands to be surplus.

Evidence November 2002-November 2004

[182] In March 2003, Real Estate, Network Capacity and Operations discussed the issues associated with the sale of the 9th Ave and 10th Ave Lands. The e-mails suggest that, while the 9th Ave Lands had been sold, how to move the operations from G Yard had not been fully resolved.

[183] In an e-mail to Mr. Berry dated March 7, 2003, Mr. Hugh Robinson of CPR noted that Real Estate had "obtained necessary sign-offs" with respect to the sale of G Yard and the elimination of track. He said that he did not know who had signed off and was concerned with "what exactly was being contemplated"; he noted that Real Estate had costed the removal of tracks, but that "we must be clear that it is not RE that decides which one will be implemented". He suggested that a risk assessment ought to be completed.

[184] On March 7, 2003, Mr. Salmond responded, noting that that they did not have a "current track plan" for the track from 8th Street East to the depot, "including G & B yards". He said that a long term track plan was necessary, taking into account spans across the Elbow, dealing with the "turnouts on curves" and resolving "the issue of the Rocky Mountaineer". He said, "There is some urgency to get this done so that RE can get on with selling the surplus land".

[185] On March 25, 2003, Mr. Robinson responded requesting approval to spend $2000 "to gather information and put together a plan to allow for the appropriate operational risk assessment".

[186] Having presumably received the necessary approvals, Mr. Salmond completed a "Level 2 Risk Assessment" on the "Calgary G & B Yards – Land Sales", which he put into a written report dated May 9, 2003. The Risk Assessment covered 3 tracts of land, G Yard (i.e., the 9th Ave Lands), B Yard "South Side Phase 1" (Interlink Lands), and the B Yard "South Side Phase 2" (10th Ave Lands).

[187] The assessment indicated, with respect to Phase 2, the 10th Ave Lands, that additional property would be sold on B Yard, retaining sufficient property "at east end to permit additional spans over Elbow River on approximate alignment as shown in plan". All "remaining tracks in B Yard with the exception of B3" were to be removed.

[188] Mr. Salmond explained that the purpose of a Level 2 assessment was to identify risks associated with changes to operations. The assessment identified receptors that needed to be considered which, in this case, included issues related to employee safety, public safety, environment, service and productivity, financials, and reputation.

[189] The potential issues identified with respect to the 10th Ave Lands included risks of increased trespassing, conflict between trains and public infrastructure, yard congestion, public noise complaints, and risks to the public from rail accidents. The assessment assessed risks on a matrix with likelihood/frequency on one axis, and severity on the other. It also assessed available mitigation strategies, with the merits of a strategy being assessed in light of the risk – for example, they would not necessarily mitigate a low likelihood/low severity risk.

[190] The most significant risks identified with respect to B yard were in relation to yard congestion (12-15), which was almost certain to happen and was viewed as severe; it was a risk that would have to be mitigated for the project to go ahead. Other material risks included risks of collision between a train and trespasser, and reduced revenue or increased operating costs (12). For the more significant risks the mitigation strategy identified was not to sell B Yard, if selling it in the future, to "ensure representation of all stakeholders in decision in cost/benefit analysis" or relocating B Yard Capacity.

[191] Mr. Salmond's assessment considered ameliorating yard congestion by building a "Connetix facility' which is a facility where they can transload shipments between a truck and a railcar. In his testimony, however, Mr. Salmond explained that a Connetix facility would involve steps that were time consuming and expensive, and there was no facility sufficient to do it.

[192] In an e-mail dated May 12, 2003 with respect to the risk assessment, Mr. Salmond said that there were no significant issues with the lands that had been sold, but that there were issues with the sale of the remaining lands that would need to be mitigated:

> Based on the results of the review, there are no significant issues regarding the removal of trackage from lands already sold that cannot be relatively easily mitigated. Where mitigation of potential issues in this regard was discussed, the project sponsor (Nestor Lando) and Matt Foot (Project Engineering) have the responsibility to ensure that this mitigation is included in the project plan to remove the subject trackage.
>
> Significant issues were raised regarding the potential future sale of the remainder of B Yard land. Significant mitigation strategies were discussed, up to and including not selling this portion of land, and retaining it for current and possible future rail uses.

[193] A follow up e-mail dated June 9, 2003 noted that only two comments were received, and that no changes were required.

[194] On June 25, 2003, Mr. Ed Dodge of CPR wrote an e-mail to John Walsh raising a concern about having a street across the CPR right of way as part of the sale. He wanted to confirm whether that was the case. Mr. Walsh responded,

> Ed/Mike - the lands involved in a sale to Remington Properties last year involved two major surplus parcels of land. The first site is a strip of land fronting on 9th and is approximately 2200' in length by 150' at the deepest width narrowing to 66' near the Elbow River bridge. The future uses for this property will be service/commercial. The other site is the old CPET site on 10th is roughly 14 acres in size, with the future uses being mixed use development. The purchaser is very aware of the adjacency to our operating environment. With respect to a road crossing our ROW, I can confirm there is no basis for that rumour. If there is to be

> a future crossing, it would likely come in the form of an underpass similar to all other underpasses that connect 9th and 10th Streets in Calgary. Hope that answers your questions.

[195] In cross-examination Mr. Walsh asserted that Mr. Dodge's question was about air rights because it was so impossible that there could be a roadway across the tracks that no one would ask whether one was being contemplated; however, Mr. Dodge's question refers to "having a connecting street". Mr. Walsh's response refers to a "road crossing" in contrast to an underpass; he does not contrast an underpass to an overpass. This was, in my view, an example of Mr. Walsh's tendency to advocate in his testimony.

[196] Mr. Walsh testified generally that he was aware that CPR was looking to find an alternate site for B Yard. He wasn't closely attached to that process but was aware that Operations looked at a couple of alternate sites. He was not closely involved in the efforts to find a replacement for B Yard.

[197] The B Yard issue came up again in November 7, 2003, when Mr. Zacharopolous sent an e-mail to Mr. Salmond, Mr. Hyder and others noting that they had a meeting "to review CPR's potential options at B-yard". The e-mail identified the "take-aways" from the meeting, which related to a range of issues but included addressing the Rocky Mountaineer storage and land acquisition. In a response from the same day Mr. Heron noted with respect to Rocky Mountaineer that they had been "hoping that the whole issue would go away", and that it was important to have a consistent message to them. Mr. Heron said, "We also need to be consistent with what RMR will find out from the developer and from the City". He noted that CPR needed by contract to provide storage to RMR through 2008.

[198] Mr. Zacharopoulos's e-mail, which was sent at 6:16pm, may have in part been a response to an e-mail sent by Mr. Hyder at 11:13am, also on November 7, 2003. Mr. Hyder set out "potential revenues and costs for the Remington sale on Tenth Ave. depending upon the depth of the site". He noted that "the more depth we sell the higher the proceeds" but that an increased depth would also increase the cost of replacement rail. Mr. Hyder noted,

> Perhaps the answer is not purely economic but depends on CP's requirements over the long term for duplication, maintenance, safety, buffering and future considerations about LRT sharing the right of way, etc. What is the right of way width under Palliser Square and Gulf Canada Square?? Should that be the minimum width for East Calgary??

[199] Mr. Hyder included a spreadsheet setting out the price costs and net proceeds from the "Current" sale of 104 feet, the "Extended" sale of 130 feet, and the "Maximum" sale of 150 feet. Because of relocation costs, the "Current" sale scenario had the highest potential financial upside, only requiring the relocation of 3 tracks.

[200] Mr. Salmond testified that he did not know where Mr. Hyder obtained the estimates for track removal. He also said that he did not think it was practical to split up tracks in the way suggested by Mr. Hyder's e-mail; B Yard needed to be kept as a whole.

[201] The next mention of B Yard was in February, 2004, when Mr. Hyder sent an e-mail dated February 13, 2004 to Mr. Zacharopoulos, Mr. Nimmo's successor in Real Estate, responding to questions that "required review". In response to the question of whether CPR can "abort the sale if it decides that it cannot make additional land surplus??" Mr. Hyder cited and quoted Article

2.02. In response to the question, “Is there a minimum amount of land that CP must include in the sale” Mr. Hyder quoted Article 6.05. Mr. Hyder explained that Mr. Zacharopoulos was fairly new to his position and was not familiar with the background for the sales.

[202] Shortly after Mr. Hyder’s e-mail to Mr. Zacharopoulos, CPR employees from Real Estate, Operations and Network Capacity had a long e-mail discussion about the 10th Ave Lands. The discussion started with an e-mail, dated February 24, 2004, from Mr. Gordon Johnson, then service area manager for Operations, to Mr. Berry, and was copied to several others. Mr. Johnson’s e-mail had no content, just the subject line “B Yard and the cleaning tracks at Alyth cannot be for sale!!!!!”.

[203] Mr. Berry responded in the e-mail quoted earlier that this was not a viable long-term position given the location of the tracks in the City, and the need to maintain positive political relations with the City. Ultimately, he suggested, it was necessary to prepare and plan for the eventuality that B Yard would have to go, and that CPR should not turn down a cash offer for the lands without a good reason.

[204] Mr. Salmond testified that he was not sure what triggered Mr. Johnson’s initial e-mail, although he speculated that, with the sale of the 9th Ave and Interlink Lands, the possibility that the 10th Ave Lands would be sold had filtered down to people in Operations.

[205] Mr. Zacharopoulos replied to Mr. Berry and Mr. Johnson on February 25, 2004, noting that Mr. Berry’s message was in line with his own proposal at an earlier meeting. Mr. Zacharopoulos said to Mr. Johnson that the infrastructure shortcomings were “well understood” and that Real Estate would not “jeopardize operating requirements”. Mr. Zacharopoulos said that the goal was to improve operations “while maximizing value from assets so we finance needed initiatives such as Shepard and Ellerslie”. He suggested that they should get together in early March to “review options and opportunities”.

[206] Mr. Franczak, the Vice-President of Operations, responded that while the “land play” was understood, “no one has identified to me the specific part of the operation that will be impacted by this and what workaround we might be able to develop to get around this”. Mr. Franczak suggested that Mr. Johnson’s team “needs to do this quickly and get back to us on this”.

[207] Further e-mails identified the significance and importance of B Yard, and the extent of the operations taking place there; on February 28, 2004 Mr. Franczak said, “It would seem to me that unless we were to get capacity to replace this somewhere right close to Alyth, all best [sic] on selling this land are off. Other suggestions??”.

[208] Mr. Berry responded, “we have to look at this in more depth before we’ll have any credibility in saying that it can’t be done.”. He then listed specific questions that needed to be addressed:

> 1 - is having 79 cars for these customers at one time normal or is this an abnormal surge
>
> 2 - what can be done from a commercial perspective to limit the amount of cars
>
> 3 - are these customers here for the long term or are they in a declining traffic mode
>
> 4 - is all the land currently needed or can a portion of the tracks be released now

> 5 - what amount of replacement infrastructure is needed
>
> 6 - is there another manageable location for this infrastructure (Ogden Park once the autos are moved to Shepard?)
>
> 7 - what's the cost of this new infrastructure (if another location is feasible)
>
> 8 - what would be the change in Operating cost from a new location
>
> etc ...
>
> Doing a thorough analysis of this to show we've done our 'due diligence' will enable us to respond clearly and effectively to others within the Company and to the City and/or the province when they ask us to leave B Yard.
>
> If it's okay with you, my team will lead the analysis and put the pieces together but will require engagement from your team.

[209] Mr. Franczak responded, “fair enough”, and suggested Mr. Berry should lead the review. Mr. Franczak emphasized though that they had to have meaningful responses to the questions Mr. Berry had asked and couldn’t accept “a lot of ‘you gotta believes’”.

[210] Mr. Zacharopoulos in turn responded, in an e-mail dated March 1, 2004,

> Guys, we’re on-board and committed to working with you on finding a win situation for CPR – that’s what this is all about. We don’t want to eliminate this opportunity without a good analysis of what our needs and options are – both now and in the foreseeable future.

[211] Following the e-mail exchange between the various CPR employees, Mr. Salmond reviewed options to relocate B Yard.

[212] Mr. Salmond’s task, as he understood it, was to review whether there was another manageable location for B Yard. He considered land either owned by CPR, or that CPR could acquire. He identified a variety of options, some of which required the cooperation of third-parties, and some of which were not desirable from an operational point of view, largely because they were too far away from Alyth or had other issues. Mr. Salmond testified that on closer look it became apparent that there were issues with some of the options he identified, in particular moving B Yard to Q Yard.

[213] In his March 25, 2004 summary of his review to Mr. Schumacher and Mr. Johnson, Mr. Salmond stated:

> I've put a few notes together about our review last Friday of potential alternate sites for track capacity in the terminal area. These could be used to replace any capacity that may be lost in the future from B Yard. An assumption is that any move from B Yard would be part of a larger vision by the City of Calgary for redevelopment of this area, and they would assist, if necessary, in making some City owned property available elsewhere.
>
> I've listed the sites in the order of priority that we discussed, with priority being determined by how a new site would impact your operating efficiency. You indicated that either of the first 3 options could be made to work without

> significantly impacting existing operations. Please advise if I've missed anything we discussed, or if you have had any other thoughts since last week…

[214] With respect to Ogden in particular Mr. Salmond said,

> 3. Additional tracks at Ogden Park. 5 additional tracks could be added at Ogden Park, adjacent to those that were constructed in the fall of 2002. Would require providing Alstom alternate storage tracks on the property leased from us. Have checked, and would not be an issue to reclaim the land required from Alstom, provided they got replacement track capacity elsewhere on the Ogden property. In the event that the auto compound were to be relocated to the Shepard area, the existing track capacity at Ogden Park could be utilized instead.

[215] Mr. Salmond then sent a further e-mail to Mr. Zacharopoulos, who had asked if he was "correct in understanding that any of these options provide for sufficient trackage to replace B Yard", and about timing of the move, saying:

> ***Ike, there has been no discussion with the Service Area on timing - they are content to remain in B Yard until required to move***.
>
> All options would appear to provide the opportunity to construct sufficient capacity to replace what's at B yard now.
>
> Options 1 and 2, however, would require negotiations with the City and others, and some design work, to confirm.
>
> The other options we could proceed with more or less on our own. ***However, of these, only Option 3 [Ogden] is recommended as a replacement for B yard that is relatively neutral to the Service Area. In terms of timeline for Option 3, I'd suggest the earliest would be design and possibly grading in 2004, and track construction in the first half of 2005, assuming there is a budget to do the work***.
>
> I suggest we convene a short meeting to discuss next steps relative to B yard. I'll send an invitation for early next week [emphasis added].

[216] Mr. Hyder understood that Mr. Salmond was recommending option 3, additional tracks at Ogden. He also agreed that the e-mail suggests that this could be constructed by the first half of 2005, assuming there is a budget to do the work.

[217] In his testimony Mr. Salmond noted that Ogden was the only track that did not require the significant expense of an additional assignment. He said that it would be operationally neutral by virtue of not having to move the switching operation of B Yard into Alyth.

[218] He explained that to move B Yard to Ogden would have been possible if the auto compound at Ogden were relocated, and the tracks upgraded. In addition, it would have been possible to move a railway equipment manufacturer who leased space at Ogden (Alstom), and upgrade the tracks. Mr. Salmond did note that Ogden was an inferior location operationally relative to B Yard.

[219] On May 31, 2004, Mr. Kowalchuk of CPR wrote an e-mail cc'd to Mr. Salmond with respect to Cargill. It noted that Cargill was looking for alternative locations, although they expected Cargill "to be in operation for another 3-5 years at minimum at current site". The e-mail said that our "plans around B yard should have that in mind". It noted that "we don't want

Cargill to get the feeling we are happy or getting excited they are planning another alternative to current site especially as it turns out might save CPR relocation money for B yard, or at least lessen the scope of what needs to be relocated".

[220] Around this time, Mr. Lando of CPR asked Mr. Salmond what customers were serviced through B Yard, and how many cars go to each customer. Mr. Salmond responded on June 7, 2004 that "the Service Area agreed to review and get back to us on what they require to service the customers if B yard were not there. This is probably better than a list of customers".

[221] On August 25, 2004, Mr. Hyder authorized Remington to act as an agent for CPR in the "subdivision and redistricting application process when surveying and subdividing the railway lands involved in the proposed sale to Remington Development Corporation at Tenth Avenue and Fourth Street S.E. in Calgary".

[222] In September 2004, CPR had conversations with the City with respect to the construction of the 4th Street SE underpass. In internal e-mails, Mr. Salmond noted that one of the issues that needed to be dealt with was "Relocation of B Yard and closure of 30th Avenue". The closure of 30th Avenue related to the possibility of moving B yard to Manchester. Mr. Salmond understood that the City wanted to relocate B Yard so that they wouldn't have to go under any more tracks than necessary. He said that this was just an exploratory meeting; CPR was prepared to give up the tracks where 4th Street SE is, but they then needed to have that track capacity elsewhere.

[223] On September 24, 2004, Mr. Hyder wrote to Mr. Zacharopoulos setting out the capital requirements for 2005. This included $500,000 in track replacement for the 10th Ave Lands. Mr. Hyder testified that he understood these expenses might be incurred in 2005.

[224] On November 18, 2004, Mr. Hyder advised Mr. Cooper that he had given Brian Wetter authority to act as CPR's agent for the subdivision application. As noted earlier, he said in the e-mail that "My only concern is that CP operations has not given final approval to remove all of the tracks to leave just four main line tracks".

[225] On November 24, 2004, the first subdivision application was submitted by IBI.

[226] This evidence suggests that, prior to November 2004, CPR had determined that the closure of B Yard was inevitable given the movement of the City and the City's priorities, and that it was important to take steps for moving B Yard in anticipation of that inevitability. It also shows that Network Capacity had explored a number of alternatives for relocating B Yard, and had recommended Ogden as operationally feasible and within CPR's control to accomplish. Mr. Hyder had also identified a tentative cost for track replacement, a cost significantly less than the purchase price to be paid by Remington for the 10th Ave Lands, particularly in light of the Participation Agreement. Mr. Hyder testified that he understood that this was a cost to be incurred in 2005. He has identified this as a capital requirement to Mr. Zacharopoulos.

[227] CPR had not, however, taken any practical steps to implement that alternative, and Operations remained where they were pending being "required to move". Real Estate remained uncertain whether parts of B Yard would remain after the sale to Remington – whether "all of the tracks" were being removed – and communicated that to Remington.

[228] In my view, while CPR continued to use B Yard, and it was possible that some tracks would remain on the site, it had effectively determined that B Yard was surplus. It had determined that B Yard needed to be relocated given the political and demographic realities of the City of Calgary, a feasible plan for relocating it had been recommended by Network Capacity

and a tentative cost of relocating materially less than Remington's purchase price had been identified.

[229] Certainly, no single document from CPR shows this analysis or reasoning. The contemporaneous record shows that different personnel within CPR viewed the desirability of moving B yard differently. There were complexities remaining with relocating B Yard, such as the relationship with Cargill. CPR had not committed to moving B Yard to Ogden and was discussing other alternatives with the City. The CPR witnesses vigorously denied that 10th Ave Lands had been declared surplus as of 2004. They all asserted in various ways that the 10th Ave lands "were not surplus" at this time, and that they never became surplus prior to 2010-11, when they moved B Yard to Manchester. Further, the documents do not show CPR making a surplus decision through a process consistent with that required by its 2003 policy document.

[230] But, as earlier noted, the evidence as a whole suggests that surplussing in practice was much less formal than that process document sets out. With respect to the CPR witnesses, they appeared to define surplus as "in use", which was not how surplus was practically defined by CPR at the time. In saying it was not surplus they consistently referenced its ongoing operational role, yet Mr. Campbell also testified that surplus decisions depended on a business case, and that until 2006 he did not know about Remington's offer to purchase or what it contained. That is, he personally lacked the information in 2004 to know whether, on a cost-benefit basis, the 10th Ave Lands were surplus or not. His suggestion now that they were not surplus was not something he could have known at the time given that he lacked a crucially relevant piece of information. Mr. Salmond also acknowledged that at the time he reviewed B Yard he did not know the price agreed to be paid for the lands by Remington; he did not know of any cost-benefit analysis that was done in relation to those lands.

[231] The CPR witnesses' answers in direct had a rote quality – "were the lands surplus at this time? No" – and when pressed in cross-examination were evasive on the definition of surplus (Mr. Salmond), gave answers that were implausible (Mr. Campbell's assertion that he had a gatekeeper role on surplussing, yet he did not know about the Remington contract until 2006), or raised overall concerns with his credibility (Mr. Hyder).

[232] The biggest issue with my conclusion that CPR declared the 10th Ave Lands surplus is that CPR took no practical steps at this time to move B Yard. What I have characterized as its effective determination that B Yard was surplus was not followed by any action to put that determination into practice. Mr. Salmond's e-mail of March 25, 2004 explains this absence of action, however: "they are content to remain in B yard until required to move". Read as a whole, and in the context of the earlier February exchange, this e-mail supports the position that CPR had determined that it could move B Yard, and that eventually it would need to do so, but Operations had no particular interest in doing so "until required". That understandable desire to put off the inevitable does not create an ongoing commitment to use B Yard so as to change my central factual conclusion that, by November 2004 when it approved the subdivision application, CPR had already determined that the "business case" for relocating B Yard had been made out – i.e., that the 10th Ave Lands were surplus.

Did CPR Determine that B Yard was Surplus Prior to November 2004?

[233] In sum, I am satisfied based on the evidence that CPR had taken the steps necessary to determine the 10th Ave Lands surplus to operational requirements prior to November 2004. That

it had done so explains why the Real Estate group identified 5.1 acres of the lands, had them surveyed, included them in a tentative plan of subdivision, and authorized its agent IBI to submit the subdivision application to the City. Real Estate did not do so for convenience while awaiting the surplus determination, but rather because doing so reflected the substance of the surplus determination that, internally, CPR had already made.

Do Communications Between CPR and Remington Negate the Effect of the 2004 Subdivision Application?

[234] Based on the analysis to this point, by surveying the land and authorizing the November 2004 subdivision application, CPR exercised its surplussing discretion under Article 2.02 of the 10th Ave Agreement. That is, as of November 2004 it had declared the portion of the 10th Ave Lands included in that application to be surplus. Further, it had done so following its internal review and identification of a feasible alternative location for B Yard.

[235] There is, however, a further evidentiary complication and barrier to this conclusion. In particular, it is arguable that other statements and assertions by CPR at that time negated the intentions otherwise revealed by that application. Specifically, the contents of the cover e-mail from Mr. Hyder, and the extension letters sent by CPR's counsel, Mr. Raby, to Remington through this period.

[236] In its brief CPR framed this as an estoppel by convention, that Remington and CPR had a mutual understanding that the lands had not been declared surplus and submitted the subdivision application on that basis.

[237] In this subsection I will review that evidence, and then assess its effect.

[238] The first evidence of note is Mr. Hyder's e-mail in relation to the application, which bears repeating in its entirety here:

> Hi Jamie - I faxed Brian a letter authorizing him to apply for subdivision on behalf of CP. My only concern is that CP operations has not given final approval to remove all of the tracks to leave just four main line tracks. He confirmed that the plan could be amended if the final configuration had to be adjusted somewhat to allow for additional tracks.

[239] Second, CPR sent the extension letters which included language saying that the Vendor had not determined that it was lawfully entitled to make an application to subdivide the land. The first letter was sent in 2003, before the subdivision application was submitted, continued in other letters sent prior to the application being submitted, but also continued in letters after the subdivision application had been submitted. Ms. Gottselig, counsel for Remington, also used this language, including in the letter sent to CPR in June 2007 to determine whether CPR was terminating the Agreement.

[240] On October 16, 2003 Mr. Raby sent the first extension letter with respect to Article 6.05. That letter stated,

> Further to our telephone conversation of October 15, 2003, we confirm our advice to you that the Vendor has yet to be able to determine that it is lawfully entitled to make application to subdivide the lands to be acquired by your client from the existing parcel and to confirm the minimum depth required pursuant to the

> provisions of Clause 6.05 of the Offer to Purchase and Interim Agreement dated November 28, 2002.
>
> Accordingly, on behalf of Canadian Pacific Railway Company, we hereby request an extension of the conditions set forth in Clause 6.05 of the said Purchase Agreement to March 15, 2004.

[241] On March 15, 2004, Mr. Raby wrote to Ms. Gottselig asking for a further extension of "the condition dates outlined in Paragraphs 6.05, 6.06 and 6.07 to April 30, 2004", and asked that she confirm her client's agreement to an extension by signing and returning a copy of the letter, which she did.

[242] On April 30, 2004, Mr. Raby wrote another extension letter, extending the conditions in Article 6.05 until August 31, 2004. He noted that "the Vendor has yet to be able to determine that it is lawfully entitled to make application to subdivide the lands to be acquired by your client from the existing parcel and to confirm the minimum depth required pursuant to the provisions of Clause 6.05 of the Offer to Purchase and Interim Agreement dated November 28, 2002".

[243] On August 31, 2004, Mr. Raby wrote a letter with identical language to the April 30, 2004 letter, extending the condition until December 15, 2004.

[244] On September 10, 2004, Ms. Gottselig wrote to Mr. Raby saying, "we understand that the parties require a further extension of the condition dates as outlined in paragraphs 5.01, 6.01, 6.02, 6.03, 6.04 and 6.06 (a) and (b) from September 15, 2004 to December 1, 2004." Mr. Raby signed the letter to indicate CPR's agreement to the extension.

[245] On June 15, 2005, after the subdivision application had been signed, Mr. Raby wrote a letter confirming "that the Vendor has not yet been able to determine that it is lawfully entitled to make application to subdivide the lands to be acquired by your client from the existing parcel and to confirm the minimum depth required pursuant to the provisions of Clause 6.05 of the Offer to Purchase and Interim Agreement dated November 28, 2002".

[246] On June 15, 2006 Mr. Raby sent a letter stating that they needed an extension pursuant to 6.05, and asking "for an extension of the conditions set forth in Clause 6.05 of the said Purchase Agreement to June 15, 2007".

[247] This evidence arguably shows that CPR did not intend for the subdivision application to be a declaration that the lands were surplus. Certainly, the CPR witnesses' testimony, and in particular Mr. Hyder's, suggested that they ought to be read that way. There are, however, some factual difficulties with doing so.

[248] First, Mr. Hyder's e-mail says that they have not been given approval for removal of *all* the tracks and suggests that the final configuration could be "adjusted somewhat". It does not communicate that the entire application was being submitted for mere efficiency, or otherwise than in compliance with the terms of the 10th Ave Agreement.

[249] In addition, Mr. Cooper testified that Mr. Hyder advised him verbally that the removal of the tracks was imminent, evidence which I accept as credible and reliable. Further, Mr. Cooper did not have information about the inner workings of surplus process at CPR and had not read the 10th Ave Agreement. He did not reply to Mr. Hyder's e-mail. Even if Mr. Hyder's e-mail could be read as CPR suggests – that is, as communicating that the 10th Ave Lands were not surplus and the subdivision application was being submitted for convenience only – it is difficult

to see how it alone could create the necessary shared assumption of fact or law between Remington and CPR to give rise to estoppel by convention: ***Ryan v Moore***, 2005 SCC 38 at para 59. And, in any event, I do not read the letter as CPR suggests. I also accept Mr. Cooper's evidence that Mr. Hyder told him that the removal of the tracks was imminent. In my view there was no shared assumption with Remington on this point which could give rise to an estoppel by convention.

[250] Second, I am not persuaded that Mr. Raby's e-mails accurately reflect CPR's intentions or understanding at that time. Notably, the language that CPR has not been "able to determine that it is lawfully entitled to make an application to subdivide the lands" is inaccurate. No one suggested at any point in this trial, or provided evidence to show, that CPR could not, as a matter of legal entitlement, bring a subdivision application. Indeed, such a suggestion would be quite problematic insofar as it would suggest that CPR had participated in a *de facto* misrepresentation to the City, having its agent file an application it was not lawfully entitled to make.

[251] In addition, the similarity of the language in the letters before and after the application was filed may suggest that Mr. Raby was simply reproducing the contents of a letter already on file to accomplish a practical purpose. Moreover, and importantly, Mr. Raby did not testify, so I do not know if he was even aware that the subdivision application had been filed when he wrote the letters.

[252] As a result, while the language of Mr. Raby's letters raised some concerns for me, I ultimately do not find them sufficient to negate CPR's intention to declare a portion of the 10th Ave Lands surplus, as evidenced by the November 2004 subdivision application.

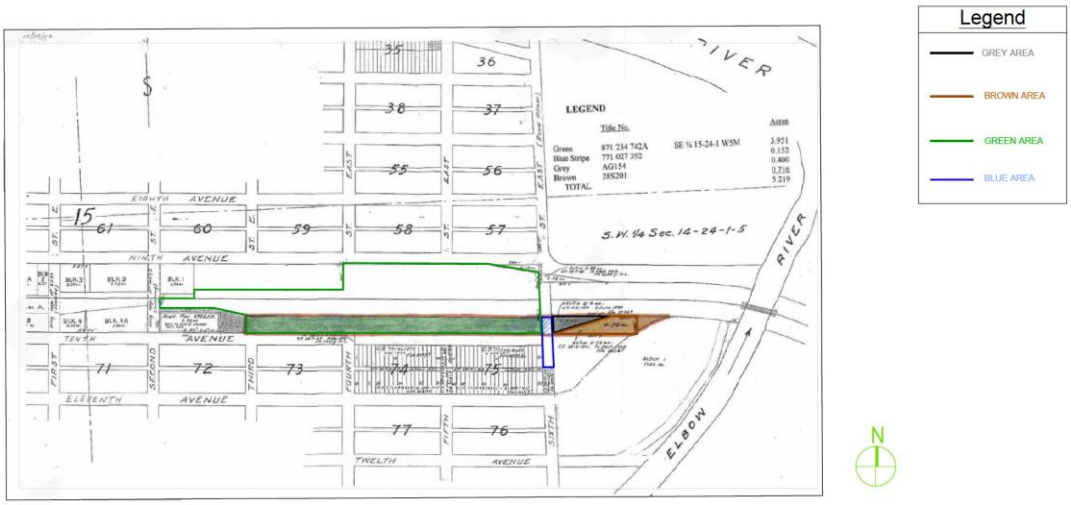
What is the effect, if any, of the subdivision applications subsequent to November 2004?

[253] Remington submits that each of the subdivision applications represents a new surplus declaration, such that the lands in dispute in this case are those included in the November 2005 application, not just the November 2004 application.

[254] I do not accept Remington's submissions in this respect. First, the 10th Ave Agreement does not explicitly contemplate multiple surplus declarations, or multiple applications for subdivision. Obviously the parties could have agreed to make an additional surplus declaration, and doing so had the potential to be mutually beneficial, giving CPR greater profit and Remington greater land. But it does not arise directly from the terms of Article 2.02 or Article 6.05.

[255] Second, the evidence around the subsequent applications does not suggest they were further surplus declarations. The parties and witnesses agreed that the second application, adding the small portion of land, was done for the purposes of the City's construction of the 4th Street Underpass. That purpose does not relate to the 10th Ave Agreement.

[256] The third application included a significant amount of land falling outside the Existing Parcel – i.e., outside the 10th Ave Agreement's scope altogether. As tracked by Mr. Romanesky, one of CPR's expert witnesses, the Existing Parcel in excess of the Subdivided Lands is outlined in green, blue and orange:



[257] As is clear from this illustration, the Existing Parcel does not include the half of Lot 5 east of 6th Street SE, that was included in the third subdivision application. I note in that respect that Article 13.03 of the 10th Ave Agreement requires amendments to the Agreement be done through a further agreement in writing.

[258] In addition, the e-mails sent by IBI, while hearsay with respect to CPR's intentions, and contested in different respects by both CPR and Remington's witnesses, make it difficult to understand the third application as an unambiguous declaration that those additional lands were surplus and available to sale for Remington. The letter says the lands "may" become surplus and notes the need for a lease back agreement for CPR.

[259] As such, I find that neither the second nor the third subdivision application created an additional surplus declaration.

Did CPR, for the purposes of the 10th Ave Agreement, declare the 10th Ave Lands surplus prior to November 2006 and, if so, what portion of the lands did it declare surplus?

[260] Based on this analysis, I conclude that for the purposes of the 10th Ave Agreement CPR declared the approximately 5.1 acres of land included in the first subdivision application to be surplus when it surveyed those lands and authorized the submission of that application.

[261] One complexity remains in this analysis, which is what to do with the Blue/Grey parcel that falls within the Existing Parcel, and that was not included in the subdivision applications, but which, based on Mr. Menzies' e-mail, was not included because it had already been subdivided. While no witness spoke to this issue, Mr. Menzies' e-mail does explain the otherwise surprising omission of those lands from any of the subdivision applications.

[262] The evidence shows that, at the time of the 10th Ave Agreement, CPR believed that none of the 10th Ave Lands were subdivided. As earlier noted, Mr. Nimmo's memo to Mr. Walsh refers to all of the 5.219 parcel as being "serviced to the lot line but not subdivided". The property information summary said of the 10th Ave Lands: "It would have to be subdivided to enable transfer".

[263] As such, even if the Blue/Grey parcel was already subdivided, it does not affect my interpretation of the 10th Ave Agreement. The Agreement was negotiated and drafted on the

premise that all of the 10th Ave Lands needed to be subdivided prior to sale, so that Article 2.02, Article 6.05 and the Opening Paragraph could operate coherently for all of them.

[264] It does, however, create a practical problem: if the Blue/Grey parcel was already subdivided, it could not be declared surplus through the process in the 10th Ave Agreement – i.e., through the subdivision application. Should it nonetheless be included within the lands contracted to be sold to Remington pursuant to the Opening Paragraph of the 10th Ave Agreement?

[265] It is arguable that the surplus declaration made by the first subdivision application ought to also include the Blue/Grey parcel, which was outlined on Schedule A to the 10th Ave Agreement and had, it seems, already been subdivided. It is also arguable, however, that lands not included in the subdivision application are necessarily not declared surplus, and are not included for sale, regardless of the reason why they are not included.

[266] The parties did not provide evidence or submissions on this point. I do not have sufficient evidence to conclude with certainty that the Blue/Grey parcel was previously subdivided, or a fair basis for assessing the implications of that fact, if true. To ensure a fair resolution, and so that the parties' submissions can be made in the context of the remainder of my reasons, I reserve my decision on whether the Blue/Grey parcel ought to be added to the 5.1 Acres of Subdivided Lands as property that ought to have been sold to Remington.

Had the other conditions of the 10th Ave Agreement been satisfied by November 2006?

[267] To close the 10th Ave Agreement the parties had to complete a number of conditions in addition to the declaration that the lands were surplus (indirectly a condition by virtue of Article 6.05) and the filing of the subdivision application.

[268] The evidence at trial showed that, as of November 2006, there were no material conditions outstanding pursuant to Articles 5 and 6 (and by incorporation Article 2.02) of the 10th Ave Agreement. Remington had done its environmental evaluation of the 10th Ave Lands along with the Interlink Lands. The parties had agreed on terms for sale of the Ogden Lands. The parties had agreed that the terms of the mortgage and participation agreement for the 10th Ave Lands would mirror those for the Interlink Lands. There were no outstanding issues in relation to any existing encumbrances on the land. The subdivision application had been brought.

[269] In addition, the City granted CPR's subdivision application with respect to the 10th Ave Lands on November 3, 2006. Judy Lupton, who in 2005-2006 was the Chief Subdivision Officer for the City of Calgary, walked the Court through the City's approval document, and was unambiguous in her evidence that the City had granted the necessary approval for the subdivision to be completed. The approval included a variety of conditions and matters that would need to be addressed as Remington progressed through the development process; however, the approval as granted was sufficient to allow the matter to proceed to Land Titles for subdivision.

[270] As a result, while the 10th Ave Agreement could not have closed on November 4, 2006 – various documents needed to be finalized, including obtaining the relevant documents from Land Titles and executing the mortgage and participation agreement – I am satisfied that there was no uncertainty with respect to whether closing would occur. As of November 3, 2006, the 10th Ave Agreement could have closed in months if not weeks.

[271] As stated by Article 3.01 of the 10th Ave Agreement:

> The closing date of the purchase and sale transaction herein shall take place within 30 days following the removal of all of the conditions outlined in Article 5 and Article 6 hereof, and receipt by the Vendor of the tentative plan of subdivision and all ancillary documentation such that the plan is in registerable form or sooner by mutual agreement of the parties (herein called the "Closing Date" or the "Closing").

Given the foregoing, did CPR breach the 10th Ave Agreement?

[272] As of November 3, 2006, CPR had thus declared at least 5.1 acres of the 10th Ave Lands to be surplus. The subdivision application had been submitted and approved. The parties had agreed to the terms for the mortgage and participation agreement. Remington had completed its environmental review. The parties could move to closing in the ordinary course, with no substantive matters outstanding.

[273] Unbeknownst to Remington, however, also by November 3, 2006, the Province had made an offer to CPR to purchase the 10th Ave Lands, an offer that Mr. Walsh generally supported, and with respect to which he had directed Mr. Hyder: "We will have to move quickly to get this deal moving ahead of the Tory Leadership Campaign".

[274] The Province became interested in the 10th Ave Lands in late spring/early summer 2006 in relation to its long term goal of building a high speed rail line between Edmonton and Calgary. It commissioned an appraisal of the lands which it received in July 2006, including the parcels of lands owned by Remington (i.e., the Interlink and 9th Ave Lands). The appraisal was provided by the Province to Mr. Hyder, and Mr. Brownlee confirmed that he had told CPR about the Province's interest in acquiring the properties. He met with Mr. Hyder to discuss the appraisal in August 2006.

[275] By September 2006, the Province and CPR were actively negotiating the Province's acquisition of the lands. Mr. Brownlee's notes indicate that he met or spoke with Mr. Hyder on August 17, 2006, with Mr. Walsh on September 8, 2006, with Mr. Hyder on September 25, 2006, with Mr. Walsh and Mr. Hyder on October 11, 2006, and with Mr. Hyder on October 19, 2006.

[276] Ms. Macdonald for the Province pointed out that Mr. Brownlee was discussing various matters with CPR, and various tracts of land; however, I note that the handwritten notes produced by Mr. Brownlee appear to relate entirely, or near entirely, to the 10th Ave Lands and air rights; I infer from that context that all these discussions were with respect to the 10th Ave Lands transaction.

[277] This inference is supported by Mr. Brownlee's substantive notes of the discussions. In relation to the September 8, 2006 discussion with Mr. Walsh, Mr. Brownlee noted, "agree to work together to 'noodle' this one out; likes the idea of 'air rights' solution". In relation to the October 11 discussion, Mr. Brownlee's noted, "CP lands + air rights – very attractive especially at 75% or [downward arrow]", and that "John would like to deal in '07 for [illegible] buy lands with [proviso] that they are aware of major devel. plans in area & will take these into consideration"

[278] Also in September, Mr. Brownlee met with Mr. Remington, Mr. Menzies, Mr. Hyder and Mr. Walsh. At that meeting, the Province expressed an interest in purchasing lands owned by Remington, which both Mr. Hyder and Mr. Remington recall being an expression of interest in purchasing the Interlink Lands. Mr. Remington told Mr. Brownlee that he was not interested in

selling. The meeting was brief. After that meeting, Mr. Brownlee testified, he and CPR focussed on reaching an agreement only involving the Province and CPR.

[279] On September 29, 2006, Mr. Brownlee sent Mr. Hyder an e-mail setting out transaction options that would facilitate the Province's plans for building high-speed rail. The options included squeezing a line along the CPR right-of-way, purchasing all of the CPR titled lands, and acquiring air rights over a portion of CPR's line along with a portion of the adjacent lands, including part of the 9th Ave Lands. Mr. Brownlee recommended a combination of acquiring adjacent land and air rights for a total purchase price of $26.06M with a ten-year lease back to CPR with two five year renewal terms.

[280] On October 22, 2006, Mr. Brownlee wrote to Dr. Thompson noting that they had had "a couple of good meeting with the folks at CPR" and that they were "now preparing a draft Memorandum of Understanding that should provide the basis of an agreement for sale". The e-mail said that "CPR have assigned a solicitor to give their 'requirements' for the sale". Mr. Brownlee's notes suggest that Mr. Hyder had told him on October 19th that a lawyer was working on a draft memorandum of understanding, and that, on October 24, 2006, Mr. Brownlee reviewed a draft Memorandum of Understanding from CPR, and had made comments.

[281] A draft memorandum of understanding from 2006 – with 2006 as the date at the signature line – shows the parties having identified what was the final purchase price for the land and air rights, $24,750,000. This version would have been written in October or November, because it refers to the "Option Lands" which, in a December 2, 2006 e-mail to Mr. Hyder, Ms. Brownlee indicated she had changed to "9th Avenue Lands," and because it was evidently amended by a later version date stamped by the Province as received on December 14, 2006.

[282] By the end of October, the negotiations between CPR and the Province had thus progressed to the point that the parties had ironed out the basics of the transaction. On November 1, 2006, Mr. Hyder wrote an e-mail to Mr. Walsh setting out the lands and air rights to be acquired, and the approximate purchase price, as well as a proposal for CPR to continue operating on the lands. In response, Mr. Walsh expressed his general approval ("I like the numbers and approach") and that they needed to move quickly on the deal. He did express some concerns with a proposal for CPR to lease back the lands, suggesting as an alternative that CPR have a right of occupation for a period of time. He also noted that Remington has "interests in the area that need to be considered".

[283] Following this exchange, on November 3, 2006, Mr. Walsh directed Remington to put the subdivision application on hold. His stated reasons at the time, which he maintained in his testimony at trial, were to pursue with the City unrelated matters of importance to CPR. I accept that was part of his motivation. But equally if not more important was putting the brakes on the subdivision application process while CPR was in the process of finalizing the transaction with the Province.

[284] In the letter that Mr. Walsh sent to the City dated November 7, 2006, which was written with the assistance of Ms. Lawrence, Mr. Walsh said, "we are currently in discussions with another party to purchase the lands identified in blue and green on the attached Schedule 2…This other offer is open until December 15th". At the time, and at trial, Mr. Walsh said this was a tactic to move the City forward, to create a sense of urgency in the City to reach the decision. In support of this characterization, I note that no evidence suggested the existence of a deadline of December 15th in CPR's dealings with the Province. Further, the Remington witnesses generally

accepted this explanation from Mr. Walsh, with only Ms. Lawrence having suspicions that CPR was in discussions with a third party, who she thought might be the Province. Mr. Remington testified that they went along with what CPR wanted because they felt they had no other choice, although he also wanted to cooperate with CPR with resolving its other issues with the City. He took at face value Mr. Walsh's representation that the reference to a third party was included only to create a sense of urgency.

[285] In actuality, CPR was in "discussions with another party to purchase the lands". The statement was true, not false. That may suggest that this reference, and the letter itself, was motivated by the fact of those discussions. The inclusion of this reference otherwise seems strange. It would be a dishonest statement to a public authority, not simply a tactic. I also do not understand what, as a tactic, the reference would have accomplished – why would the City feel any urgency because CPR was in negotiations with a third party? And, as it turns out, the City felt no such sense of urgency. If a false statement is said to be for tactical purposes, one would expect the tactic to have a plausible basis. When it does not, and when it is in fact not a false statement, it is reasonable to consider whether some other factor may have motivated it. Although it must equally be acknowledged there was also no real reason for Mr. Walsh to have included the true fact in the letter. It risked alerting Remington to what was going on, and even if true it would still have had minimal tactical utility. As such, it would be unwise to make any strong factual inferences based on the reference in the letter.

[286] More significantly, I find it impossible to ignore the close proximity of the following events: 1) CPR has a substantive offer from the Province which Mr. Walsh views as desirable to accept "quickly"; 2) the subdivision application is well under way and has, in fact, been approved; 3) Remington is working closely with the City on its redevelopment plans for Rail Town; 4) Mr. Walsh directs that the subdivision application be put on hold; 5) Mr. Walsh writes the letter to the City, references the ongoing discussions with a third party, and asks for concessions on a variety of issues.

[287] In addition, the subdivision process moving forward with Remington had the potential to create awkwardness for CPR given that it now wanted to sell the lands to the Province, not to Remington. As noted, Remington was actively engaged with the City – Mr. Remington and Ms. Lawrence met with Mayor Bronconnier on October 31, 2006, and the City, Remington and CPR had created a team to bring the Rail Town development forward. They had jointly retained a consultant, IBI, and concept plans were being circulated for Rail Town. Remington's conversations with the City were occurring on the basis that the lands were being sold to Remington, and considerable effort was being put in by Remington, and by the City, on the vision Remington had for Rail Town. Given that CPR now wanted to sell the lands to the Province, so that that vision could not be realized, it was cleaner for CPR that those conversations, at least in relation to the subdivision application, be put on hold.

[288] As such, while I accept CPR's claim that it sought to further other objectives when it sent the letter to the City, I also find that it sent the letter, and put the subdivision application on hold, because it now hoped to sell the 10th Ave Lands to the Province, rather than to Remington.

[289] By this point, CPR and the Province were exchanging draft memoranda of understanding. The October notes of Mr. Brownlee refer to having received a draft from CPR and Macleod Dixon. On November 29, 2006, Mr. Brownlee and Mr. Hyder had a telephone conversation in which, according to Mr. Brownlee's notes, Mr. Hyder communicated that Mr. Walsh was talking

only about air rights, rather than a land sale. However, Mr. Brownlee met again with Mr. Hyder and advised him, according to Mr. Brownlee's notes, that the Province "was reluctant to reduce the parcel it was purchasing; it would rework the Memorandum of Understanding and provide a draft to Mr. Hyder". In testimony, Mr. Brownlee explained that they needed to acquire land so that they would be able to access the air rights – i.e., to have access to the high speed rail station that would be at that location.

[290] Ms. Brownlee advised Mr. Hyder in an e-mail dated December 2, 2006, that she had made some amendments to the description of the lands in the draft Memorandum of Understanding (from "Option Lands" to "9th Avenue Lands") and suggesting that Mr. Hyder advise if that approach was incorrect.

[291] This was the state of affairs – that CPR had put the subdivision process on hold, and it and the Province had a substantive framework for their proposed transaction and were exchanging draft memoranda of understanding – as of December 3, 2006.

[292] CPR then asked Remington representatives to attend a meeting at the CPR offices on or about December 4, 2006.

[293] Mr. Remington, Mr. Menzies and Ms. Lawrence attended the meeting for Remington. Mr. Walsh and Mr. Hyder represented CPR. Mr. Brownlee and his wife attended the meeting. Neither Mr. Brownlee nor the CPR employees recall whether Mr. Brownlee was at this meeting; however, I accept the evidence of Mr. Menzies, Ms. Lawrence and Mr. Remington that Mr. Brownlee and Ms. Brownlee were there.

[294] At the meeting, Mr. Walsh told Remington that CPR believed that it had no ongoing obligations under the Agreement because the lands were not surplus, that it could sell the land to anyone it wanted, that it had agreed to sell the lands to the Province, and that Mr. Remington should "get over it".

[295] In describing the meeting this way, I rely on the testimony of both Mr. Remington and Mr. Walsh, who were to a material extent consistent in their accounts of what took place. I accept Mr. Remington's more complete account as accurate, and as corroborated in its essential details by the testimony of Mr. Walsh.

[296] Mr. Remington said,

> We sat, and Mr. Walsh said, I have -- something to the effect, I've got some – some bad news. We've decided that we're going to sell the lands to the Province. It's in our discretion who we can sell it to. And I think I responded that, We're in a contract. You're breaching the contract. We have a contract. And he said, Well, it's in – the way I read the contract is we have an out. It's in our discretion and the lands are not surplused, so we're selling them to the Province. And I think I said something like, If they're not surplused, then how are you selling them to the Province? And he said, Well, get over it. That's what we're doing.

[297] And Mr. Walsh said,

> A. The purpose of the meeting was to confirm to Remington that we were going to proceed with the Province transaction.
>
> …

> Q: And you said, No, it's – it's in the discretion of CPR whether to – to declare these surplus. It's in our discretion, and we're not going to declare them surplus, and we're going to go ahead and sell to the Province rather than to Remington?
>
> A: Because they weren't surplus.
>
> Q You told that to Mr. Remington?
>
> A: Yes.
>
> …
>
> Q So you have a recollection of that – of that one-on-one discussion with Mr. Remington?
>
> A I know he wasn't very happy
>
> Q And – and did you at – at the time of the meeting tell Mr. Remington to – to get over it?
>
> A Yes I did. That was out of character for me, and I apologized for that.

[298] Thus, while CPR had not irrevocably committed itself to entering into an agreement with the Province, it had told Remington that it did not intend to proceed with the 10th Ave Agreement and was, instead, going to sell the land to the Province.

[299] In my view, as of that meeting CPR was in breach of the 10th Ave Agreement. To use the language of contract repudiation, CPR communicated to Remington that it "no longer intend[ed] to be bound" by the 10th Ave Agreement: ***Rhymney Railway Co v Brecon and Merthyr Tydfil Junction Railway Company***, (1900) 69 LJ Ch 813 at 818; ***Guarantee Co of North America v Gordon Capital Corp***, [1999] 3 SCR 423 at para 40.

[300] Further, in its negotiations with the Province it was conducting itself as if it had no ongoing obligation to Remington; it was receptive to an offer to purchase the lands for an advantageous price and was in the process of negotiating the specific terms of the memorandum of understanding between the parties.

[301] Certainly CPR could have changed course at this point – Remington remained keen to acquire the 10th Ave Lands. It was not seeking to terminate the agreement or to treat it as at an end. But at that moment, CPR's statements and conduct showed that it did not share Remington's desire to proceed. Rather, CPR breached the 10th Ave Agreement in pursuing the relationship with the Province, and announcing to Remington that it no longer intended to sell Remington the lands, when the conditions of the 10th Ave Agreement had been substantively satisfied and the parties were in a position to close.

[302] And, obviously, CPR did not change course, but rather acted in accordance with its stated intention to breach the 10th Ave Agreement. CPR and the Province signed a Memorandum of Understanding effective March 19, 2007. On April 9, 2007 they signed two contracts, one for air rights and a small tract of land, and one for a larger tract of land, including the 5.1 acres contracted for sale to Remington. The contract for the Province to acquire lands, including the 10th Ave Lands, closed on December 5, 2007. The contract for the air rights closed on July 5, 2007.

[303] On June 15, 2007, Mr. Raby wrote to Ms. Gottselig, counsel for Remington, saying that "Canadian Pacific Railway Company has determined that no portion of the Existing Parcel is currently surplus to the Vendor's existing railroad operations nor is that situation to change in the immediate future". He indicated that, on June 18, 2007, Remington's $50,000 deposit would be returned to it.

[304] CPR and Remington had a contract for the sale and purchase for the 10th Ave Lands that could only be terminated based on a term or condition of the 10th Ave Agreement, most notably those set out in Articles 5 and 6 and, by incorporation in Article 6.05, Article 2.02. While the 10th Ave Agreement was described as an Offer to Purchase, it was – and no party or witness before me suggested otherwise – a binding contract for the sale of land, that the parties could only avoid based on the provisions of the Agreement itself. Here, where the conditions had been substantively satisfied, and Remington was ready and able to perform, CPR had no basis for walking away from its obligations. Because it nonetheless did so, CPR breached the 10th Ave Agreement with Remington.

Did CPR breach its contractual duty of good faith?

[305] Every contract includes a common law obligation to act honestly in relation to a party's duties and obligations under that contract: ***Bhasin v Hrynew***, 2014 SCC 71 at para 33 and para 74. Even in commercial contracts, parties assume a "basic level of honest conduct": ***Bhasin*** at para 60, although see ***Fram Elgin Mills 90 Inc v Romandale Farms Limited***, 2021 ONCA 201 at paras 385-386. The duty means that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract": ***Bhasin*** at para 73; ***CM Callow Inc v Zollinger***, 2020 SCC 45 at para 42.

[306] The duty can include a duty of disclosure where non-disclosure "amounts to active dishonesty in a manner directly related to the performance of the contract"; it does not, however, create a general duty to disclose: ***CM Callow Inc v Zollinger***, 2020 SCC 45 at paras 77 and 81-82.

[307] Good faith requires a party to exercise its contractual discretion honestly and in light of the purposes for which it was given: ***Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District,*** 2021 SCC 7 at para 68. It does not, however, deprive a party of the ability to act in its legitimate economic self-interest, even if doing so results in economic loss to the other party; the duty of good faith does not warrant judicial moralism: ***Bhasin v Hrynew***, 2014 SCC 71 at para 70. The focus remains on the reasonable expectations of the parties given the contract into which they entered and its commercial context: ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 192. The common law duty is a narrow one: ***Styles v Alberta Investment Management Corp***, 2017 ABCA 1 at para 47.

[308] Remington submits that CPR breached its duty of honest performance because:

(a) It misled Remington into believing that it was working alongside Remington to close the 10th Ave Agreement while instead it was secretly double dealing and selling lands to the Province.
(b) It falsely claimed the lands were not surplus, and not capable of being sold, when it had already sold them to the Province.

(c) If the lands were not surplus, it failed to use good faith efforts to ensure that the lands were declared surplus and capable of being sold to Remington; it instead abandoned its agreement with Remington to close a deal with the Province.

(d) It strung Remington along with claims of residual lands and offers to work on other deals with Remington, and then left Remington without any residual lands.

(e) It put the subdivision on hold for reasons unrelated to Remington or the Agreement, but instead for CPR's own interests.

[309] I have found that CPR declared at least 5.1 acres of the 10th Ave Lands surplus for the purposes of the 10th Ave Agreement, and that it also did so through its internal assessment process in February-April 2004. As a result, I do not consider Remington's arguments with respect to CPR's exercise of its discretion. CPR cannot have improperly or dishonestly exercised a discretion *not* to declare the lands surplus when I have found that, as a matter of law and fact, it *did* declare them surplus.

[310] With respect to CPR's representations, on being asked in cross-examination if he told Remington that there "might" be land left over, Mr. Walsh said "yes". Mr. Menzies said that they were told that the Province would be prepared to sell lands back to Remington that "might" be remaining after the Province's planning process. Ms. Lawrence said they were told "we'll see if there's any – any remnant land that Remington could acquire".

[311] I am not satisfied that those representations were dishonest. The opportunity to acquire residual lands did not materialize, and the evidence at trial suggested that there was little chance it would have materialized given the inchoate nature of the Province's high speed rail plans in 2007. The statements also, though, were not representations that it was certain there would be residual lands available to Remington; Mr. Brownlee and Mr. Walsh said only that there "might" be lands available. Further, the Province went on to participate in the visioning exercise in 2007 which suggests that, at the time of the December 2006 meeting, its representatives did understand it might be possible to provide lands to Remington. The evidence as a whole is insufficient to show that the representations were dishonestly made.

[312] I am also not satisfied that the other issues raised by Remington – the alleged failure to disclose the negotiations with the Province and placing the subdivision application on hold – constituted a breach of the duty of good faith.

[313] CPR breached the 10th Ave Agreement: by November 2006 it had a contractual obligation to sell the lands to Remington and, instead, it sold the lands to the Province. It did not disclose that it was making a deal with the Province until it and the Province had worked out the basics of their prospective agreement. In doing so CPR committed a legal wrong and is liable to Remington for that wrong.

[314] I cannot say, however, that CPR's conduct or actions towards Remington disclose any additional wrongdoing. CPR did not disclose its dealings with the Province immediately, but it disclosed them a month or so after it had some certainty that the deal was going to proceed. It did not lie to Remington about what it was doing or misrepresent the situation through its actions. Indeed, the letter putting the subdivision application on hold, while certainly less than honest in what was said to the City, at least had the effect of preventing Remington from investing more effort in what Mr. Walsh knew would be a fruitless endeavour. Further, CPR sent that letter openly, not secretly; it told Remington what it was doing, even if it did not tell them all of the

reasons why it was doing it. Mr. Walsh's other letter to the Mayor did not contain enough other information to affect this finding.

[315] To find that CPR breached its duty of good faith in this case risks making any deliberate breach of a contract also a breach of the duty of good faith. Yet the Supreme Court of Canada and the Court of Appeal's jurisprudence clearly shows that some dishonest or misleading conduct by a contracting party beyond the fact of the breach is required. Not every breach is a dishonest breach. I am not persuaded that such conduct exists here.

[316] I acknowledge that CPR constructed the transaction with the Province to bolster its argument that the lands were not surplus, such that it had no ongoing obligation to Remington. In a draft of the memorandum of understanding CPR had initially included a clause that CPR would declare the lands surplus prior to the sale:

> The Vendor shall have determined in its absolute discretion that the Lands are surplus to the operational requirements of the Vendor. This condition is inserted for the sole benefit of the Vendor and may be unilaterally waived by it. This condition shall be satisfied or waived on or before March 30, 2007.

[317] But then, in the signed Memorandum of Understanding, they changed the language to say, "the lands described herein are not currently surplus". I infer that this change was made because CPR realized that if it declared the lands surplus prior to the sale to the Province, it risked prejudicing its position that the 10th Ave Agreement could not close because the lands were not surplus. Further, in initial drafts of the memorandum of understanding, a clause was included that Remington would confirm that it had no interest in the lands, and that clause was removed because Mr. Walsh knew that Remington would never give that confirmation.

[318] Various terms added to the transaction between CPR and the Province, although ultimately doing nothing to preserve Remington's interests, such as a right of first offer, and the agreement that the Province would work with Remington towards an integrated development, suggest that CPR approached the negotiations with the Province aware that its actions were likely to cause problems with Remington, and those problems were better avoided.

[319] Also, CPR made sure that the closing date for the sale of the lands did not occur until several months after the expiry of the 10th Ave Agreement and structured the sale so that it fell within Mr. Walsh's signing authority, rather than needing a higher level of review.

[320] Nonetheless, these circumstances speak to the manner of CPR's breach, but they do not change the nature or quality of the breach, which arose from CPR's decision to sell the lands to the Province when it was obligated to sell them to Remington. They arguably show some consciousness in Mr. Hyder and Mr. Walsh what they were doing was wrong, but that is not sufficient to show the dishonesty necessary for a finding of bad faith or dishonest performance.

[321] I emphasize, however, that my analysis on this issue would be very different had I not found that, prior to November 2004, CPR addressed the surplus status of the 10th Ave Lands, determined that those lands were surplus to operating requirements, and then brought forward the subdivision application, thereby making the necessary determination for the 10th Ave Agreement as to the portion of the 10th Ave Lands that was surplus to operating requirements.

[322] Had I found that CPR had not made those efforts, I would be inclined to view their conduct as dishonest and as a breach of their duty of honest performance. In particular, I would be troubled by, in this hypothetical, CPR doing nothing to decide whether the lands were surplus

or not while, non-hypothetically: a) CPR continually extended the Agreement; b) CPR participated in the subdivision application, decided what land to include and surveyed the land; c) made statements at the time, through Mr. Hyder's e-mail, that the only issue was whether some tracks beyond the four main line tracks would need to be included, something that could be accommodated within that application given that only 100 feet of lands were included east of 4th Street SE; d) indicated to Remington that the surplus decision would be made soon, particularly at the time of contracting; e) marketed the B Yard Lands as a single parcel for development; and f) explicitly told Mr. Cooper of Remington that the removal of the tracks was "imminent".

[323] That is, I find that CPR acted honestly towards Remington in part because I have found that they declared the 10th Ave Lands to be surplus, both in fact and in law. Had I not made that finding, I would have serious concerns about whether CPR's conduct was consistent with the duty of good faith, despite the "absolute" nature of their discretion under Article 6.08(c). That absolute discretion permitted CPR to either declare the lands surplus or not, based on its subjective assessment of the situation. It did not justify CPR making no decision at all while, through its words and conduct, giving Remington the impression that it had done so, and that the closing of the 10th Ave Agreement was only a matter of time.

Conclusion on CPR's Contract Breach

[324] As of December 4, 2006, CPR had a contractual obligation to sell 5.1 Acres of the 10th Ave Lands – the lands included in the first subdivision application – to Remington. The conditions of the 10th Ave agreement had been substantially satisfied as of that date. Remington was ready and able to perform. CPR repudiated the 10th Ave Agreement when it decided to sell the lands to the Province, and announced that intention to Remington.

[325] CPR then entered into the memorandum of understanding with the Province and, ultimately, a contract for the sale of the 10th Ave Lands. It sent the letter from Mr. Raby announcing that the 10th Ave Lands were not surplus so that the 10th Ave Agreement could not be completed. In December 2007 it completed its sale of the 10th Ave Lands to the Province.

[326] In short, CPR breached the 10th Ave Agreement, starting with its repudiation in December 2006.

[327] CPR's argument that Remington waived that breach, or that it is estopped from pursuing an action in relation to that breach, are considered after my assessment of the Province's liability.

Did the Province Induce CPR's Contract Breach?

Law on Inducing Contract Breach

[328] To establish that the Province induced CPR to breach its contract with Remington, Remington must show:

i) The existence of a contract;
ii) knowledge or awareness by the defendant of the contract;
iii) a breach of the contract by a contracting party;
iv) the defendant induced the breach;
v) the defendant, by his conduct, intended to cause the breach;
vi) the defendant acted without justification; and

vii) the plaintiff suffered damages.

369413 Alberta Ltd v Pocklington, 2000 ABCA 307 at para 13; ***Brae Centre Ltd v 1044807 Alberta Ltd***, 2008 ABCA 397 at para 19.

[329] In ***SAR Petroleum et al v. Peace Hills Trust Company,*** 2010 NBCA 22 at para 40, the New Brunswick Court of Appeal described the elements as follows (quoted as a list, for ease of reading):

> (1) there must have been a valid and subsisting contract between the plaintiff and a third party;
> (2) the third party must have breached its contract with the plaintiff;
> (3) the defendant's acts must have caused that breach;
> (4) the defendant must have been aware of the contract;
> (5) the defendant must have known it was inducing a breach of contract;
> (6) the defendant must have intended to procure a breach of contract in the sense that the breach was a desired end in itself or a means to an end;
> (7) the plaintiff must establish it suffered damage as a result of the breach; and
> (8) if these elements are satisfied, the defendant is entitled to raise the defence of "justification" .

[330] In respect of the defendant's intention, the New Brunswick Court of Appeal further specified that "to establish an intention to induce a breach of contract it is necessary to establish (1) that the defendant knew its acts would induce a breach of contract; and (2) the defendant's acts were an end itself or a means to an end". It emphasized that both aspects must be addressed: ***SAR Petroleum*** at para 41. The Court noted that "[n]egligent conduct is not actionable in cases involving an intentional tort" but the "pursuit of a benefit or economic advantage over and above the preservation of existing contractual rights qualifies such as a means to an end": ***SAR Petroleum*** at para 5. With respect to the plaintiff having no obligation to prove malice, see ***698828 Alberta Ltd v Elite Homes (1998) Ltd***, 2020 ABCA 154 at para 53.

[331] In ***369413 Alberta Ltd v Pocklington***, 2000 ABCA 307, the Court of Appeal held the defendant may be liable where it knew about the contract, and interference with the contract was "necessarily incidental" to achieving its objective: ***Pocklington*** at para 40, citing ***Fraser v. Board of Trustees of Central United Church,*** [1983] 38 OR (2d) 97 at 103 (HCJ).

[332] The Court of Appeal further held that necessary intention can be established where the defendant knew about the contract and turned a blind eye to whether a breach would arise: ***369413 Alberta Ltd v Pocklington***, 2000 ABCA 307 at para 41. Turning a blind eye includes where the defendant "chose not to acquire the information [about the contract], but proceeded on the basis that the contract was unenforceable": ***Pocklington*** at para 42; ***Luan v ADP Canada Co***, 2020 ABQB 387 at para 183.

[333] A mistaken *bona fide* belief that the contract would not be breached does not give rise to liability, but for the belief to be "*bona fide* rather than the result of recklessness or wilful blindness, some basis for the belief must exist, and some reasonable effort must have been made by the defendant to learn the truth": ***Pocklington*** at para 43.

[334] Or, as the New Brunswick Court of Appeal put it, if a defendant "chose not to bother to read the terms of the contract, the law would normally deem them to have the requisite knowledge for the purposes of the third essential element of the tort (wilful blindness)": ***SAR***

Petroleum et al v. Peace Hills Trust Company, 2010 NBCA 22 at para 46; see also ***Husky Injection Molding Systems Ltd v Schad***, 2016 ONSC 2297 at para 314.

[335] The concept of wilful blindness was, in the criminal context, explained by the Supreme Court in ***Sansregret v The Queen***, [1985] 1 SCR 570 at para 22 where the Court said:

> Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.

[336] The Court in ***Sansregret*** also cited Glanville Williams , *Criminal Law: The General Part*, 2nd ed, London, Stevens & Sons Ltd, 1961, for the principle that wilful blindness is relatively narrow as a basis for liability. It is equivalent to knowledge and should be found only where "it can almost be said that the defendant actually knew". That is, where the defendant suspected the fact and realized its probability, but "refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge": ***Sansregret*** at para 22.

[337] In ***Strategic Acquisition Corp v Multus Investment Corporation***, 2016 ABQB 681 at para 160, Justice Mahoney found that the defendant knew of a right of first refusal by virtue of it being registered on title, but also found that the discharge of the caveat could be relied upon by the Defendant. Justice Mahoney cited Professor Klar for the principle that a defendant need not be shown to have knowledge of the precise terms of the contract "as long as the defendant had 'the means of knowledge' yet deliberately disregarded them": ***Strategic Acquisition*** at para 162; affirmed on this point, ***Starke Capital Corp v Strategic Acquisition Corp***, 2017 ABCA 250 para 30-33.

[338] In ***Lobban v Wilkins***, 2014 ABQB 653 Justice Yamauchi found that the defendant Baillee induced Wilkins to breach a contract with Lobban for Lobban's purchase of land from Wilkins. Baillee induced the breach by having Wilkins withdraw the subdivision application. Baillee did so to prevent Lobban from acquiring the land. Justice Yamauchi found that whether or not Baillie knew about the terms of the contract, he was reckless or wilfully blind to the breach. He did not ask to see the contract, even though he "easily" could have done so: ***Lobban*** at para 64.

[339] In ***Super-Save Enterprises Ltd v 249513 BC Ltd***, 2003 BCSC 897, the BC Supreme Court held that a defendant who asked the contracting party whether there was a contract, who observed that party looking to find a contract, and who was assured that no contract was in place, could not be considered to have been wilfully blind: ***Super-Save*** at para 36.

[340] In ***SAR Petroleum et al v. Peace Hills Trust Company,*** 2010 NBCA 22 the Court discussed the policy basis for the tort. After noting the decision of Lord Hoffman that the Defendant must be shown either to have induced the breach of the contract as an end in itself or as a means to an end, the Court held at paragraph 53:

> Lord Hoffman's formulation of the intention test makes eminent good sense. It accords with what I regard to be one of the tort's primary objectives: to protect contractual rights by placing limits on the ability of persons to pursue their economic self-interests, in a competitive marketplace, without due regard for the contractual rights of others… The law seeks to discourage those who deliberately embark on a course of action with the object of obtaining a contractual benefit promised to another. Similarly, those who pursue a course of action designed to bring about a breach of contract with a view to realizing an economic benefit or advantage for themselves or their principals at the expense of others should not be able to escape the grasp of this intentional tort. Such conduct qualifies as unacceptable commercial behaviour, best summed-up in the word "opportunism". On the other hand, defendants who in good faith are pursuing their economic interests in accordance with existing contractual rights will fall outside the intended scope of the tort. Certainly they cannot be accused of acting for an improper purpose.

[341] In this case, a contact existed, was breached and caused damage to the Plaintiff Remington. In addition, if the Province knew about the 10th Ave Agreement, induced the breach and intended to do so, then it had no justification for its conduct. The issues here are thus limited to:

1. Did the Province induce CPR's breach of the 10th Ave Agreement?
2. Did the Province have the necessary intention – did it know that its conduct would lead to a breach of the 10th Ave Agreement, or was it reckless or wilfully blind as to that result?

Did the Province induce CPR's breach of the 10th Ave Agreement?

[342] I am satisfied that the Province's conduct induced CPR's breach and that it caused that breach intentionally.

[343] The Province approached CPR. It independently obtained an appraisal of the lands and used that appraisal as the basis for its offer. It did not offer a disproportionate price, but it offered a price that took into account the significant increase in the value of the land from 2002-2007. Under the 10th Ave Agreement, and the terms of the participation agreement that CPR and Remington had agreed upon, CPR would only receive half of that increase.

[344] To put it somewhat differently, I am satisfied that had the Province not approached CPR, CPR would have closed the 10th Ave Agreement with Remington. The departure of CPR from the 10th Ave Lands was inevitable, a fact it recognized several years previously and which led it to determine that the lands were surplus. Discussions had begun with the City which, in due course, led to B Yard relocating to Manchester at no expense to CPR. Had the Province not brought its offer to the table there is no reason to believe that CPR and Remington would not have concluded the transaction they began in 2002.

Did the Province know that it would cause a breach of the 10th Ave Agreement?

[345] No representative of the Province saw the 10th Ave Agreement. They did not ask CPR or Remington for a copy. They thus did not have actual knowledge of its terms, or the specifics of Remington's rights and CPR's obligations under that Agreement. They did not have actual subjective knowledge that, by entering into an agreement with CPR, they were putting CPR in

breach of the 10th Ave Agreement. The question is, however, was the Province reckless or wilfully blind to the fact that its actions would lead to a breach of the 10th Ave Agreement?

[346] Certainly, the Province had clear notice that Remington had a contract with CPR giving rise to a legal interest in the 10th Ave Lands.

[347] On or about September 15, 2003, Remington registered a caveat on title to the 10th Ave Lands. The caveat said that Remington "claims an interest in the following described lands by virtue of an Offer to Purchase and Interim Agreement dated November 30, 2002 made between the Caveator, as Purchaser, and Canadian Pacific Railway Company, as Vendor, with respect to the lands".

[348] In her affidavit in support of the caveat, Ms. Gottselig said "I believe that the Caveator has a good and valid claim on the Lands and I say that this Caveat is not being filed for the purpose of delaying or embarrassing any person interested in or proposing to deal with it".

[349] Neither Dr Thompson nor Mr. Brownlee obtained or reviewed the language of the caveat, although Mr. Brownlee said that he performed a title search at the time he sought the appraisal (June-July 2006). Mr. Brownlee explained his decision not to review the caveat on the basis that it was not relevant to the appraisal. He did not explain why he did not perform a further title search, or look at the caveat, when the Province approached CPR in August 2006.

[350] Counsel for the Province, Mr. Chappell, also obtained the land titles certificate as of March 30, 2007. The certificate said "Caveat re: offer to purchase; caveator – Remington Development Corporation", and gave the address and name of Ms. Gottselig. Mr. Chappell did not testify, and no witness for the Province could say whether he reviewed the language of the caveat or, if he did not, why he did not. No evidence was provided to suggest he contacted Ms. Gottselig to discover the nature of Remington's interest.

[351] The Province had additional grounds to know of Remington's interest in the 10th Ave Lands. In the appraisal the Province obtained on the lands, the appraiser Altus Heylar relied on the surveyor map of the 10th Ave Lands that had been filed as part of the third subdivision application, and that had Remington's logo affixed to it. The appraisal also indicated that the gross developable area in the 10th Ave Lands had been provided by Remington. The appraisal referred to information provided by Remington about the developable area on the land.

[352] Mr. Brownlee said, "We knew that the lands outside of there were owned by – by the Remington Corporation". However, the map in the appraisal with Remington's name on it showed the 10th Ave Lands. The information in the appraisal should have alerted the Province to Remington's interest in the land.

[353] Further, all of the drafts of the memorandum of understanding prior to the executed draft referred to Remington's interest in the lands. The first draft memorandum of understanding, from October-November 2006, included the following clause:

> 3(d) The Vendor shall have received confirmation from Remington Development Corporation ("Remington") in a form satisfactory to it that it has no further interest in any of the Lands, other than to ensure that the development thereof is consistent with the proposed development by Remington of the lands shown as hatched on Schedule 'B'. This condition is inserted for the sole benefit of the Vendor and may be unilaterally waived by it. This condition shall be satisfied on **[the date of receipt of tentative approval of the subdivisions of the land as**

> **contemplated in sub clause (a) hereof/some other appropriate date?]**
> [emphasis in original]

[354] A subsequent version added that Clause 3(d) was to be completed "on or before the date which is ninety (90) days following the date of full execution of the formal agreement contemplated in clause 9 hereof". A subsequent version edited the clause, but retained the central point that CPR needed to receive confirmation from Remington that it had "no further interest in any of the lands".

[355] Mr. Walsh testified that this clause was added by the Province "because they knew about the agreement with Remington". Mr. Walsh said that the clause was removed because he knew that Remington would never agree to it. Mr. Brownlee said that this clause was added by CPR: "Alberta wanted clean titles, and they – and CP, I think, put it in to ensure that that's what we would get". Mr. Brownlee also said, however, that he "probably started" the drafting process. Regardless of who included the clause, it would have additionally alerted the Province to the fact of Remington's potential interest in the land, and for a potential conflict between that interest and the proposed agreement. Indeed, Mr. Brownlee agreed that by this point in time he "understood that Remington, at least at some point in time, had some interest in some of these lands".

[356] In an e-mail dated March 2, 2007, Mr. Brownlee continued to refer to the confirmation clause; he noted that they were hoping to complete the formal agreement by March 30, 2007, but that "clause 4(d) allows 90 days following that day (i.e. the end of June) to resolve your discussions with Remington. We could amend the MOU to give you another 30 days or so in this clause if this would help you out".

[357] This clause was removed from the memorandum of understanding before it was signed on or about March 19, 2007. It did not reappear in the final contract. No explanation was given for the removal of that provision, apart from Mr. Walsh's statement, "I actually had this clause removed 'cause why would they do that?" Mr. Brownlee did not explain why he, as agent for the Province, accepted the loss of the assurance of clean title that, he said, this clause had helped to provide.

[358] The memorandum of understanding and the agreement made other references to Remington, and to its interests in the area. The first draft memorandum said:

> 8. The Vendor and the Purchaser covenant and agree that they will use reasonable commercial efforts to cooperate and work with each other and with Remington and the City of Calgary to integrate the development of the Lands, the Option Lands, the City of Calgary LRT infrastructure as referenced in clause 3(c) above and Remington's proposed development of the lands referenced in clause 3(d) above, and in particular, to accommodate the following in such integrated development:…
>
> (d) the desire by Remington to use its lands as a • development and to link such development to 9th Avenue and 10th Avenue SE

[359] A subsequent version included the integrated development clause in 8, but replaced "• development" with "mixed use development". It also included the following additional clause:

> The Vendor agrees to use best efforts to work with Remington to come to a mutually acceptable agreement for at least two points of pedestrian access for the Purchaser across Remington's property on 9th Avenue. The Purchaser agrees to work with Remington to develop mutually compatible access over its air rights property, if required.

[360] A further draft of the memorandum of understanding added in a right of first refusal for Remington. In that version, the clause said:

> In the event that the Purchaser determines that a portion of the Lands is surplus to their needs, the purchaser shall offer to sell the surplus lands to Remington at the price outlined in Schedule 'C' adjusted for increases in value by applying a CPI factor.

[361] A subsequent draft described this as a right of first offer, and added a clause that:

> The Vendor shall have determined in its absolute discretion that the Lands are surplus to the operational requirements of the Vendor. This condition is inserted for the sole benefit of the Vendor and may be unilaterally waived by it. This condition shall be satisfied or waived on or before March 30, 2007.

[362] In the signed Memorandum of Understanding, the clause requiring Remington to confirm it had no interest was gone. The integrated development clause remained in the memorandum. And the right of first offer was amended as follows:

> In the event that after completion of the acquisition of the Lands, the Purchaser determines that it wishes to dispose of a portion of the Lands, the Purchaser shall offer such portion to Remington and the Vendor jointly as the price outlined in Schedule 'C' adjusted for increases in value by applying a CPI factor; provide that if Remington sells its property lying immediately sought of the Lands to an arm's length third party, such rights of first offer shall thereupon terminate. Any sale of all or a portion of the Lands, including a sale to Remington and the Vendor jointly shall be subject to the Vendor's Occupation Right

[363] The final memorandum included the survey of the lands included in the third subdivision application, with Remington's logo included.

[364] The final agreement between the parties included a version of the integrated development clause, and of the right of first offer. In the final version of the right of first offer, however, the offer was not to be made directly to Remington, but was rather to be made to CPR, who could then involve Remington in a potential acquisition.

[365] This information – the caveat, the appraisal, the confirmation clause in the draft memorandum of understanding – clearly and explicitly indicated to the Province that Remington had a legal interest in the 10th Ave Lands. The right of first offer, and the integrated development clause, do not relate to Remington's legal interest in the 10th Ave Lands, but they did provide an additional alert to the Province about Remington's interests in the area.

[366] In addition, I note the two meetings Mr. Brownlee attended with Remington, only one of which he recalls. At that first meeting, discussed previously, Mr. Brownlee asked if Remington would be interested in selling lands to the Province. At the second meeting, in December 2006, Mr. Brownlee would have heard Mr. Remington assert that he had a contract with CPR for the 10th Ave Lands and heard Mr. Walsh say, "get over it".

[367] None of Mr. Brownlee, Mr. Walsh or Mr. Hyder recall if Mr. Brownlee was present at that meeting. However, all of the Remington witnesses recall Mr. Brownlee and his wife being present, and I accept their positive recollection that he was there, over the inability of the other witnesses to remember one way or another. The meeting was highly significant to Remington,

and in other material respects Mr. Remington's account of the meeting has been confirmed by Mr. Walsh, which makes me trust its general accuracy.

[368] Yet, in the face of all of this information – the caveat, the appraisal, the confirmation clause, the December meeting with Remington – Mr. Brownlee did not ask to see the agreement between Remington and CPR. He did not ask Remington for more information about the nature of its legal interests in the agreement. He did not ask CPR to provide the agreement. Instead, he says, he relied on representations by CPR that they had clear title to sell the lands.

[369] Mr. Brownlee's evidence on this point was, however, vague. He did not testify to a specific conversation or provide details about what he was told. He did not say who, or when, someone at CPR told him that the agreement with Remington should not be a concern. He had no written communications with CPR asking for confirmation that Remington had no interest in the land that might be adversely affected by the contract between CPR and the Province.

[370] Mr. Brownlee's evidence on his inquiries and the information he had about the 10th Ave Agreement was:

> Q Now, at this time in the early fall of 2006, what information did you have, if any, about Remington's interest, if any, in the 10th Avenue lands?
> A I don't believe we had any information at that time.
>
> Q And did you, at some point, come to have some understanding?
> A Much later, there -- it was indicated to us that there had been an agreement, I believe, but I -- I think it had expired, if I recall correctly
>
> …
>
> Q Did you have an understanding of what he [Mr. Walsh] meant by "noodle this one out"?
> A Well, I think to – to work – try and work through it, and – and I – I believe CPR was interested in selling the lands to Alberta, and Alberta was interested in buying, but we wanted to make sure that we had the right titles.
>
> Q The right? Sorry.
> A Titles.
>
> Q…And what did – what was your discussions with CPR with respect to what the Province wanted for titles?
> A Clean titles.
>
> Q Okay. And what did that mean to you?
> A Titles that were not encumbered…No Caveats, unless it was a utility that was under the ground.
>
> Q And – what was your understanding at that time as to CPR's ability to sell that, the 10th Avenue lands… to the Province
> A Well we were – advised by them that they – they could sell them.

…

Q …Did you ever receive a copy of the 10th Avenue land agreement between CP and Remington?
A No
…
Q And when it says ‘want option from Remington’ [for land access] you never went to Remington discuss obtaining that type of option? You never went directly to Remington did you?
A No

Q And no one on behalf of the Province did?
A Not to my knowledge
…

Q the Province – or you on behalf of the Province never went to Remington to try and include them in this deal; correct?
A That’s correct

Q And Remington were never involved in any of the negotiations or discussions of the MOU; correct?
A Correct.

Q Same with the purchase agreement; correct?
A Correct
…

Q [re the Remington confirmation clause] Do you recall at some point in time Mr. Hyder or Mr. Walsh or someone on behalf of CP saying to you on behalf of the Province, ‘we think we should get Remington to sign off, agreeing that they no longer have an interest in these lands being sold to the Province? Do you recall that?
A No, not specifically. We always asked CP to provide what we called a ‘clean title’. How they acquired that was between CPR and – and Remington Corporation.

…

Q And the idea here was to obtain confirmation from Remington that it had no further interest in any of the lands. So by this point in time, sir, you understood that Remington, at least at some point in time, had some interest in some of these lands?
A In some of them, yes.

…

Q Okay. So at this point in time, did you not ask the [for the] Province, ‘What exactly are Remington’s interests in this area where – you’re providing us with this draft, and it’s got all this Remington – all these references to ‘Remington’. Remington’s not participating in

these negotiations.' Did you say to them, 'What exactly are Remington's interests in this area?
A No. We were interested in buying a clean title from CPR.

Q And one of the ways this was being contemplated…at least in this draft, was item 3(d) [the confirmation clause]…That was going to help you get clean title, sir, wasn't it?
A We anticipated that, yes.

…

Q And you certainly didn't ever go to them and say, 'Remington, I'm interested to know why you are referenced in these agreements and what your interests are?'
A No.

…

Q …So did you understand from this [e-mail referring to counsel for the Province reviewing title] that Mr. Chappell was reviewing title to the lands that were being acquired?
A Sure. Yes.

Q And this is part of the exercise you talked about of wanting to ensure clean title?
A That's right

Q And, in fact, you searched titles at the very beginning when you started looking into this, didn't you?
A I did.

…

Q And it's a caveat registered…September 26, 2003, offer to purchase, Remington Development Corporation. So do you recall seeing that caveat registered on title when you were reviewing title and wanting to ensure clean title for the Province?
A When we searched the titles, they were for the appraisal. They weren't for the purchase agreement.

Q So around this period of time, April of 2007, when we're getting closer to the execution…Do your recall receiving this title around that time?
A No.

[371] In argument counsel for the Province characterized this evidence as Mr. Brownlee having been told "it's expired; it doesn't exist, or at least it's not valid, binding, anything to worry about". I do not, however, think that Mr. Brownlee's evidence warrants that characterization. Mr. Brownlee provided no specifics about what he was told and by whom, primarily focussing on what he understood or thought was the case.

[372] Further, and importantly, neither Mr. Walsh nor Mr. Hyder corroborated this evidence from Mr. Brownlee. They were not asked, and did not say, that they had advised the Province about the status of the 10th Ave Agreement with Remington. Indeed, Mr. Walsh's evidence that the confirmation contemplated by the draft memorandum of understanding could not be obtained from Remington is inconsistent with the suggestion that he or Mr. Hyder would have made such a representation to the Province.

[373] Based on this evidence, I am certainly satisfied that the Province was negligent in failing to determine whether its agreement with CPR would result in a breach of Remington's contract. The more difficult question is whether that negligence amounted to wilful blindness. As emphasized by Glanville Williams, wilful blindness is equivalent to knowledge, and should only be found where "it can almost be said that the defendant actually knew": ***Sansregret v The Queen***, [1985] 1 SCR 570 at para 22.

[374] The focus here is on the conduct of Mr. Brownlee. Mr. Brownlee was the agent for the Province, and the only witness for the Province with direct involvement in the negotiations with CPR. Dr. Thompson said that he was relying on Mr. Brownlee to conduct the negotiations; he assumed that Mr. Brownlee was vetting everything in relation to Remington. Dr. Thompson was not an expert in land purchasing, which is why he retained Mr. Brownlee. He assumed that Mr. Brownlee performed adequate due diligence. Indeed, Dr. Thompson appears to have had only a limited understanding of the transaction given that in his memo about the transaction to then Infrastructure Minister Luke Ouellette, and Lloyd Snelgrove, then President of the Treasury Board, he said that part of the transaction involved acquiring "Remaining lots from CPR and Remington for $14,139,837".

[375] Mr. Chappell, the lawyer who did the title review, did not testify, and thus could not explain his knowledge or information about the caveat registered on title. The Province centred Mr. Brownlee in its account of the Province's approach to the transaction.

[376] The Province in argument submitted that I ought not to find Mr. Brownlee's conduct to have been wilfully blind, relying in significant part on its submission that Remington, through its conduct, communicated to Mr. Brownlee that it did not have an ongoing interest in the lands.

[377] I have several problems with this submission. First, Mr. Brownlee did not testify that his understanding or view of the situation was influenced by the conduct of Remington. His evidence was that he was relying on information from CPR about the agreement. Second, by the time Remington became aware of what was happening, in December 2006, Mr. Brownlee had already been alerted to Remington's interest through the caveat, the appraisal, and the confirmation clause. The Province had made its offer to CPR, and the parties had negotiated the substance of the agreement between them. The need to make inquiries had already arisen, but no such inquiries had been made. Third, Mr. Brownlee attended the December 2006 meeting, and heard there Mr. Remington's assertion that Remington and CPR had a contract. Fourth, as discussed below in relation to waiver and estoppel, if Remington's conduct after December 2006 has any relevance at all given the events prior to that time, it has to be understood in the context of CPR's statement that it had decided to sell the lands to the Province, and in light of the representations made by CPR and the Province to Remington at the December meeting.

[378] I also note that Mr. Brownlee had an incentive to push the transaction to close, rather than to ask awkward questions that might derail it. Specifically, while Mr. Brownlee was paid an hourly rate by the Province for his work, the bulk of his compensation was to be paid on the

closing of the transaction based on the sale price by CPR. That compensation was significant – in the end he was paid $280,465.40.

[379] Ultimately, I am satisfied that the Province was wilfully blind to the fact that the agreement between it and CPR would result in a breach of CPR's agreement with Remington. It knew about the contract and turned a blind eye to whether a breach would arise: ***369413 Alberta Ltd v Pocklington***, 2000 ABCA 307 at para 41; ***Luan v ADP Canada Co***, 2020 ABQB 387 at para 183.

[380] First, I rely on the clarity of the information available to the Province about Remington's legal interest in the lands. Like Justice Mahoney in ***Strategic Acquisition***, I view the fact that Remington's interest was registered on title as *prima facie* sufficient to alert the Province that there were questions to be asked about the effect its agreement would have on those interests. As Justice Yamauchi said in an unrelated context – "a caveat…operates as a warning or protection of the alleged interest": ***Mylonas Enterprises Ltd v Foundation Place Inc***, 2013 ABQB 385 at para 15.

[381] I have considered the Province's point that Remington ultimately removed the caveat from title. It did so, however, some ten months after the agreements between CPR and the Province had been signed, and 16 months after the Province approached CPR and negotiated the transaction. Further, Remington removed the caveat based on Mr. Remington's reasonable belief that they would be sued if they did not do so. While, as I discuss below, the removal of the caveat has significance for Remington's specific performance claim, its removal in December 2007 does not shift my characterization of the Province's conduct. The Province failed to make any inquiries at any point after June 2006. It did not do so when Mr. Brownlee did a title search as part of the appraisal process and saw the reference to Remington in the appraisal. It did not do so in the fall of 2006 when it saw the confirmation clause. It did not do so after December 4, 2006 when it heard from Mr. Remington that he believed Remington and CPR had a contract. It did not do so through to April 2007 when Mr. Chappell did his title review and the contract between CPR and the Province was signed.

[382] As that summary indicates, it was not only the caveat that put the Province on notice regarding Remington's interests. The confirmation clause in the draft memoranda, the information in the appraisal, and the statements by Mr. Remington, alerted the Province of the need to make diligent inquiries about the precise nature of Remington's known legal interest in the 10th Ave Lands. Yet, the Province never made such inquiries.

[383] Second, I rely on how easy it would have been for Mr. Brownlee (or Mr. Chappell or Dr. Thompson) to make inquiries of Remington. Mr. Brownlee met Mr. Remington in September 2006 and could have spoken with him then. He met him again in December 2006. He could have contacted Ms. Gottselig, whose name was listed on title. He could have written an e-mail to CPR and asked them to provide written confirmation that Remington had no ongoing interest in the lands. In this respect I note the difference between the conduct of the Province and that of the defendant in ***Super-Save Enterprises Ltd v 249513 BC Ltd***, 2003 BCSC 897, who made diligent inquiries to discover whether there was a contract that might be at risk. Similar to the defendant in ***Lobban v Wilkins***, 2014 ABQB 653, the Province could "easily" have made inquiries, but did not.

[384] Third, I am not satisfied on the evidence that CPR represented to Mr. Brownlee that it had clean title to the lands, or that the 10th Ave Agreement had expired. CPR has not testified

that such a representation was made. Mr. Walsh's evidence that the confirmation clause was removed from the draft memorandum because he knew that Remington would not give the necessary assurance, is inconsistent with the claim that CPR would have made such a representation to Mr. Brownlee. Mr. Brownlee's own evidence in this respect is generic and based on his recollection rather than on, for example, the extensive handwritten notes he kept with respect to the transaction. No written evidence of such a representation was produced at trial.

[385] Rather, I find that Mr. Brownlee deliberately disregarded the facts that were evidently before him – that Remington had a present legal interest in the 10th Ave Lands that might be breached by the contract between the Province and CPR and that, in fact, *was* breached as a result of the contract between the Province and CPR. He avoided asking the questions that would have revealed the contractual interests Remington had at stake, allowing the Province to continue to pursue the lands it wanted and Mr. Brownlee to achieve a financial benefit at the transaction's closing: ***SAR Petroleum et al v. Peace Hills Trust Company,*** 2010 NBCA 22 at para 46; ***Husky Injection Molding Systems Ltd v Schad***, 2016 ONSC 2297 at para 314.

[386] I reiterate that my focus is on Mr. Brownlee because his is the only account provided to me by the Province in relation to what the Province did to explore Remington's interest in the 10th Ave Lands. I emphasize, however, that Mr. Brownlee is not the Defendant, and that the Province had access to resources and people that could have assisted Mr. Brownlee. What happened was not the fault of Mr. Brownlee alone, and the Province is responsible for choosing to apparently place the burden for navigating complex legal problems on someone without the training or expertise to do so, and who had a significant financial interest in closing the transaction.

[387] The Province did not provide me with meaningful evidence about due diligence that may have been completed by Mr. Chappell or others at the Province. Dr. Thompson did not speak to the due diligence process in direct. In cross he responded "yes", without specifics, on being asked "you would have reviewed some of the key documents and performed at least some due diligence". On being taken to the appraisal's recommendation that a legal opinion be given on title, Dr. Thompson said he was not sure if the Province received a legal opinion on the lands.

[388] An e-mail from Mr. Chappell to Mr. Raby, Mr. Hyder and Mr. Brownlee dated April 2, 2007 says,

> Further to my review of title to the land and encumbrances it does not appear that any such encumbrances should remain as a Permitted Encumbrance. Accordingly, the revised agreement reflects that there are no Permitted Encumbrances. I will wait for your reply on this issue.

[389] That e-mail confirms that a title review was completed. It does not, however, address Remington's caveat, which was not an encumbrance on the land, but the assertion of a right in the lands. It does not tell me what, if anything, Mr. Chappell did on seeing the caveat listed on the title certificate he obtained in March, 2007.

[390] In the absence of other evidence about the Province's due diligence, I can only focus on Mr. Brownlee, on what he was told, on steps he did not take, and on the reasons he may not have taken them. But, again, the fault for placing sole responsibility for dealing with this contract on a third party agent compensated by the vendor on completion of the contract, pursuing a contract

with CPR on notice about Remington's legal interests, and doing nothing to ascertain the effect of that pursuit on Remington, is the Province's, not Mr. Brownlee's.

[391] I acknowledge also that Mr. Brownlee, who is not a lawyer, could not have read the 10th Ave Agreement and deduced the relationship between the various clauses, and the legal significance of CPR's submission of the subdivision application. But he did not need to do so. The Province has access to counsel and the resources to assess the legal rights at play. Plus, had the Province or Mr. Brownlee asked Remington whether it had an interest in the lands, Remington would have confirmed what Mr. Remington had already asserted at the meeting with Mr. Brownlee – that it had a contract to acquire the 10th Ave Lands. That assertion would have been accurate and have told the Province what it needed to know.

[392] No doubt Mr. Brownlee hoped for the best, seeing the issue as "between CPR and Remington Corporation". But hope is not an excuse. Faced with clear information about Remington's legal interests in the 10th Ave Lands, the Province deliberately avoided finding out the truth about those interests, so that the Province, and Mr. Brownlee, could pursue what they wanted.

Did Remington waive CPR's contract breach, or is it otherwise estopped from pursuing a remedy against CPR or the Province?

Law on Waiver and Estoppel

[393] CPR and the Province submit that Remington is estopped from relying on CPR's breach of contract to sue for damages. In the alternative, they submit that Remington waived the breach of the 10th Ave Agreement.

[394] The Supreme Court has held that "waiver and promissory estoppel are closely related". Underlying both doctrines is the idea that the waiving/estopped party should not be allowed to retract its choice when doing so would be unfair to the other party: ***Saskatchewan River Bungalows Ltd v Maritime Life Assurance Company***, [1994] 2 SCR 490 at 499.

[395] For the Defendants to establish that Remington waived its rights under the 10th Ave Agreement, it must show that Remington took steps which amounted to foregoing reliance on those rights: ***Saskatchewan River Bungalows Ltd v Maritime Life Assurance Company***, [1994] 2 SCR 490 at 499. Further, it must establish that Remington had full knowledge of its rights, and "an unequivocal and conscious intention to abandon them". The test is stringent because the party asserting waiver – here, CPR – has given no consideration for the benefit which waiver would provide: ***Saskatchewan River*** at 500.

[396] To establish estoppel the Defendants must show that Remington has "by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on". In addition, it must show that, in reliance on the representation, it acted or in some way changed its position: ***Maracle v Travellers Indemnity Company of Canada***, [1991] 2 SCR 50 at 57.

[397] There must be evidence that Remington led CPR to "suppose that the strict rights under the contract would not be enforced"; that is, that there must be evidence from which it can be inferred that Remington "intended that the legal relations created by the contract would be altered": ***John Burrows Ltd v Subsurface Surveys Ltd***, [1968] SCR 607 at 615; ***Maracle v Travellers Indemnity Company of Canada***, [1991] 2 SCR 50 at 58-59.

[398] The promise can be inferred from circumstances but must be unambiguous: ***Engineered Homes Ltd v Mason***, [1983] 1 SCR 641 at 647. The conduct should be assessed practically, sensibly and contextually, considering whether the person asserting the estoppel reasonably understood the statement or action to be an assurance on which they could rely: ***Thorner v Majors and Others***, [2009] UKHL 18 at para 85.

[399] The doctrine of promissory estoppel ought not to be interpreted so as to require parties to immediately assert their legal rights. As the Supreme Court held in ***John Burrows Ltd v Subsurface Surveys Ltd***, [1968] SCR 607 at 615:

> It is not enough to show that one party has taken advantage of indulgences granted to him by the other for if this were so in relation to commercial transactions, such as promissory notes, it would mean that the holders of such notes would be required to insist on the very letter being enforced in all cases for fear that any indulgences granted and acted upon could be translated into a waiver of their rights to enforce the contract according to its terms.

[400] CPR and the Province rely on Remington's conduct after it was advised of CPR's decision to sell the 10th Ave Lands to the Province. In particular, they rely on Remington's participation in the visioning exercise with the Province regarding the 10th Ave Lands, its acceptance of CPR's return of its deposit, and its removal of the caveat on the 10th Ave Lands.

[401] To ensure I assess Remington's conduct after December 2006 in totality and in context, and because this time period is also relevant to Remington's claim for specific performance, I first summarize the events between the December 4, 2006 meeting and the closing of the contract between CPR and the Province in December 2007. Then I analyze whether those events, alone or in totality, constitute waiver or estoppel.

Conduct of Remington, December 4, 2006 – December, 2007

The December 4 Meeting

[402] The three most significant facts about the December 4, 2006 meeting are, first, that Mr. Walsh, Mr. Hyder and Mr. Brownlee all attended the meeting. As previously explained, Mr. Brownlee does not recall whether he was there (and neither do Mr. Walsh or Mr. Hyder) but, based on the evidence of Mr. Remington, Mr. Menzies and Ms. Lawrence I find that he was there.

[403] Second, at that meeting Mr. Remington was upset and angry and said, "we had a deal", to which Mr. Walsh replied, "get over it". Mr. Remington did not threaten to sue CPR or the Province, but he communicated his objections and certainly did not indicate his acquiescence (a point acknowledged even by Mr. Hyder).

[404] The testimony of Mr. Walsh and Mr. Remington on this point was described earlier. For her part, Ms. Lawrence said, "The thing that I remember most is John Walsh responding to Randy's 'We had a deal,' by saying 'Get over it'".

[405] Third, at the meeting Mr. Walsh suggested that if Remington worked with the Province, Remington might still be able to obtain some portion of the 10th Ave Lands. As Ms. Lawrence put it, Mr. Walsh said, "involve the Province in the planning, and we'll see if there's any – any remnant land that Remington could acquire".

[406] Mr. Menzies said:

> One of the things that the – both the Province and CPR proposed to us was that they weren't sure what their land requirements were going to be, and they were prepared to sell back to Remington Development any surplus lands that might occur after that planning process. So they were taking virtually all the lands we included in our subdivision but were prepared to consider selling lands back, depending on what their requirements were, but they were unclear at the time what that was.
>
> Q And what was proposed moving forward?
>
> A We agreed that – both the Province and we agreed that we were trying to mitigate any potential damages to us, so we agreed to start a process where we would look at – the Province and – and ourselves together would look at what their requirements might be and what the surplus lands might be. We were hoping that it still was, you know, something that we could salvage
>
> Q Did CPR share the details of any agreement with the Province at that point?
>
> A Not on the December 6th [sic] meeting, no, other than they indicated to us verbally that there was a – part of the agreement was a buyback option for Remington or right of first refusal. I can't remember the exact terminology.

[407] Mr. Hyder was asked in direct, "did CP make any assurances to Remington that Remington would receive land as part of the CP transaction with the Province?" to which he responded, "No, they did not". In cross-examination, however, he agreed that Remington was told "there might be some lands left for Remington to still acquire," and that Remington was going to proceed with the process to see if there would be some land leftover.

Lack of Further Objections

[408] After this meeting Remington did not commence proceedings against CPR or the Province. It did not send a demand letter or other written document setting out its position that CPR was in breach of the 10th Ave Agreement. It did not initiate any further contact with CPR to set out its objections to CPR entering into an agreement with the Province. It did not contact Dr. Thompson or anyone employed by the Province to state its objections.

Visioning Process and Remington Communications

[409] In February 2007, Mr. Menzies sent an e-mail to Mr. Hyder with respect to the possible surplus lands, and the ones that were most important to Remington, saying "I am concerned that the vision we are trying to put into place for the area is in jeopardy unless we can assure ourselves that a certain portion of that are in blue i.e. lot 2 (2.77 acres) is preserved for development". He also said that he was not as concerned with lot 4 "as this lot does not require subdivision and I believe, under the terms of our agreement, could be transferred on notice from Remington to CPR and the required payment". Lot 2 was the land between 4th street and 6th Street SE. Lot 4 was the portion of land east of 6th Street SE included in the 5.22 acres originally referenced in the 10th Ave Agreement, but that was not included in any of the subdivision applications (the Blue/Grey parcel).

[410] On March 8, 2007, Mr. Menzies sent Mr. Brownlee a copy of the concept plan that Remington and the City had begun developing for Rail Town. Mr. Menzies said this "will give you a pretty good idea of what we envision for the area".

[411] In April 2007, Remington received the April 2007 Rail Town "Visioning Document: Background Studies" that had been prepared for it and the City by IBI.

[412] On April 27, 2007, Ms. Lawrence sent representatives of CPR and the Province a copy of the agenda for the first meeting of the visioning group, which was to take place on May 4, 2007.

[413] On May 24, 2007, Mr. Hyder sent Mr. Menzies excerpts from the sales agreement with the Province in response to inquiries by Mr. Menzies. He provided Mr. Menzies with the right of first offer and the integrated development provision from the final agreement. Mr. Menzies testified that he had asked for confirmation that Remington could acquire surplus lands. Mr. Menzies felt comfortable enough on being given this information to begin work with the Province.

[414] The visioning process took place from May 2007 until early December 2007. An agenda for a meeting on June 4, 2007 identified the "Outcome" as: "a collaborative planning process which will result in a joint Outline Plan and Land Use redesignation which is signed-off by all Land Owners and submitted to The City of Calgary for approval".

[415] Ms. Lawrence understood Remington's motivation in participating in this process was the hope of obtaining excess land from the Province.

[416] Mr. Brownlee made notes of one of the meetings, on November 6, 2007. At that meeting Remington advised that they were "land developers, not land flippers and not land holders". He also noted, "access are [sic] important to Rem Co as well". The notes also said, "may propose => selling Alta land to R Co in exchange for guaranteed access part of project".

[417] At the final December meeting, Dr. Thompson said, "this is far as we are going to go". The Province did not have the funding to proceed further with developing high speed rail on the lands. They could not create a land use outline plan in which Remington could participate. Dr. Thompson acknowledged that the Province was not ready to develop the 10th Ave Lands or its air rights.

[418] The visioning process did result in a conceptual plan being produced by IBI, which was circulated in January 2008.

The Sixth Street Lands

[419] CPR and Remington structured the Interlink and 10th Ave transactions so that after the Interlink transaction Remington owned the 6th Street SE road allowance from 11th Ave SE to and under the CPR main line. It was agreed that once subdivision of the 10th Ave Lands was complete, Remington would transfer back to CPR the portion under the main line for $1 but, in the meantime, Remington granted CPR an easement for the operation of the main line.

[420] Once, however, the Province was acquiring the 10th Ave Lands it also wanted to acquire the portion of those lands on the 6th Street SE road allowance which, by that point, were owned by Remington.

[421] In October-November 2007 Mr. Brownlee and Mr. Raby exchanged several e-mails with respect to how to achieve this. On November 8, 2007, Mr. Brownlee said, "the Province can take back all the surplus lands and then convey the surface of the mainline back to CPR. All they will need is a note from Remington's lawyer saying that CPR is the rightful owner of all the surplus lands".

[422] On December 6, 2007 Ms. Gottselig wrote on behalf of Remington,

> We have reviewed the Intralink [sic] Agreement and the Schedule B with our client. This is to advise that Remington is in agreement with the green striped portion of the lands transferred during the course of the closing of the Intralink Agreement were intended to be transferred back to CPR at some point in time. This is to advise that our client will cooperate when you are in a position to provide documentation for consent.

[423] On December 11, 2007, Mr. Raby wrote that to effect the transfer there would need to be an agreement between CPR and Remington, following which CPR could execute an agreement in favour of Alberta.

[424] Ultimately, however, around December 21, 2007 the Province acquired the lands from Remington through the process of notification.

[425] On December 21, 2007, Mr. Hyder advised Mr. Walsh that Dr. Thompson had signed the agreement on behalf of the Province. Under that agreement, the Province paid CPR $393,158.58 for the 6th Street lands. Mr. Walsh responded,

> Mike, that's the good news. The bad news is that Randy wasn't very happy that the land was transferred by the Province. As a result, he didn't execute the Remington agreement and, subsequently left for Palm Springs for Christmas.
>
> I phoned Sandy and explained that we (CP) weren't aware of the transfer until after the fact.
>
> Sandy was going to try and contact Randy in Palm Springs to see if he would direct Randolph to sign off on behalf of Remington.

[426] Mr. Hyder also wrote a memo to file dated December 21, 2007 saying:

> • The entire title for the road allowance was transferred to Remington with the intention that the portion north of 10th Ave SE would be transferred back to CPR upon subdivision.
>
> • Remington only paid for the portion that they would eventually retain ownership of.
>
> • When CPR sold the air rights and Tenth Ave lands to the Province they surveyed the land and took the surplus portion excluding the actual rail right of way by filing a "Notification" at Land Titles.
>
> • Randy Remington will not sign the agreement because he is miffed that the Province took the property back prior to CPR discussing and explaining the process to him. The agreement does not need to be signed as it was only intended to be a paper trail….

[427] No agreement was entered into with Remington for the transfer of the 6th Street SE lands. Remington still owns the lands under the CPR main line, and CPR has an easement over those lands. Mr. Remington testified that Remington pays taxes on those lands.

Deposit

[428] As earlier noted, on June 15, 2007, Mr. Raby wrote to Ms. Gottselig saying that "Canadian Pacific Railway Company has determined that no portion of the Existing Parcel is currently surplus to the Vendor's existing railroad operations nor is that situation to change in the immediate future". He indicated that on June 18, 2007 Remington's $50,000 deposit would be returned to it.

[429] The deposit cheque was returned to Remington, and Remington cashed the cheque.

Removal of the caveat

[430] In a letter to Mr. Brownlee dated October 29, 2007, Mr. Raby said with respect to the Remington caveat, "we are not currently aware as to how easy it will be to obtain a voluntary partial withdrawal of this caveat".

[431] Remington ultimately agreed to remove the caveat to accommodate the transfer by the Province because Mr. Remington was advised by counsel that, if he did not do so, Remington risked a $25,000,000 lawsuit. He did not have any particulars about the potential lawsuit, although assumed it was a potential lawsuit by CPR.

Analysis of Waiver and Estoppel

[432] I cannot accept CPR and the Province's submission that Remington ought to be estopped from enforcing the 10th Ave Agreement, or that it has waived its rights under that agreement. Remington's conduct is not sufficient to satisfy either the test for estoppel or that of waiver.

[433] Remington was told that CPR was selling the lands to the Province. It was told that it might nonetheless be able to obtain some of the 10th Ave Lands. Faced with that upsetting outcome but in the hope that all might not be lost, Remington did what it could to salvage the situation rather than escalating conflict through demand letters or litigation.

[434] Mr. Menzies' February 2007 e-mail to Mr. Hyder shows what Remington understood, and what it was trying to do. It understood that it had a chance to retain part of the 10th Ave Lands. Mr. Menzies seems, in fact, to have understood that this outcome was likely, at least with those lands east of 6th Street SE. Remington especially wanted to preserve the portion of the 10th Ave Lands – the strip between 4th Street and 6th Street SE – which was most essential to its plan for Rail Town, which involved bridging the 9th Ave and 10th Ave Lands in that location. Mr. Menzies' e-mail told Mr. Hyder that, without those lands, Remington's vision would be in jeopardy. At that point, Remington was focussed on doing what it could to preserve that vision, an outcome it thought possible given the representations at the December 4, 2006 meeting.

[435] The visioning process did not offer Remington the hope of anything new or better than what it had contracted for in the 10th Ave Agreement, but it did offer Remington the hope that it would retain enough of the 10th Ave Lands to achieve Rail Town, that it would be able to accomplish a "joint Outline Plan and Land Use redesignation".

[436] In the circumstances, Remington's participation in the visioning exercise cannot reasonably be understood as indicating a willingness to change its legal situation or to forego reliance on its legal rights. A commercial party's rational attempts to preserve what it can of the lands it contracted for, to mitigate its loss, ought not to be understood as waiver or estoppel. Otherwise, every contract holder would have to "insist on the very letter being enforced in all

cases": ***John Burrows Ltd v Subsurface Surveys Ltd***, [1968] SCR 607 at 615. Or, here, running immediately to the courthouse at the first sign that things had gone awry.

[437] The return of the deposit is even less compelling. Whatever it means for Remington's claim of specific performance – discussed below – simply accepting its own money back when it has been told that CPR has no intention of proceeding cannot be reasonably understood as a form of acquiescence in the breach. The cases on accepting return of a deposit relied on by CPR show that doing so can, in some circumstances, be treated as electing to accept contract repudiation, therefore disqualifying a party from seeking specific performance on the basis of the contract's continuation. None of the cases say or suggest that accepting the return of a deposit amounts to acquiescence in contract breach: ***Cull v Heritage Mills Development Ltd***, (1974) 5 OR (2d) 102 (HCJ); ***Chai v Dabir***, 2015 ONSC 1327; ***Bashir v Koper***, (1983) 40 OR (2d) 758; ***Romfo v 1216393 Ontario Inc***, 2006 BCSC 1648; ***Ridge Development Corp v Haji Holdings Inc***, 2009 ABQB 664.

[438] With respect to the removal of the caveat, I accept that Mr. Remington removed the caveat in fear of being sued. I also note, however, that I do not have evidence about the materiality of that threat, or whether CPR or the Province made such a threat. As such, they may or may not have known the reasons why Mr. Remington removed the caveat.

[439] That being said, the broader pattern of conduct in this case does not support the inference that by removing the caveat Remington gave a promise or assurance to CPR and the Province that it did not intend to rely on the 10th Ave Agreement. Remington had already asserted that it had a contract. It was doing its best to keep the 10th Ave Lands that it needed to develop Rail Town, while avoiding litigation. It explicitly told CPR that some of the 10th Ave Lands were crucial for it achieving its Rail Town vision. It did not remove the caveat until months after the contract between CPR and Remington had been signed. Mr. Remington refused to execute the agreement for the 6th Street lands, thereby communicating – at around the time the caveat was removed – his unhappiness with the conduct of CPR and the Province. Mr. Hyder's contemporaneous e-mails portray Mr. Remington's refusal to execute the 6th Street land agreement as an act of petulance, but that characterization (the accuracy of which I doubt) is still inconsistent with believing Mr. Remington to be acquiescing in the conduct of CPR and the Province.

[440] In brief, I reject the submission that Remington acted in a way that evidenced an "unequivocal and conscious intention" to abandon its rights under the 10th Ave Agreement. I also reject the submission that it made any kind of promise or assurance to CPR or the Province that it was intending not to rely on the 10th Ave Agreement. It certainly did not explicitly communicate that it was abandoning or choosing not to rely on its rights, and I do not view its conduct as sufficient to support an inference of either waiver or estoppel. Rather, I find that Remington, when faced with CPR's announcement that it intended to breach the contract, and CPR and the Province's representation that Remington might still be able to obtain a portion of the 10th Ave Lands, did its best to salvage its planned development, avoid litigation and mitigate any potential loss.

[441] Remington had legal rights under the 10th Ave Agreement. The 10th Ave Lands were crucial to its vision for Rail Town, a vision that, by December 2006, it had spent considerable time and effort pursuing and developing. In that situation, looking at the matters practically, sensibly and in context (***Thorner v Majors and Others***, [2009] UKHL 18 at para 85)

Remington's conduct can be understood as focussed on the larger picture, on its successful development of Rail Town, and on being flexible and adaptable – the qualities which, the evidence shows, have contributed to its success as a developer. It does not show that it was willing to give up the legal rights and interests for which it had bargained.

[442] Indeed, the evidence shows that CPR and the Province knew that Remington *was* asserting its rights and interests. Both Mr. Brownlee and Mr. Walsh were explicitly told by Mr. Remington that he understood Remington and CPR had a deal. And Mr. Walsh took the confirmation clause out of the transaction with the Province because he knew that Remington would not confirm that it had no interest in the lands – "You knew that Mr. Remington would never agree to that? Yeah".

[443] Finally, with respect to estoppel, I reject the claim that either CPR or the Province changed their position as a result of Remington's conduct. By December 2006 they had, in substance, reached an agreement. It was then that the 10th Ave Agreement was breached, and that the Province had offered its inducement. Further, the conduct relied on by CPR and the Province – the visioning exercise, the acceptance of the deposit, the removal of the caveat – occurred *after the agreements between CPR and the Province had been signed*. The deal was done, and nothing Remington said or did at that point made any difference at all.

[444] CPR and the Province rely on the fact that their agreement had not yet closed, and the lands had not yet been transferred. CPR's brief goes so far as to claim:

> If Remington had refused the return of its deposit, maintained its caveat, objected to the deal with the Province and refused to engage in the planning process with the Province and CPR, the parties would not be here today

[445] I reject this submission. Mr. Remington *did* object to deal with the Province and Mr. Walsh told him to "get over it". By the time Remington returned the deposit, removed the caveat and engaged in the planning process, the contract between CPR and the Province had been signed. CPR was contractually obligated to sell the lands to the Province. Had Remington not removed the caveat, this litigation would simply have commenced in late 2007 with it as defendant rather than in early 2008 with it as plaintiff. Given that by May 2007 CPR had a contract to sell the lands to Remington, and now had a contract to sell the lands to the Province, I do not see any scenario in which the litigation could have been avoided. Except, perhaps, had Remington obtained enough of the 10th Ave lands to complete Rail Town, and a joint Outline Plan and Land Use redesignation, as it sought to do through the visioning process.

[446] Indeed, I am troubled by the suggestion, which infused the questions and argument on this issue, that the blame for this litigation arises with Remington for not objecting aggressively enough, for believing the representations made at the December 2006 meeting that some of the 10th Ave Lands might still be available, and for attempting to achieve a result that it would allow its development to proceed. Remington is the innocent party. The blame for this litigation lies elsewhere.

[447] CPR submitted that Remington's conduct is analogous to the plaintiff in ***DirectCash Management Inc v Macs Convenience Stores Inc***, 2018 ABQB 231. In that case Macs advised DirectCash that it did not intend to renew its service agreement because it intended to expand the services and areas covered by the agreement. It wanted to allow service providers, including DirectCash, to bid on a new contract. DirectCash submitted a proposal, but Macs chose another

service provider. DirectCash then sought to exercise the right of first refusal in its original contract which was triggered where Macs wished to retain an alternate service provider for similar services: ***DirectCash*** at para 2-4.

[448] Justice Hollins held that DirectCash had waived its ROFR. She cited the legal principle that "acts or conduct that amount to waiver involve both knowledge and intent and generally the reason giving rise to the waiver is that the party seeks to obtain an advantage or benefit from doing so". That was the case with DirectCash, who knew of its rights under the notice provision, received a non-compliant notice from Macs, "and then acted in every way, internally and to Macs, as though the notice was compliant, in the admitted hopes of gaining some advantage by sitting on both the non-compliance and its ROFR while simultaneously participating in the bidding for a new contract it now maintains could never have been concluded": ***DirectCash Management Inc v Macs Convenience Stores Inc***, 2018 ABQB 231 at para 50-51. Justice Hollins describes DirectCash as having "intentionally lulled Macs into proceeding with its bid process, seeing the opportunity of expanding its contract with Macs and knowing that, even if that failed, it could at least protect its original service agreement with its ROFR".

[449] Remington's conduct here is entirely distinguishable from that of DirectCash. Remington communicated its opposition to CPR as soon as it was told about CPR's plan to sell the land to the Province. CPR and the Province made the decision to enter into an agreement before they told Remington they had done so. Remington had nothing material to gain from the conversations with the Province – only a loss to partially avoid. All the parties recognized that the high speed rail was not an imminent possibility; any gain for Remington from the construction of such a line for Rail Town was notional at best. Most of Remington's conduct relied on by CPR – the visioning exercise, the acceptance of the deposit, the removal of the caveat – happened after the contracts were executed in April 2007. Nothing about this situation can be accurately described as "lulling" CPR or the Province, as Remington hiding its opposition to what was being done, or as Remington seeking some sort of an advantage.

[450] CPR also relied on ***Subway Franchise Systems of Canada Ltd. v Esmail***, 2004 Carswell Alta 1988 (ABQB) (aff'd 2005 ABCA 350). In that case the plaintiff applied to the Court to enforce an arbitration award. The arbitration award ordered the franchise agreements terminated and required that the defendants pay $250 US per day for every day they continued to operate the stores under the Subway name: ***Subway*** at para 3. The defendants did not participate in the arbitration process. After the award was granted, the defendants carried on business as usual, and the plaintiff's local representative continued to deal with them in the ordinary way. The plaintiff prepared monthly written reports, continued to collect royalties and other duties, and made an agreement under which the defendants paid off their share of the costs award over a series of months: ***Subway*** at para 5.

[451] The Court held that Subway was estopped from enforcing the award. It did not matter that Subway did not make an explicit representation that the award would not be enforced, because its conduct amounted to "an unambiguous representation that the plaintiff is not going to enforce the award". Its conduct indicated that it would not enforce the award and was proceeding under the existing contract: ***Subway*** at para 14.

[452] Again, I do not think this case is analogous to the facts before me. In ***Subway*** the plaintiff and defendants carried on with business as usual even though the plaintiff had obtained an order that terminated the franchise agreement; Remington's dealings with CPR and the Province after

December 2006 were a reaction to the breach of the contract, not carrying on as if the contract had not been breached. Remington reacted to the difficult situation in which it found itself after CPR announced it was selling the land to the Province, attempting to ameliorate the loss it suffered through the visioning process, making a choice to accept its money back after CPR returned the deposit, and responding to the reasonable fear of a lawsuit if the caveat was not removed. Mr. Remington communicated his objection and in various ways – such as with the 6th Street SE lands – was uncooperative with CPR and the Province. Remington did not act as if the breach of the contract was a matter of indifference.

[453] With respect to the removal of the caveat, CPR cited two cases, ***Mylonas Enterprises Ltd v Foundation Place Inc***, 2013 ABQB 385 and ***Skyline Shoes Ltd v Worthington Properties Inc***, 2004 ABQB 506. From those cases it submitted that Remington's discharge of its caveat should deprive it of its claim to the 10th Ave Lands.

[454] These two cases do not support this result. Neither case deals with waiver or estoppel. In ***Mylonas*** Justice Yamauchi was addressing the point that a caveat is communication about an interest in land and is not, in and of itself, proof of the existence of an interest in land: ***Mylonas*** at para 15. In ***Skyline*** Justice Clackson addressed the risks that would arise with his granting an application for the removal of a caveat, positing that if made effective immediately this would deprive the respondent of any prospect of obtaining title to the lands, even if the respondent succeeded on appeal: ***Skyline*** at para 8.

[455] ***Mylonas*** is inconsistent with the proposition submitted by CPR. If a caveat does not create an interest in land then, logically, the removal of a caveat does not extinguish an interest in land. The interest in the land exists as a result of the agreements and legal circumstances that underlie the caveat, not as a result of the caveat's presence or its removal.

[456] Similarly, Justice Clackson's comment in ***Skyline*** that, if he removed a caveat immediately it might effectively deprive a particular respondent of the ability to obtain title, does not establish that, in law, a party who removes a caveat loses the legal interest in the lands they otherwise hold.

[457] Assume for the moment that Justice Clackson was wrong, and the applicant in ***Skyline*** had a legal interest, and that the Court of Appeal reversed Justice Clackson on appeal. Also assume that, instead of leaving the caveat in place pending appeal, Justice Clackson had removed the caveat, and the property was sold. The applicant in that case would not have been able to obtain the property which, by then, would have been sold to a *bona fide* purchaser for value. But the applicant would nonetheless have had legal rights pursuant to its existing legal interests, which it could have pursued in court. The removal of the caveat would not have altered the nature and extent of those legal interests. Further, if the sale had not been to a *bona fide* purchaser for value then the removal of the caveat would not have precluded the applicant from seeking specific performance. Again, the point is simply that the caveat provides notice and information about an interest in land and has a practical impact on how parties deal with land; it does not create or extinguish the underlying legal rights which it reflects.

[458] As such, I reject CPR and the Province's claim that Remington waived its rights under the 10th Ave Agreement or is estopped from enforcing them.

Did the Province and CPR engage in a civil conspiracy in relation to Remington?

[459] Remington alleged that CPR and the Province committed conspiracy by unlawful means. Given my other conclusions it is not necessary to consider this claim further here, although I do touch on it briefly in my discussion of punitive damages, below.

Conclusion on Liability

[460] I find CPR liable to Remington for breach of the 10th Ave Agreement, and the Province liable to Remington for inducing contract breach.

Introduction to Remedy Analysis

[461] The question of how to remedy the wrongs done to Remington poses some significant difficulties. The obvious answer would be to order specific performance. Remington's plan was to develop the 10th Ave Lands, the 9th Ave Lands and the Interlink Lands together as a comprehensive mixed-use development, Rail Town. The loss of the 10th Ave Lands, which were essential to allow Remington the possibility of connecting and integrating the properties, eliminates Remington's ability to complete that development in the way it envisioned; they were irreplaceable.

[462] Quantifying the monetary value of that loss is remarkably complicated. Remington's development plans in 2002, in 2007 and today, were flexible and contingent on market conditions at the time of development of each stage of the project. Whatever its final form, however, the evidence satisfies me that Remington's development of Rail Town would have been profitable. The uncertain and difficult issue is: how profitable? And was the development generating that profit reasonably foreseeable in 2002 when the parties signed the 10th Ave Agreement?

[463] An order of specific performance would eliminate the need for the Court to undertake this challenging analysis; it would, as I will explain below, be the fair and appropriate remedy in the circumstances of this case. It is, however, a remedy that CPR and the Province submit that Remington elected not to pursue when it accepted the return of its deposit, removed the caveat and did not, until 2009, bring a claim against the Province or seek specific performance. Moreover, and regardless, it is not a remedy that this Court can order given that the Province owns the 10th Ave Lands: *Proceedings Against the Crown Act*, RSA 2000 c P-25, s. 17.

[464] If calculating damages at common law, the remedy for inducing contract breach is damages at large:

> Damages for the tort of inducing breach of contract are "at large". As set out by Lord Hailsham in ***Broome v. Cassell & Co. Ltd***, [1972] A.C. 1027 (H.L.), at p. 1073:
>
> > The expression "at large" should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be set in extent…

> [43] In Fleming's The Law of Torts at 765, he states that recovery of "at large" damages for inducing breach of contract is "not limited to specific or special damage and may, for example in case of wrongful dismissal, include compensation for the inconvenience and unhappiness caused by a change of job. Neither are damages limited to those recoverable from the contract-breaker; they may include the prospect of continuing employment beyond the contractual period" (citations omitted): ***Drouillard v Cogeco Cable Inc***, 2007 ONCA 322 at para 42.
>
> See also: ***Burns v Sharan Sohi***, 2012 ONSC 2414 at paras. 313-314; ***Gravelle v A1 Security Manufacturing Corp***, 2014 ONSC 5472 at para 27; ***Sateri (Shanghai) Ltd v Vinall***, 2017 BCSC 491 at para 626.

[465] Cases assessing appropriates damages for inducing contract breach have looked to what the plaintiff would have received had the contract been performed, and the loss suffered by the plaintiff as a result of the contract not having been performed. Analyzed in that way, the award of damages for inducing contract breach is, as in contract law generally, the amount necessary to put the party in "as good a position, financially speaking, as it would have been in" had the contract been performed: ***Lobban v Wilkins***, 2014 ABQB 653 at para 67-72, citing ***Naylor Group Inc v Ellis-Don Construction Ltd.***, 2001 SCC 58 at para 73; ***369413 Alberta Ltd v Pocklington***, 2000 ABCA 307 at para 76-77.

[466] In general, remoteness does not limit recovery for an intentional tort. "[I]f a tort is intended, it will not matter that the result was more harmful than the actor should, or even could have foreseen": ***Non-Marine Underwriters, Lloyd's of London v Scalera***, 2000 SCC 24 at para 99. In the case of inducing contract breach, however, where damages reflect the loss associated with the contract breach, if the losses are too remote to be recovered for breach of contract then, logically, they are also too remote to be recovered as damages for inducing contract breach.

[467] As previously noted, and with respect to CPR, the traditional remedy for contract breach is to put the plaintiff in as good a position, financially speaking, as it would have been in had the contract been performed. The plaintiff may, however, recover only those losses that would have been reasonably foreseeable to the parties when the contract was made: ***Naylor Group Inc v Ellis-Don Construction Ltd.***, 2001 SCC 58 at para 73; ***Bank of America Canada v Mutual Trust Co***, 2002 SCC 43 at para 25-27.

[468] Compensation for lost profits can be awarded for contracts concerning land; the question of whether such an award is appropriate is "no more than application of ***Hadley v Baxendale*** (1854), 9 Ex 341": ***Trinden Enterprises Ltd v Ramsay***, 2009 BCCA 125 at para 23.

[469] The assessment of ordinary contract damages, rather than damages in lieu of specific performance, is at the date of contract breach: ***Rougemont Capital Inc v Computer Associates International Inc***, 2016 ONCA 847 at para 50.

[470] The remedies analysis considers the following issues:

1. Is Remington entitled to specific performance?
2. What type of losses were reasonably foreseeable when Remington and CPR entered into the contract in 2002?
3. What losses has Remington proven, on the balance of probabilities, that it suffered as a result of the breach of the 10th Ave Agreement?

4. Given the analysis on remoteness, what amount of Remington's proven losses, if any, can it claim from CPR and the Province?
5. Did Remington have a duty to mitigate? Should any deduction be made from its claimable losses for a failure to mitigate?
6. What deductions should be made from Remington's claimable losses for land acquisition and holding costs?
7. Is Remington entitled to punitive damages?
8. What interest rate should apply to Remington's damages award, and should it be calculated on a simple or compound basis?

Is Remington Entitled to Specific Performance?

[471] Remington's claim to specific performance requires the Court to be satisfied that the 10th Ave lands are unique "to the extent that its substitute would not be readily available": ***Semelhago v Paramadevan***, [1996] 1 SCR 415 at para 22. Whether specific performance ought to be awarded depends on whether damages could adequately compensate a plaintiff for their losses: ***Asamera Oil Corporation Ltd v Sea Oil & General Corporation***, [1978] 1 SCR 633 at 644.

[472] Commercial properties rarely satisfy the requirements for specific performance; in that context, "any unique characteristics will be reflected in the profits from investment" such that damages can be calculated: ***Strategic Acquisition Corp v Starke Capital Corp***, 2017 ABCA 250 at paras 34-35; ***Southcott Estates Inc v Toronto Catholic District School Board***, 2012 SCC 51 at paras 38-40; ***Semelhago v Paramadevan***, [1996] 1 SCR 415 at para 20; ***1244034 Alberta Ltd v Walton International Group Inc***, 2007 ABCA 372 at paras 12-13, leave to appeal ref'd; ***365733 Alberta Ltd v Tiberio***, 2008 ABCA 341 at para 10.

[473] Having said that, however, courts have been prepared to order specific performance where an investment property is part of a larger plan of development, and the ability to achieve that plan is compromised by the loss of the subject property: ***Covlin v Minhas***, 2009 ABCA 404 at para 14; ***Balderston v Faul***, 2014 ABQB 762 at para 109; ***532782 BC Inc v Republic Financial Ltd***, 2001 ABQB 581 at para 27; ***Kaler v Scales***, 2009 BCSC 457 at paras 93-94; ***2475813 Nova Scotia Ltd v Lundrigan***, 2003 NSSC 48 at paras 25-26; ***11 Suntract Holdings Ltd v Chassis Service & Hydraulics Ltd***, (1997) 36 OR (3d) 328 (ONCJ). See also, ***Youyi Group Holdings (Canada) Ltd v Brentwood Lanes Canada Ltd,*** 2014 BCCA 388, at paras 43-52.

[474] As stated by Justice Lax in ***John E Doge Holdings Ltd v 805062 Ontario Ltd***, (2001) 56 OR (3d) 341 (ONSC), aff'd (2003) 63 OR (3d) 304 (leave to appeal ref'd) at para 55: "The more fundamental question [in determining whether to award specific performance] is whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties". Uniqueness means that a property has qualities that make it "especially suited for the proposed use that cannot be readily duplicated elsewhere: ***Lucas v 1858793 Ontario Inc (Howard Park)***, 2021 ONCA 52 at para 74.

[475] In ***Lucas v 1858793 Ontario Inc (Howard Park)***, 2021 ONCA 52 at para 73, the Ontario Court of Appeal held that the availability of specific performance depends on the nature of the property, the adequacy of damages and "the behaviour of the parties having regard to the equitable nature of the remedy". It also held that uniqueness should be assessed from the perspective of the plaintiff but that the Court must determine, objectively, whether the plaintiff

has shown that damages are inadequate in the circumstances: ***Lucas*** at para 75; ***Neher v Marathon Homes Inc***, 2011 ABQB 92 at paras 59-61. If damages "would be particularly time-consuming, difficult, or complex to compute, this may point in favour of specific performance": ***Lucas*** at para 79. See also, ***Youyi Group Holdings (Canada) Ltd v Brentwood Lanes Canada Ltd.*** 2014 BCCA at para 49-51.

[476] I am satisfied that the 10th Ave Lands is one of the exceptional tracts of commercial property for which specific performance would be the appropriate remedy. As the middle parcel of three acquired by Remington, it was essential for completing the Rail Town development. Remington had not acquired the necessary air rights to link the 9th Ave and 10th Ave lands; however, as the owner of the lands on either side it was uniquely positioned to be able to acquire such rights from CPR. As a rational economic actor CPR would have been expected to be willing to sell an asset it did not require for its operations; as, in the end, it did in selling the air rights to the Province. Without the 10th Ave Lands, however, that possibility evaporated. Instead, Remington was left with two segregated parcels of land which, while still economically valuable, cannot be incorporated into what Mr. Magnussen, the chair of the Calgary Municipal Land Corporation, described as a "comprehensively designed and well-planned community".

[477] The calculation of the loss associated with the loss of the 10th Ave Lands is complex and difficult to measure accurately and fairly. Remington supported its claim for damages with extensive expert evidence showing the profits it would have earned by the construction of three high rise commercial properties on the 10th Ave Lands by 2014. That claim does not, however, account for the effect of the loss of the 10th Ave Lands on the profitability of the 9th Ave Lands or the Interlink Lands. It does not account for buildings that would have been constructed on the remaining 10th Ave Lands after 2014. It depends on expert analysis in relation to the timing of City approvals, the substance of the City approvals, the costs of construction, absorption of the property into the commercial real estate market, and the revenues that would have been generated in rents and from the sale of the buildings.

[478] As the analysis below explains, I was impressed by the care and thoroughness of the Remington experts. The Defendants did not offer a persuasive response or plausible alternative to the Remington's expert's evidence. I do accept some of the Defendants' criticisms of Remington's damages calculation but, for the most part, I accept Remington's expert's calculations as accurately reflecting what Remington would have earned from 2008-2014 had the 10th Ave Agreement not been breached.

[479] Nonetheless, as Mr. Davidson of Duff and Phelps and I discussed during trial, to fully measure the loss in this case would require calculating what Remington would have earned had it been able to begin construction on all three parcels of lands in 2007 as a single Rail Town development, calculating what it would have earned from construction on only the 9th Ave and Interlink Lands, and awarding Remington the present value of the difference between those amounts. That calculation was not attempted and, in my view, would have been too speculative to permit an accurate or fair calculation.

[480] For that reason, I am satisfied that, if considering only the nature of the property and the adequacy of damages, the just outcome in this case would be to award Remington the 10th Ave Lands, and to allow it the opportunity to build the comprehensive mixed-use development that is feasible and desirable given current market and planning conditions.

[481] CPR and the Province submit, however, that Remington ought to be denied specific performance. First, they submit that by accepting the return of the deposit and removing the caveat, Remington lost its ability to claim specific performance. In substance, they argued that Remington elected to accept CPR's repudiation of the 10th Ave Agreement and to treat the Agreement as at an end; as such, Remington elected to pursue its claim in damages, not specific performance. Second, they submit that Remington has engaged in undue delay, which should disqualify it from obtaining specific performance as a remedy. Third, they submit that specific performance is precluded by the *Proceedings Against the Crown Act*.

[482] A number of cases support the Defendants' argument that, by accepting the return of the deposit, and by removing its caveat, Remington elected to treat the contract as an end, and to pursue damages instead of specific performance. In ***Cull v Heritage Mills Development Ltd***, (1974) 5 OR (2d) 102, the Court held that when the plaintiff cashed the deposit cheque, "he then lost his right to specific performance and thereby elected to accept the Defendant's breach as discharging the contract". See also, ***Kim v Trump***, [2014] OJ No 1948 (SC) at paras 131-133.

[483] On the other hand, in ***Bashir v Koper***, (1983) 40 OR (2d) 758 (CA) the defendant argued that a plaintiff who accepted the return of his deposit was barred from (or had waived) specific performance. The Court of Appeal rejected this argument because, first, the trial judge had not considered it and, second, because "it is not in our opinion an election at all. It was merely a reaction to the vendor's repudiation": ***Bashir*** at para 7. In the result, the Court of Appeal reversed the trial judge's decision denying specific performance.

[484] In ***Romfo et al v 1216393 Ontario Inc***, 2006 BCSC 1648, most of the defendants refused the return of their deposits, but two of the plaintiffs accepted. The defendants argued that cashing the cheques amounted to an acceptance of the defendants' repudiation, thereby disentitling those plaintiffs from seeking specific performance. The Court disagreed. It noted that the defendant did not account for the circumstances in which the cheques were cashed; rather, it "seems to assume that it is a rule of law that the cashing of a returned deposit cheque must be taken as an election to accept a repudiation of a contract": ***Romfo*** at para 35. The Court held this was "overly formulaic", saying that what needed to be done was to assess what the cashing of the cheques communicated, considered on an objective basis in the context of the surrounding circumstances: ***Romfo*** at para 36.

[485] With respect to the caveat, the Defendants relied on the decisions in ***Mylonas Enerprises Ltd v Foundation Place Inc***, 2013 ABQB 385 and ***Skyline Shoes Ltd v Worthington Properties Inc***, 2004 ABQB 506, suggesting that those cases support the argument that by removing the caveat, Remington surrendered protection of its interest and as a result, never had a fair, real and substantial justification for claiming specific performance.

[486] In my view, neither Remington's removal of its caveat, nor its acceptance of its deposit, automatically disqualify it from obtaining specific performance. The question is, rather, whether those actions together "represented an election to accept the defendant's wrongful repudiation of a contract and thereby disentitled the plaintiff from suing for specific performance": ***Romfo et al v 1216393 Ontario Inc***, 2006 BCSC 1648 at paras 36-37.

[487] As summarized by the Supreme Court in ***Semelhago v Paramadevan***, [1996] 1 SCR 415 at para 15,

> In cases such as the one at bar, where the vendor reneges in anticipation of performance, the innocent party has two options. He or she may accept the repudiation and treat the agreement as being at an end. In that event, both parties are relieved from performing any outstanding obligations and the injured party may commence an action for damages. Alternatively, the injured party may decline to accept the repudiation and continue to insist on performance. In that case, the contract continues in force and neither party is relieved of their obligations under the agreement.

[488] An election to accept repudiation must be unequivocal and must be communicated; once made, it is irrevocable: ***Charter Building Company v 1540957 Ontario Inc (Mademoiselle Women's Fitness & Day Spa)***, 2011 ONCA 487 at paras 25-27; ***Morrison-Knudsen Co Inc v BC Hydro and Power Authority***, (1978) 85 DLR (3d) 186 at 246.

[489] In a 2009 decision, Justice Lee suggested that an election to seek damages may not bar a later claim for specific performance; however, he also acknowledged that this issue was not relevant to the application to amend pleadings that was before him: ***Rabbit Hill Recreations Inc v Stetler***, 2009 ABQB 329 at para 92-94. Further, and in any event, I agree with and adopt the careful review of the case law on this issue in ***Fengyun v He***, 2017 BCSC 110 at paras 52-74; "a party who accepts the other party's repudiation cannot later elect to revive the contract and sue for specific performance": ***Fengyun*** at para 74.

[490] At the time that Remington accepted the deposit and removed the caveat, the 10th Ave Lands had not been transferred to the Province. At that point litigation could not be avoided, given that CPR had entered into an agreement to sell the 10th Ave Lands to the Province, but also had an existing contractual obligation to Remington. But had Remington asserted its rights, refusing to accept its deposit, and refusing to remove its caveat, the dispute would have crystallized prior to the transfer of the lands from CPR to the Province. And crystallizing the dispute would have enabled the central question – who is entitled to the 10th Ave Lands – to be determined before the lands were transferred to an ostensible *bona fide* purchaser for value, and one against whom an order for specific performance is not available: s. 17 of the *Proceedings Against the Crown Act*.

[491] Remington never wrote to CPR to demand that CPR comply with its contractual obligations. Neither it nor its counsel sent a letter or e-mail setting out Remington's position that the 10th Ave Agreement remained in effect. Remington is a sophisticated party. It was represented by counsel and could certainly have communicated its position to CPR. The principles governing election to accept contract repudiation are neither niche nor novel. I am not suggesting asserting its contractual rights was a precondition to Remington seeking specific performance. As I have previously explained, CPR knew that Remington objected to it selling the lands to the Province. However, in the context of its acceptance of the deposit, and its removal of the caveat, Remington's failure to put its objections in writing is significant in considering whether it elected to accept repudiation.

[492] At that time Remington still sought to obtain some of the 10th Ave Lands from the Province, to mitigate its loss through having enough land to connect the 9th Ave Lands to the Interlink Lands. Further, it was relying on CPR and the Province's representations that some of the 10th Ave Lands might be made available to Remington. It wanted to preserve its relationships with CPR and the Province, not instigate conflict that might not be necessary if a sufficient

portion of the 10th Ave Lands could still be obtained. Remington believed what CPR and the Province had told it.

[493] Ultimately, however, that is insufficient to change my determination that Remington communicated to CPR and the Province that it elected to pursue damages, not specific performance. Neither CPR nor the Province promised Remington lands; they only told them that some lands "might" be available. Remington was shown portions of the Memorandum of Understanding and had no reason to think it contained any guarantee. It also knew that CPR had entered into a contract with the Province for the lands and did not intend to complete the 10th Ave Agreement.

[494] Remington's conduct facilitated the transfer to the Province when it should have understood that, based on the facts then available to it, the transfer of the lands made specific performance difficult if not impossible to achieve. Remington had not yet determined that the Province had induced the contract breach; as such, at that time the Province was apparently a *bona fide* purchaser of value from whom specific performance would not be available. Further, and in any event, the Province is statutorily protected from an order for specific performance (even if a declaration as to the parties' rights may be granted). Facilitating the transfer to the Province, particularly in the absence of any written objection or protest, communicated to CPR and the Province that Remington was prepared to forego specific performance.

[495] I emphasize that in reaching this conclusion I am not finding that this was Remington's subjective intention. Indeed, I accept that that was not what Remington subjectively intended to do, that Remington still wishes to obtain the 10th Ave Lands, and that an order of specific performance would be the most fair and just outcome in this case. I reach this conclusion with considerable reluctance given the suitability of specific performance as a remedy. Nonetheless, the evidence satisfies me that in 2007 Remington communicated by its actions that it elected to accept repudiation and not to pursue specific performance. That election cannot now be revisited.

[496] With respect to delay, because specific performance is an equitable remedy, "a person may lose the right to the remedy by delay": ***Harris v McNeely***, (2000) 47 OR (3d) 161 (CA) at para 30. The delay must be such that, as a consequence, it would be unjust to order specific performance: ***Baud Corporation, NV v Brook***, (1973) 40 DLR (3d) 418 (ABCA) at para 19; ***Bark-Fong v Cooper***, (1913) 49 SCR 14 at 23.

[497] In ***Lindsay Petroleum Co v Hurd***, (1874) 5 PC 221 at 240, the Court held that to rely on delay the Court must consider "the length of the delay and the nature of acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy". This principle was cited by the Supreme Court in ***M(K) v M(H)***, [1992] 3 SCR 6, where the Court noted that mere delay is not sufficient to bar an equitable remedy through the operation of laches; rather, the Court must consider whether the delay constitutes acquiescence or renders the prosecution of the action unreasonable; "Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine": ***M(K) v M(H)***, [1992] 3 SCR 6 at 78.

[498] Remington's failure to seek specific performance in the first instance contributes to my assessment that, at the time it commenced this action, it ought to have understood that it had chosen to pursue damages. The two years between CPR's assertion that the 10th Ave Agreement was terminated in mid-June 2007, and the order permitting the amendment of Remington's Statement of Claim on June 17, 2009,when coupled with Remington's acceptance of the deposit,

the removal of the caveat and the failure to formally assert its contractual rights, persuades me that justice between Remington, CPR and the Province requires that Remington's remedy be limited to damages.

[499] Given this determination, I do not need to consider the effect of s. 17 of the *Proceedings Against the Crown Act*. Given that the *Proceedings Against the Crown Act* was thoroughly argued, however, and has rarely been considered in the context of specific performance, I make some observations about its application in a case such as this.

[500] Section 17 of the *Proceedings Against the Crown Act* states:

> When in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance but may, instead, make an order declaratory of the rights of the parties.

[501] Several cases have applied or interpreted this provision (or its equivalent from other provinces).

[502] In ***Macquarrie and Macquarrie v the Province of Nova Scotia and Power***, (1972) 32 DLR (3d) 603 the Court issued a declaration that the vendor of land was entitled to specific performance to require the Province to acquire the land. The Province conceded its breach but could not or would not acquire the property because no appropriation of funds had occurred to permit it to do so. The Court cited older case law in support of this declaration to the effect that "it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him": ***Macquarrie*** at para 36.

[503] In ***Dominion Building Corp v R***, [1933] AC 533 (PC) the Privy Council held, in *obiter*, that under the then applicable statute "there is jurisdiction in respect of claims of the subject against the Crown to consider and determine what is right to be done and, as their Lordships do not doubt, to make a declaration as to the right of the subject to specific performance if the circumstances justify it": ***Dominion Building*** (at p. 10 of online text).

[504] In ***Smith v Attorney General (NS)***, 2004 NSCA 106 at para 76, Justice Cromwell, as he then was, observed that the provision prohibited the granting of a permanent injunction, but that this did not create a problem because "as a practical matter…a declaration of right may be made in place of a permanent injunction".

[505] In ***Chinook Farms Ltd v Alberta***, (1986) 48 Alta LR (2d) 337 (QB) the Court essentially ignored the statutory prohibition, making an order enjoining the Crown from carrying out its water management program, and stating that the Crown could not rely on s. 17 when it has acted "in an unlawful manner which results in depriving an individual of his rights". Subsequent King's Bench decisions have rejected this approach: ***Alberta Shuffleboards (1986) Ltd v Alberta***, (1992), 132 AR 126 (QB); ***AUPE v Alberta***, (1996) 197 AR 1 (QB). In ***ANC Timber Ltd v Alberta (Minister of Agriculture and Forestry)***, 2019 ABQB 710 at para 58. Justice Topolinski put it succinctly saying:

> ***Chinook Farms*** is neither persuasive nor helpful. There is no assessment of PACA s 17, nor any discussion of the "rights" at issue (i.e. constitutionally protected rights or not). Like the Courts in ***Mount Pearl (City) et al v Newfoundland (Minister of Provincial and Municipal Affairs),*** 1991 CanLII

> 7508 (NL SC), and ***AUPE #1***, I elect not to follow it. Like Belzil J in ***AUPE #1***, I prefer Lefrud J's reasoning in ***Alberta Shuffleboards***; s 17 of PACA is plainly and unambiguously drafted, and precludes granting an injunction against the Minister in these circumstances.

[506] Authority suggests that s. 17 does not prohibit injunctions being issued against Crown servants (***Prosper Petroleum Ltd v Her Majesty the Queen in Right of Alberta,*** 2020 ABQB 127 at paras 79-80; ***Smith v Attorney General (NS)***, 2004 NSCA 106 at para 93); however, that proposition is not at issue in the context of specific performance.

[507] Based on this authority, s. 17 prohibits the Court from ordering specific performance against the Crown but permits the Court to make a declaration of the rights of the parties. Absent Remington's election, I could make a declaration that it is entitled to specific performance, while not ordering the Crown to transfer the 10th Ave Lands to Remington. That declaration should, however, be granted only "if the circumstances justify it". Further, in assessing the appropriate circumstances, the Court should be mindful of the general prohibition contained in the statute – the Court shall not make an order for specific performance against the Crown.

[508] In ***Macquarrie and Macquarrie v the Province of Nova Scotia and Power***, (1972) 32 DLR (3d) 603, the Crown acknowledged its obligation and acknowledged its breach but, for what appears to be political reasons (para 8), was not doing what it had agreed to do. In that case the declaration, which could push the government to make the appropriation it had agreed to make, was necessary and appropriate. I note in this respect that s. 17 makes the prohibition against granting an order of specific performance mandatory ("shall not") but makes the granting of a declaration permissive ("may").

[509] Were Remington entitled to specific performance, the circumstances in favour of granting a declaration are the uniqueness of the 10th Ave Lands, the difficulty in properly quantifying the loss, CPR's breach of its contractual obligations, and the Province's wrongful conduct in inducing the contract breach. Given, however, that Remington communicated its election to accept repudiation and to pursue damages rather than specific performance, no declaration of entitlement to specific performance can be made.

[510] In sum, then, while the nature of the 10th Ave Lands makes this case appropriate for specific performance, I find that Remington elected to accept CPR's repudiation of the agreement and elected to pursue its claim in damages; as a consequence, it is not entitled to specific performance.

What type of losses were reasonably foreseeable in 2002 when CPR and Remington entered into the 10th Ave Agreement?

[511] To establish liability for contract breach Remington must prove on the balance of probabilities that CPR's breach of contract resulted in the damages it claims. Second, it must establish that the damages were reasonably foreseeable in 2002, when the parties entered into the 10th Ave Agreement: ***Naylor-Group Inc v Ellis-Don Construction Ltd***, 2001 SCC 58 at para 73; ***Dow-Chemical Canada ULC v Nova Chemicals Corporation***, 2020 ABCA 320 at para 57; ***Jorna & Craig Inc v Chiasson***, 2020 NSCA 42 at para 91-92; ***Houweling Nursersies Ltd v Fisons Western Corporation***, (1988) 37 BCLR (2d) 2 at 6 (CA).

[512] Courts have required that a plaintiff's losses be within the reasonable contemplation of the contracting parties since at least the foundational decision of ***Hadley v Baxendale*** (1854), 156 ER 145. That case dealt with a common carrier's failure to deliver a mill shaft in circumstances where the failure to deliver the shaft resulted in significant lost profits to the miller. The Court found that those losses were not ordinary losses, they would not have resulted "in the great multitude of such cases occurring under ordinary circumstances". Further, the "special circumstances" which gave rise to that loss were not "communicated or known to the defendants": ***Hadley*** at 151. As such, the losses were not reasonably foreseeable and not recoverable.

[513] ***Hadley*** identified two paths for a finding of reasonable foreseeability. A loss will be reasonably foreseeable when it is one that arises "naturally, i.e., according to the usual course of things, from such breach of the contract itself, or such as may reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it": ***Hadley*** at 151. A loss will also be reasonably foreseeable when, while not what would ordinarily follow from contract breach, it is a special circumstance communicated by the plaintiff to the defendant at the time the contract was entered into: ***Hadley*** at 151.

[514] The Court of Appeal and House of Lords elaborated on ***Hadley*** in ***Victoria Laundry (Windsor) Ltd v Newman Industries Ltd.***, [1949] 1 All ER 997 (CA) and ***Czarnikow Ltd v Koufos***, [1967] 3 All ER 686 (HL) (***Heron II***).

[515] In ***Victoria Laundry*** the Court explained that the first route to reasonable foreseeability relies on imputed or objective knowledge, the idea that "everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of the ordinary course": ***Victoria Laundry*** at 1002. Reasonable foreseeability also arises, however, where a person has actual knowledge that a loss is likely to arise from breach in this particular case; this is the "second rule" that makes that additional type of loss recoverable: ***Victoria Laundry*** at 1003.

[516] The Court also noted that, with respect to either basis for foreseeability, the defendant need not "actually have asked himself what loss is liable to result from a breach". The point is if, had the defendant thought about it, this loss would have been reasonably foreseeable as liable to result from the breach: ***Victoria Laundry*** at 1003. See: ***BDC Ltd v Hofstrand Farms Ltd***, [1986] 1 SCR 228 at paras 24-26; ***Vorvis v ICBC***, [1989] 1 SCR 1085 at para 49 (per Wilson J, dissenting on other grounds).

[517] In ***Heron II*** Lord Reid discussed the degree of likelihood a loss must have to be reasonably foreseeable saying, "I use the words 'not unlikely' as denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable": ***Heron II*** at 690. A result that is a substantial possibility, but that would only occur in a small minority of cases, would not be reasonably foreseeable: ***Heron II*** at 691, discussing ***Hadley***. The question is:

> whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation: ***Heron II*** at 691.

[518] He said further that it "is generally sufficient that that event would have appeared to the defendant as not unlikely to occur": ***Heron II*** at 693.

[519] Lord Morris of Borth y Gest said at 700-701:

> My lords, the words phrases and passages to which I have referred are useful and helpful indications of the application of the rule in ***Hadley v Baxendale***; but they neither add to the rule nor do they modify it. I regard the illuminating judgment of the Court of Appeal in ***Victoria Laundry (Windsor) v Newman Industries Ltd*** as a most valuable analysis of the rule. It was there pointed out … that, in order to make a contract-breaker liable under what was called "either rule" in ***Hadley v Baxendale***, it is not necessary that he should actually have asked himself what loss is liable to result from a breach but that it suffices that if he had considered the question he would as a reasonable man have concluded that the loss in question was liable to result. Nor need it be proved, in order to recover a particular loss, that on a given state of knowledge he could, as a reasonable man, foresee that a breach must necessarily result in that loss.

[520] Lord Hudson said, at 708:

> A close study of the rule was made by the Court of Appeal in the case of ***Victoria Laundry (Windsor) v Newman Industries Ltd***. The judgment of the court, … suggested the phrase … "liable to result" as appropriate to describe the degree of probability required. This may be a colourless expression, but I do not find it possible to improve on it. If the word "likelihood" is used, it may convey the impression that the chances are all in favour of the thing happening, an idea which I would reject.
>
> I find guidance in the use of the expression "in the great multitude of cases", which is to be found in more than one place in the judgment in ***Hadley v Baxendale***, indicates that the damages recoverable for breach of contract are such as flow naturally in most cases from the breach, whether under ordinary circumstances or from special circumstances due to the knowledge either in the possession of or communicated to the defendants.

[521] Supreme Court of Canada cases applying these principles have held that losses associated with a failure to deliver a crown grant were not foreseeable given that the courier did not know what the envelope contained and, in any event, had no reason to know that "its failure to effect timely delivery could result in consequential loss profits to anyone" (***BDC Ltd v Hofstrand Farms Ltd***, [1986] 1 SCR 228 at para 27), and that mental distress from wrongful dismissal would not have been in the reasonable contemplation of the parties at the time the employment contract was entered into (***Vorvis v ICBC***, [1989] 1 SCR 1085 at para 49, Wilson J. dissenting on other grounds). That latter position was reconsidered in ***Honda Canada Inc v Keays***, [2008] 2 SCR 362, where the Court held that mental distress was reasonably foreseeable where it arose from the employer acting unfairly or in bad faith in the manner of dismissal.

[522] In ***Mustapha v Culligan of Canada Ltd***, [2008] 2 SCR 114 at para 19 the Court held that, except with respect to the time of assessment, the principles and outcomes of negligence and contract were the same in assessing the foreseeability of the defendant's psychiatric injury. In its tort analysis it had explained the degree of probability for something to be reasonably

foreseeable by reference to ***Overseas Tankship (UK) Ltd v Miller Steamship Co Pty***, [1967] AC 617 (PC) (***Wagon Mound No 2***): "a 'real risk', i.e., 'one which would occur to the mind of a reasonable man in the position of the defendant…and which he would not brush aside as far-fetched'": ***Mustapha*** at para 13.

[523] My colleague Justice Labrenz summarized the Court of Appeal's case law on the issue of reasonable foreseeability in ***Khalil v Durant***, 2021 ABQB 241 at paras 79-84.

[524] In ***Noble v Principal Consults Ltd (Trustee of)***, 2000 ABCA 133 at para 10 the Court of Appeal said that damages are "limited to the ordinary natural consequences of a breach or for consequences that might reasonably have been in the contemplation of both parties when they made the contract". See also, ***Petersen Pontiac Buick GMC (Alta) Ltd v Campbell***, 2013 ABCA 251 at para 50.

[525] In ***644036 Alberta Ltd v 625494 Alberta Ltd.***, 2018 ABCA 236 at para 39, a tort case, the Court said, "The Supreme Court of Canada has defined reasonable foreseeability as a 'real risk', i.e. 'one which would occur to the mind of a reasonable man in the position of the defendant … and which he would not brush aside as far-fetched".

[526] Justice Labrenz held that the high interest rates registered by the plaintiff in ***Khalil*** were not within the reasonable contemplation of the parties, noting that the defendant had no knowledge of the plaintiff's financial situation, and that the plaintiff testified that he could mortgage another entity for a much lower rate: ***Khalil*** at para 84.

[527] ***644036 Alberta Ltd v Kay Mcvey Smith & Carlstrom LLP***, 2018 ABCA 236 dealt with a trial judge's calculation of damages arising from its solicitor's negligence in failing to convey certain lands. The issue in the case was whether the trial judge should have awarded damages based on the land value at the closing date versus at the time of subdivision. The Court agreed that the relevant date for assessing damages was the date of breach but held that that did not mean the damages were the land value at that point in time. Rather, the damages needed to take into account the risk to the plaintiff arising from the negligence that would have been contemplated by the defendant at the date of breach. Here, the lawyer knew about the subdivision before the transaction closed. She knew the importance of all included titles being conveyed. The respondents on appeal acknowledged that it was foreseeable that the lands would be subdivided. The Court held at para 43-44:

> We disagree with the trial judge that the subdivision was too remote or there were too many intervening factors that could affect the value of the land with the passage of time. This evidence and the respondents' admission establish that the subdivision was reasonably foreseeable at the time of Heikel's breach. As a result, Heikel ought to have known at the time that if she failed to ensure that all the titles were transferred to the appellant, then the appellant would not receive the full value of the subdivision. This is sufficient to establish a loss in negligence.
>
> The appellant does not need to go any further to establish that it was reasonably foreseeable in November 2004 that the appellant would sell the land at the time of subdivision or at any other particular time. It is not the sale, but the subdivision itself that materially increased the value of the land.

[528] This case law establishes three central points.

[529] First, the relevant time frame to assess remoteness is 2002, when the parties entered into the 10th Ave Agreement.

[530] Second, the question to be answered is, if CPR had turned its mind to the issue, what loss would it have understood to arise ordinarily, in the natural course of things, from the breach of the contract? What losses would be liable to result? "Liable to result" includes things which are a "considerably less than an even chance" to occur, but it does not mean something that is merely possible, or conceivable, or a thing that might happen. It is something that is "not unlikely", and that will "flow naturally in most cases from the breach". It must be something that would have occurred to CPR had it turned its mind to the question of possible losses for Remington in the event of a breach, and that it would not have brushed aside as far-fetched.

[531] Third, determining what was in the reasonable contemplation of the parties at the time they entered into the 10th Ave Agreement requires considering the information available in 2002 which, here, includes CPR's analysis of the B Yard Lands prior to sale; information about Remington, its business, and its plans for the 10th Ave Lands; the 10th Ave Agreement and related documents; and, records contemporaneous with the negotiation of the Agreement.

[532] Thus, a reasonably foreseeable loss in this case is the type of loss that, knowing the 10th Ave Agreement and the information available in 2002, would be unsurprising to the reasonable person. It might not be the only type of loss that was unsurprising – a range of losses can flow in the ordinary course from the breach of contract – but it, itself, must be the sort of loss one would expect to be caused by breach of the 10th Ave Agreement.

[533] In doing this analysis I have chosen to begin not by considering whether the losses claimed by Remington at trial were reasonably foreseeable, but rather by considering what, in general, that information suggests was within the reasonable contemplation of the parties in 2002 and, in particular, in the reasonable contemplation of CPR. I approach the issue this way because, to my mind, it more closely replicates the analysis as it would have been done in 2002 – if CPR breaches this agreement, what type of losses will be the natural or ordinary result of that breach? It approaches the question neutrally and generally, rather than only in response to the claim made by Remington. I then return to and conclude the remoteness analysis after I have assessed the evidence with respect to the losses proven by Remington at trial.

CPR's Pre-2002 Analysis of the 10th Ave Lands

[534] Prior to entering into the 10th Ave. Agreement, CPR commissioned analysis about the B Yard and G Yard lands, and the basis on which they could be sold. Some of this evidence was referenced previously with respect to the circumstances surrounding the 10th Ave Agreement but is repeated here for convenience and to identify all of the facts relevant to assessing what was reasonably contemplated by the parties in 2002 with respect to the consequences of contract breach.

[535] Remington presented evidence from Stephen Shawcross, both as a fact and expert witness. Since 1990 Mr. Shawcross has been the Director of the Calgary Office of the IBI Group, where he has worked in a planning capacity since 1979 and, as discussed below, is an expert in urban planning and in railway development. He also has personal knowledge of the history of the proposed Rail Town development, having been retained by CPR to do assessments of the property, in 1996 and 2001.

[536] Mr. Shawcross testified that CPR retained IBI to develop a program for the G Yard, B Yard and Interlink lands, to identify their highest and best use, and to complete a financial analysis to determine their residual land value.

[537] The study, dated May 1996, identified a "net developable area of 19.44 acres, with half of the site developed for residential purposes, and half for commercial purposes". Another 4.86 acres would be allocated for parks, open space and internal roads and circulation. IBI assessed the land as having a value of between $12.09 to $14.12 per net developable square foot, depending upon the absorption rate. It described the site as follows:

> The subject site occupies approximately 33.41 gross acres along CP's main rail line traversing the City of Calgary. The site is located in the Victoria Park community immediately southeast of Calgary's downtown core district and is generally bounded by 9th Avenue S.E. on the north, 10th and 11th Avenues S.E. on the south, Macleod Trail S.E. on the west and the Elbow River on the east. After allowances for a 100 foot railway right of way through the central portion of the property, the net area is estimated at approximately 24.30+/- acres. The site is zoned direct control and allows for the development of a wide variety of light industrial, commercial and residential uses.

[538] It noted that the "redevelopment potential of the site is considerable" but that the timing would depend in part on the development of East Village, Victoria Park and the Stampede grounds. It also noted that the planning context pointed to a mix of "commercial (i.e. – retail), residential and Stampede uses on the CP Rail lands and adjacent properties".

[539] IBI also identified a "development concept" for the site:

> The development concept for the subject site is envisioned as a distinctive collection of residential and mixed use projects cast in a formal setting of private courtyards, gardens and stately piazzas. The residential projects will cater to a variety of market niches drawn to the vibrancy and unique urban experience offered by Calgary's developing east end. The trend to warehouse conversion and new construction in the general area has created a dynamic and eclectic collection of restaurants, shops, cafes, clubs, artist's lofts and prestigious addresses. The site, by virtue of its size and locational characteristics can be developed to enhance and expand upon these opportunities, and in so doing, create a distinctive residential and mixed use enclave – an urban village as it were.
>
> It is also intended to provide office and retail functions along with unique live/work environments which are intended to provide a place for artists, homecrafters and 'makers of things' to live and work within the community.
>
> Office and retail use would be accommodated within the initial phases of the development. These uses would be augmented by hotel, entertainment and specialty restaurant as the project matures, and in response to urban renewal and expansion initiatives associated with East Village, the Stampede, Victoria Park and the World's Fair. …
>
> The development program assumes that 50% of the site would be developed for residential purposes and 50% for non-residential purposes.

[540] It identified the non-residential as including a Floor Area Ratio (FAR) of 1.75, for a total of 740,955 square feet. FAR is a standard number in development and planning which identifies the amount of buildable square feet on any square foot of land by applying a multiplier to the base unit of land to determine the gross floor area developable on that property; a multiplier of 1.75 means that for every square foot of land, 1.75 square feet of buildings could be constructed (taking into account that some parts of the land have no buildings on them, which would increase the square footage actually constructed on a single square foot). A FAR of 7 on a 50,000 square foot piece of land would allow for 350,000 of building on that land, but the building can be constructed on a base floor plate that is, for example, only 25,000 square feet.

[541] IBI contemplated the office space as including retail, office and light industrial. It assumed a builder profit of 10% of hard development costs, excluding land.

[542] It analyzed the commercial space using variable absorption rates but assumed a capitalization rate of 11.5% and a discount rate of 9%.

[543] Mr. Hyder did not recall seeing this document. Mr. Walsh did not recall seeing this report or being told that IBI was preparing a report regarding the sale of the lands in downtown Calgary.

[544] Mr. Shawcross testified that he worked on the report with Mr. Nimmo. Mr. Nimmo acknowledged that he was familiar with the document, and that he personally provided Mr. Shawcross with the instructions regarding the analysis. However, he maintained that the ideas in the document, and in particular the idea of developing the property as a single site, were IBI's, not CPR's. Mr. Nimmo said he was seeking to get a third-party perspective on the land, not to advance a particular perspective. Mr. Nimmo understood this to be a land use planner's viewpoint of the site; CPR neither constrained what IBI proposed, nor did it endorse it.

[545] In 2001, CPR again retained IBI to create an "Alternative Land Use Scenario Evaluation" for the "East Downtown Marshalling Yard" in November, 2001.

[546] As previously noted, the document begins by saying, "Canadian Pacific Railway has identified lands surplus to operational requirements in the East Downtown Marshalling Yard, and intends to move forward with subdivision of this land". It notes that CPR sought "to determine the optimal land use and disposition strategy".

[547] The document covered much of the same ground as the 1996 assessment. In its market overview on the residential side it considered multi-family market, high-rise apartments, medium-rise apartments, low-rise apartments and townhouses. With respect to the commercial market it noted that market's "significant volatility" but that it had a "positive near-term outlook" such that "development of additional major commercial projects is likely in the near future". It said, further, that:

> Avison Young Commercial Real Estate provided data on all major commercial land transaction [sic] occurring in the downtown area over the previous three years. Our analysis of this data suggests that current average land prices for mixed-use mid-rise product are on the order of $35 per square foot, while high-rise office tower land prices are averaging approximately $110 per square foot, or approximately $16 per buildable square foot. Those values are for roughly comparable projects located on the peripheral area of downtown.

[548] The report identified five "alternative land use scenarios…including low rise residential, mid rise residential, high rise residential, low rise office commercial, and hi rise office commercial". It said, that "it is not recommended that the entire site be developed with a single use". It said that the analysis of each use was, instead, "to determine the optimal mix of uses that represents the highest and best use for the site under current conditions". It said that under these alternative uses, the land was worth between $6.5 million and $14.6 million, noting that the "highest land value is obtained under the high density commercial use, while the lowest value is obtained under the low density commercial office use". It observed, though, that those high density uses bring higher levels of market risk and would be less likely to obtain planning approvals "across the entire site".

[549] IBI then set out a development concept for the land, which included access across the CPR lines to connect the 9th Ave. and 10th Ave. portions of the project, and which described the concept in these terms:

> The development concept for the subject site is envisioned as a distinctive collection of residential and mixed-use projects cast in a formal setting of private courtyards, gardens and stately piazzas…The size, by virtue of its size and locational characteristics can be developed to enhance and expand upon these opportunities, and in doing, create a distinctive residential and mixed-use enclave – an urban village, as it were.
>
> With the linkages as proposed in the development principles section, this enclave could be connected both visually and physically to the East Village Redevelopment Scheme and garner the considerable cachet that will be associated with this major redevelopment, in particular, the amenity characteristics associated with the central canal and riverfront promenade.
>
> There is also the potential to provide office and retail functions, along with unique live/work environments which are intended to provide a place for artists, homecrafters and "makers of things", to live and work within the community. More typical retail functions would be located at street level along 9th Avenue, whereas the unique live/work environments are proposed immediately adjacent to the tracks in the 10th Avenue assembly. Thereby providing screening and buffering for the conventional residential uses.

[550] Its proposed development plan included all of the potential land uses, with 85,000 square feet of low rise office/commercial, and 484,000 square feet of high rise office/commercial.

[551] It included a schematic showing an overpass over the rail lines. Mr. Remington testified that he recalled in particular seeing the picture showing the bridge over the rail lines and illustrating the ability to connect the lands.

[552] Finally, it set out a "variety of options available to Canadian Pacific for disposing of the property". This included selling individual parcels, which had "the lowest level of risk, but also offers the lowest level of potential reward"; bulk sale of the land "to a single builder or a consortia" which had low risk with an intermediate level of potential reward; and, developing the land itself, which had the higher risk but also the highest potential reward. It noted with option two, the bulk sale, "Canadian Pacific could become a joint venture partner, establishing a base price for the land, but also sharing in potential upside profits".

[553] IBI suggested that there "may be several consortia of developers who were unsuccessful in their bid to secure the East Village land, but that may still be interested in securing a substantial block of developable land within the downtown".

[554] Mr. Shawcross testified that this document was created for CPR, and in particular at the direction of Mr. Nimmo. He thought that Mr. Hyder may also have been involved.

[555] Mr. Hyder does not recall ever seeing this document.

[556] Mr. Nimmo sought in his testimony to distance himself from this document. He described the document as meaningless, as simply a vehicle to a destination, which was selling the land for profit. He said that he did not care about the IBI concept; the vehicle was less important than the conclusions.

[557] In September 2002, CPR prepared the property information summary. This document was provided to Mr. Remington. It set out information about each of the 9th Ave, 10th Ave and Interlink Lands. It provided information about the planning context and development opportunities on the lands.

[558] With respect to 9th Ave it said:

> **Planning**
>
> Although the CPR lands were not included in the East Village Area Redevelopment Plan, that ARP is the planning document governing all development north of the site between 9th Avenue and the Bow River and would presumably be applied to this parcel.
>
> The East village ARP proposes a mix of commercial and residential uses along the north side of 9th Avenue SE. Similar uses would probably be allowed on the south side of 9th Avenue SE for the subject parcel…
>
> **Zoning**
>
> DC Direct Control – Bylaw #53Z95. Previously I-2, General Light Industrial District. This allows a mix of commercial, light industrial, and residential uses which are compatible with each other in certain downtown areas. The site will likely be reclassified as part of the subdivision process….
>
> **Development**
>
> Acreage assessments do not apply to CPR land in the downtown core (letter on file). Park dedication or 10% cash in lieu payment on lands subdivided will apply.
>
> The eastern end of the parcel may be impacted by the floodplain/floodway guidelines of the Elbow River.

[559] With respect to the Interlink Lands it said:

> **Planning**
>
> This parcel is within the area governed by the Victoria Park East Area Redevelopment Plan (ARP). It states that "the area will ultimately become a blend of high density residential and specialized commercial ventures." The Former Interlink Site is included within the 'Future Study Area' north of 11th Avenue SE

that is designated for mixed-use, including residential uses. Land use policies will be formulated through future planning studies of the area.

Zoning

DC Direct Control – Bylaw #53Z95. Previously I-2, General Light Industrial District. This allows a mix of commercial, light industrial, and residential uses which are compatible with each other in certain downtown areas

Development

The eastern end of the parcel may be impacted by the floodplain/floodway guidelines of the Elbow River.

[560] With respect to the 10th Ave Lands it said:

Planning

This parcel is within the area governed by the Victoria Park East Area Redevelopment Plan (ARP). It states that "the area will ultimately become a blend of high density residential and specialized commercial ventures." The Tenth Avenue Parcel is included within the 'Future Study Area' north of 11th Avenue SE that is designated for mixed-use, including residential uses. Land use policies will be formulated through future planning studies of the area.

Zoning

DC Direct Control – Bylaw #53Z95. Previously I-2, General Light Industrial District. This allows a mix of commercial, light industrial, and residential uses which are compatible with each other in certain downtown areas

Development

Acreage assessments do not apply to CPR land in the downtown core (letter on file). Park dedication or 10% cash in lieu payment on lands subdivided will apply.

[561] Finally, CPR prepared a short brochure with respect to the lands, which was to facilitate interested persons providing "direction to the City and CP Rail Ltd in discussions for an Area Redevelopment Plan (ARP) concerning this area". The brochure said, "Calgary has a long term redevelopment opportunity encompassing ten city blocks at the heart of Downtown, East Village, Victoria Park East and Inglewood". It identified as potential land uses, "hotel, convention facility, science centre, offices, commercial/retail". It said for further information to contact Mr. Nimmo, which means it is from a time period prior or proximate to the negotiation of the 10th Ave Agreement, given that Mr. Nimmo left CPR in 2003.

Remington's Interest in the 10th Ave Lands

[562] CPR first approached Remington in 2000 about the three tracts of land, along with the Ogden land, through CPR's then real estate agent, Orville Katz of Priority Realty Inc. Those conversations resulted in Remington sending a letter of intent to CPR dated October 23, 2000. The letter proposed purchasing "19.57 net acres more or less, after road widening (to be confirmed)" of land along 10th Avenue SE and 9th Avenue SE The proposed price was "Three Hundred and Fifty Thousand Dollars per acre ($375,000.00) [sic]".

[563] Nothing came of those original discussions. In 2002, however, CPR again approached Remington about acquiring the properties. Following those discussions, Remington sent a further letter of interest dated July 12, 2002, with respect to possibly acquiring land owned by CPR. Amongst the lands in which Remington expressed an interest were 4.5 +/- acres on 9th Avenue, and 16.2 +/- acres on 10th Ave SE. It proposed with respect to the 16.2 acres that Remington "would be interested in purchasing a 50% interest in these lands and working with CP on a joint venture basis to develop the property over the next few years". The letter also proposed that payment for the 9th Ave Lands would be made through CPR taking back the Ogden lands that it had previously sold to Remington but that, as it turns out, were "currently not developable".

[564] At the time Remington contracted to acquire the B Yard Lands, Mr. Remington was given some information about the ability to develop the lands on a comprehensive basis; while he could not recall reviewing the 2001 IBI plan for the lands, he did recall one of its visual images with the overpass over the railway tracks showing the connection and the general structure of the mixed-use development.

[565] Mr. Remington testified that while Remington's plans were relatively vague at the time of purchase, the intention throughout was to do a comprehensive mixed-use development covering all three plots. While it would be possible to develop the three tracts of land independently, that was not the intention with which they entered into the three agreements. He also testified that they knew that they needed zoning flexibility, although other than that it needed to be flexible, they didn't have a specific plan. They had not done a particular market analysis, although they were aware of the general market conditions.

[566] In questioning prior to trial, Mr. Remington acknowledged that at the time they entered into the 10th Ave Agreement they had no formal plan for development of the B Yard Lands.

[567] Also in questioning, the evidence of the then President of Remington, Mr. Mason, was:

> There was nothing specific because it was very preliminary, but there was – call it water fountain chatter about what we could do with the land. The property was so huge that – but it was just a very general nature…we never had anything specific, but we did have general pie-in-the-sky kind of thing that we could do with those lands…I wasn't a part of any plans, you know, it was a piece of land of course we were going to have some discussion of what we could do, but that was basically it…
>
> Generally anything from – I mean it was all pie-in-the-sky, it could have been anything from an arena to relocation of city buildings, city, Bow Valley College, it was all over the map.

[568] Mr. Mason sold his shares and left Remington in 2004; neither party called him as a witness at trial.

[569] In 2002 Remington was an active developer of properties; at the time it entered into the contracts it had about 2M square feet under construction. In 2002 it did not yet have a planning group and it had never done a residential project or inner city development. It was primarily working on commercial developments in Calgary and Edmonton.

[570] Mr. Remington testified that in 2002 Remington's business model involved finding lands available for purchase, deciding whether to purchase the land, and then determining what to do

with the land after purchasing it. Remington would try to add value to the land, for example by rezoning and adding services. It did not buy land for the purposes of reselling it.

[571] In 2002 Remington had a demonstrated interest in buying larger pieces of land for the purpose of comprehensive development. Within a few years of acquiring the B Yard Lands Remington acquired the land at Quarry Park for development, and went on to build a comprehensive multi-use development on that property.

[572] This evidence shows that Remington was a for-profit development company approached by CPR about the possibility of buying lands, including the B Yard Lands. Its experience was primarily commercial, although not downtown high-rise commercial properties. It had not created or imagined specific development plans for the B Yard Lands but did intend to develop them comprehensively.

[573] CPR emphasized the testimony of Mr. Mason, and in particular his reference to Remington's plans being pie-in-the-sky. This evidence is not, however, inconsistent with what was said by Mr. Remington. Both Mr. Remington's evidence and Mr. Mason's is that they were acquiring a large piece of land for development, the specifics of which they had yet to determine. Mr. Mason's evidence does not suggest that Remington would not develop the land, or that it would not act like the for-profit commercial developer it was and that CPR knew it to be: developing the land in accordance with market opportunities and constraints (including planning constraints). His evidence, and Mr. Remington's evidence, is simply that, in 2002, they did not yet know what that would look like for the B Yard Lands.

[574] CPR additionally asked that I draw an adverse inference against Remington for failing to call Mr. Mason as a witness. CPR stated that Mr. Mason was the best individual to provide evidence regarding the factual matrix because he was the president, an "equal partner" and "actively involved" at the time the 10th Ave Agreement was negotiated and executed, and because he had no financial stake in the outcome of the case. CPR further argued that Mr. Mason was not equally available to both parties as a witness, stating that had CPR called Mr. Mason as a witness, it would forego the opportunity to cross-examine him.

[575] As this section discusses, Mr. Mason was questioned by CPR in the course of litigation, and his questioning was introduced as evidence at trial. On the issue of whether Remington had concrete development plans for the 10th Ave lands, I accept Mr. Mason's questioning evidence that it did not. Further, I note that either party could have called Mr. Mason as a witness. It is not obvious to me why CPR did not call Mr. Mason, given their argument that he had relevant and material evidence to provide. While CPR raises a concern regarding its right to cross-examine Mr. Mason had they called him as a witness, there are ways in which this concern could have been dealt with at trial.

[576] Drawing an adverse inference would be inappropriate in light of my reliance on Mr. Mason's questioning transcript, the consistency between Mr. Mason and Mr. Remington's evidence about the lack of specific plans for developing the B Yard Lands, Mr. Remington's key role in the negotiation of the 10th Ave Agreement, and the availability of Mr. Mason as a witness to either Remington or CPR: ***Williams v Rosenstock***, 2020 ABQB 303 at para 24. An adverse inference would also not contribute to my analysis of the evidence and findings of fact, given that I have accepted Mr. Mason's questioning evidence relied on by CPR, and found that Remington did not have specific plans for the development of the B Yard Lands. To put it

slightly differently, CPR's submissions do not make it clear what adverse inference I would be drawing beyond the facts as I have found them.

2002 Appraisal, 10th Ave Agreement and Interlink Participation Agreement

2002 Appraisal

[577] The amount paid for the 10th Ave and Interlink lands was set through an appraisal by the Altus Group dated January 23, 2003 with a valuation date of November 1, 2002 ("2002 Appraisal"). The 2002 Appraisal assessed the 11.01 acre south parcel, and the 5.219 acre north parcel – i.e., the Interlink Lands and 10th Ave Lands. It used both a direct comparison approach and a development approach for the bulk of the properties, with a direct comparison approach for a 1.352 acre serviced parcel (on the 10th Ave Lands). The direct comparison approach is based on comparison to an "equally desirable substitute property"; the development approach projects a hypothetical subdivision and identifies a gross sale price for the resultant lots using a direct comparison approach. The development approach is used "where comparable market activity is limited or non-existent".

[578] The 2002 Appraisal noted as a strength that the "large site size allows for multiple redevelopment options". It also noted that the "narrowness of 10th Avenue lot provides a functional challenge". It identified the larger site as being "well situated for destination uses and downtown service uses". It observed challenges in the downtown office market at the time with the issues in the high tech market.

[579] With respect to the general Calgary economy, it noted that it was the "administrative and financial centre for the Canadian energy industry". It identified that office vacancy was 11% for the City as a whole, and downtown was 10.4%, with an increase between Q2 2001 and Q3 2002. It also made observations about the industrial, retail and residential market places. It concluded that "Calgary's position as the financial and corporate centre of the Canadian energy industry, together with the diversifying economic base, will ensure the city's long-term growth. Calgary has emerged as the second largest head office location in Canada". It went on to review the Beltline office market in some detail, as well as trends in the Victoria Park area.

[580] In reviewing the development prospects, the 2002 Appraisal identified the limited land-use classification Direct Control but said that the "discretionary uses in proposed buildings is much wider ranging and includes laboratories, printing establishments, commercial schools, drinking establishments and restaurants". It also noted that a "re-designation to a more appropriate land use is anticipated to accommodate future development"

[581] The 2002 Appraisal identified the highest and best use for the property, explaining that this was the "reasonable, probable and legal use of vacant land…which is physically possible, appropriately supported, financially feasible and that results in the highest value". It concluded that the "highest and best use of the subject is concluded to be for commercial/office uses oriented to downtown service providers including office/medical, technology, business service and educational uses and secondary retail/commercial uses". In the Executive Summary it said, "The Highest and Best Use is for redevelopment for commercial, office and service commercial uses in a phased development".

[582] It compared the Interlink and 10th Ave Lands to six other properties. Four were commercial or in a business park, one was a proposed superstore, and one was a hotel and casino

site. None of the comparable properties included high-rise office developments or residential developments.

[583] The 2002 Appraisal also used a development approach analysis. Under that approach it also used a variety of properties to compare the 10th Ave and Interlink Lands to, identifying the most comparable as two "serviced commercial holding properties located in a similar area".

[584] It identified the appropriate discount rate by looking at retail investments, office investments and industrial investments; given the location of this property, it applied a discount rate of 13%, which was somewhat higher than the comparables.

10th Ave Agreement

[585] In the 10th Ave Agreement, the parties made the following references to development of the 10th Ave Lands:

> **11.02** Prior to the Closing Date and at any time that the Mortgage and the Participation Encumbrance are registered against title to the Lands subsequent to the Closing Date, the Purchaser shall be required to obtain the Vendor's approval to any land use redesignation or subdivision application incidental to the Purchaser's proposed development of the Lands. Prior to the Closing Date, the Vendor covenants to execute any such approved redesignation and subdivision applications and the Vendor covenants to execute any application for a development permit, building permit or other commitment or obligation purposed [sic] to be made to any third party incidental to the purchaser's purposed [sic] development of the Lands in its capacity as the then registered owner of the Lands, provided that:
>
> > (a) any such application shall not, prior to the Closing Date, proceed to the point where an obligation incurred as a condition of any such approval becomes a financial charge against title to the Lands, except where such charge is the responsibility of the Vendor in accordance with Article 6 hereof, or the Vendor agrees to accept such charge in its absolute discretion; and
> >
> > (b) no such application shall authorize the development or all or any portion of the Lands for residential purposes.
>
> **11.03** The Purchaser covenants to notify the Vendor of any development permit application approvals and generally to keep the Vendor updated on the status of development matters including development agreements. Where the Vendor's approval is required to land use redesignation or subdivision application, such approval shall not be unreasonably withheld. To the extent that Purchaser requires the Vendor's approval to an application or an application is required to be made in the name of the Vendor, or the Vendor is required to provide a consent to allow the Purchaser to make such an application, the Vendor agrees to provide such approval, application or consent within 7 business days of a written request being made therefor by the Purchaser.

[586] In addition, Article 17 provided that if the Interlink Agreement did not close, then the Purchaser would transfer the 10th Ave Lands back to the vendor for consideration of $1.00. As

well, the lands not adjacent to Interlink required a minimum of 100 feet in depth and were more expensive than the lands adjacent to Interlink.

Participation Agreement

[587] The parties agreed that the terms of the Interlink Participation Agreement would be applied to the 10th Ave Lands. That Agreement provided in Article 4.1 that the participation amount would be payable on the earlier of the termination date (December 13, 2011) and the "sale of all the Lands pursuant to one or more Third Party Sales". Article 4.2 then provided:

> Notwithstanding the provisions of Section 4.1 hereof, payment of the Participation Amount shall be paid by the Purchaser to the Vendor in the following circumstances:
>
> (a) in the event that the Purchaser desires to develop the Lands or a particular Parcel, the Purchaser may provide a notice to the Vendor, at its option, indicating its desire to terminate this Participation Agreement concurrently with an application to the City of Calgary for a development permit relating to the construction of such improvements on the Lands or a particular Parcel (the "Development Notice"). In the event the Purchaser provides a Development Notice to the Vendor, then a Participation Amount shall be payable by the Purchaser to the Vendor based on the then Appraised Value of the Lands or such particular Parcel, as the case may be. Payment of the Participation Amount shall, however, not be due until the earlier of:
>
> (i) the date of issuance of such development permit by the City of Calgary; or
>
> (ii) six months following the date of the Development Notice,
>
> provided that, in the event that such development permit has not been issued within six months of the date of the Development Notice, the Purchaser may, within such six month period, provide the Vendor with a notice indicating that it is withdrawing the Development Notice, in which event the provisions of this Participation Agreement and Encumbrance shall continue to apply as if the Development Notice had not been delivered. For the purposes hereof, the "date of issuance of the development permit" means the date that the City of Calgary has approved the development permit application and all applicable appeal periods have expired;
>
> (b) at the option of the Purchaser, at any time after the expiry of the Term of the Mortgage. In this regard, the date of written notice by the Purchaser to the Vendor of the exercise of this option shall be deemed to be an Appreciation Date. The Purchaser acknowledges that it shall have no right to unilaterally set an Appreciation Date in advance of the expiry of the Term of the Mortgage, even where the Mortgage has been prepaid in full; and
>
> (c) upon payment of the Participation Amount as it relates to the Lands or a particular Parcel, as the case may be, then this Participation Agreement and Encumbrance shall be terminated as it relates to the Lands or such particular Parcel, as the case may be, this Participation Agreement and Encumbrance shall remain in full force and effect only as it relates to any remaining Parcels

comprising the Lands in respect of which a Participation Amount has not yet then been paid.

CPR Documents Contemporaneous with the 10th Ave Agreement

[588] In his contemporaneous notes from the time of the negotiations with Remington Mr. Hyder noted the following relevant points:

Participation Mortgage

- Fix price when apply for dev. Permit.

…

CP approval of concept plan & sales

CPR positive contribution to planning/concept – monthly meetings

…

Not a JV

Therefore can book total sale price

..

CP approval of plans/uses

If portion is enviro impacted; CP will take back and refund price

CP is neighbouring land use therefore has concerns with adjacent land use therefore wants input to planning

Specifically preclude residential uses

6.11 purchase agreement can be unwound if 11 acre agreement is unwound – 5.56 acre can stand alone.

[589] Mr. Nimmo wrote a memorandum for Mr. Walsh at the time of the proposed sale which said the following in relevant part:

This memo provides an overview of a proposed disposition of CPR lands at Calgary to Remington Development Corporation (RDC).

The overall premise of the transaction being that CPR and RDC will develop lands by remediating, subdividing and rezoning of the lands into smaller parcels for resale.

…

The Transaction Rational

The current collective appraised value of these lands is $11,755,000.

The value of the site is expected to increase for three reasons. Firstly, given its location and the overall growth of the City, the value should increase. Secondly, as the site is developed, the market will recognize the value of the site through the lens of the new development as opposed to through the existing perspective of industrial use. Thirdly, a strong development will unto itself create value.

> Given the significant values and the anticipation of rising values due to market and site attributes, it is advantageous to participate in the value created throughout the development of the site. In addition, gaining the expertise of a developer adept at creating site value would also be advantageous.
>
> To extract the sites' value, significant expenditures are required totalling up to $2,000,000 for remediation, $2,955,000 million for subdivision rezoning and $500,000 for track relocation for a potential grand total of$5,455,000.
>
> Given the significant costs involved in developing, it's advantageous to have another party front end the development costs.
>
> Based upon the rational [sic] that with a co-participant risk can be offset and most of the ensuing benefits retained, in informal survey of the more successful developers with the propensity to fund projects of this nature was undertaken. Remington Development Corporation was approached and the transaction outlined below negotiated.

Analysis

[590] Based on this documentation, I am satisfied that it was reasonably foreseeable at the time of the 10th Ave Agreement that Remington would develop the 10th Ave Lands and that it would develop them in the most profitable way possible based on market conditions at the time of development, including planning opportunities and constraints. Further, and more specifically, it was reasonably foreseeable that that development would be part of a larger multi-use development across the B Yard Lands including low, mid and high-rise residential, and low-rise and high-rise office commercial buildings. It was probable that at least 50% of the B Yard Lands would be used for non-residential purposes, and that in general the focus of the B Yard Lands development would be on commercial uses as the highest and best use of the lands, specifically "commercial/office uses oriented to downtown service providers". The 10th Ave Lands would be part of that commercial development, given the restriction against using those lands for residential purposes.

[591] Consequentially, the loss reasonably foreseeable in relation to a breach of the 10th Ave Agreement was Remington's loss of the ability to construct the part of that development on the 10th Ave Lands and, as well, the disruption of the larger development opportunities for the B Yard Lands caused by losing the 10th Ave Lands.

[592] Notably, prior to selling the land to Remington, CPR had IBI review the B Yard Lands not once, but twice. On both occasions CPR was advised that the ideal development would be mixed-use, and would include commercial development. In 1996 it was told that the ideal development would be "50% for non-residential purposes". In 2001 it was again told that a mixed-use development would be ideal and that it would include low, mid and high-rise residential, and low-rise and high-rise office commercial buildings. Further, it was advised that high density commercial use would create the highest land value, albeit with the highest market and planning risk.

[593] I note that those materials appear to have only been seen by Mr. Nimmo, but Mr. Nimmo was senior to Mr. Hyder, and the person responsible for advising Mr. Walsh about the transactions; I am satisfied that, if Mr. Nimmo had the information, then CPR can be understood to have had the information. I also do not think, in this case, it matters that Remington saw only

one photograph from those documents. The assessment here is an objective one and is focussed on what was reasonably foreseeable at the time the contract was entered into. The IBI assessments show what an independent third party knowledgeable about development, who had turned their mind to the issue, identified as the appropriate uses for the B Yard Lands. In essence, it gave CPR the perspective of a reasonable person assessing the properties. The IBI reports are certainly not the only evidence about reasonable foreseeability but they are properly taken into account in the remoteness analysis.

[594] Further, as Remington pointed out in its reply brief, Mr. Remington saw the "Key Design Principles" map, which depicts high rise commercial buildings, along with mid-rise, low-rise and townhouse developments.

[595] CPR prepared materials about the land which it provided to Remington, and which noted the development capacity of the land, including its current planning status. It noted for each parcel of land the possibility of residential and commercial uses.

[596] CPR approached Remington. Remington was not a land flipper. It had an active property development business, with 2M square feet under construction at the time it entered into the contract. CPR marketed the three parcels of land together, and Remington only ever expressed interest in all three properties (although taking the risk that it may not obtain all three of them).

[597] Remington did not have a specific plan for the B Yard Lands but, even in Mr. Mason's evidence on which CPR relies, it planned on developing the lands – it just did not know precisely what that would look like given the size of the lands for which they had offered. Indeed, even if Remington were to obtain the lands today, given the numerous years it would take to develop them, they would not know with certainty what that development would look like in the end. What they would know now, and what they knew in 2002, was that what the development would look like would be based on the planning and market environment at the time of development.

[598] The 2002 Appraisal, which was prepared in January 2003, and which was used to price the 10th Ave Lands and Interlink Lands, identified the 10th Ave Lands and Interlink Lands as appropriate for "multiple redevelopment options". It focussed on the commercial and office sector, with a significant discussion of the Beltline office market, and the corporate nature of the Calgary economy. It identified the highest and best use of the property as "commercial/office uses oriented to downtown service providers including office/medical, technology, business service and educational uses and secondary retail/commercial uses".

[599] The 10th Ave Agreement precluded residential development on the land. It referenced the possibility of the "Purchaser's proposed development of the Lands" and that the purchaser might apply for a "development permit, building permit". The 10th Ave Agreement dealt with the 10th Ave Lands in a way that protected the possibility of development, ensuring the stand alone portion of the 10th Ave Lands was at least 100 feet deep.

[600] The Interlink Participation Agreement also referenced the possibility of development, as a triggering event for payment of the participation amount.

[601] As a whole, this evidence satisfies me that it was reasonably foreseeable in late 2002 that Remington would develop the 10th Ave Lands based on current market and planning conditions. It was reasonably foreseeable that it would create a multi-use development across the B Yard Lands including low, mid and high-rise residential, and low-rise and high-rise office commercial buildings, but with a focus on commercial development, particularly on the 10th Ave Lands

where residential development was not permitted. As such, it was the loss of the chance to profit from this development that was the reasonably foreseeable consequence of the breach of the 10th Ave Agreement. Certainly, had this possibility – that as a result of the breach Remington would be unable to complete the 10th Ave Lands portion of a larger mixed use development with a commercial focus, and to profit from that development – been put to CPR they could not have brushed it aside as far-fetched, said it was very unusual or not easily foreseeable, or even that it was a substantial possibility but one only likely to occur only in a small minority of cases.

[602] To put it differently, I am satisfied that CPR accepted the risk that, if it breached the contract, it would be liable for Remington's lost profits for not being able to develop the lands commercially: Swan, Adamski and Na, *Canadian Contract Law, 4th Ed.*, para 6.252. CPR had addressed development explicitly in the 10th Ave Agreement, precluding residential development. It agreed to a term that ensured that the land west of 4th Street would be suitable for development. It gave itself the opportunity to benefit from increased land value associated with an application of a development permit through the Participation Agreement. It based the price of the lands on a document which said that commercial downtown servicing development was the highest and best use for the lands. Yet, it did not include a term in the contract to limit its liability for breach of contract to the value of the land, or to exclude development losses from damages.

[603] In reaching this conclusion I have considered the evidence that complicates or, arguably, even contradicts it. Specifically, Remington had never constructed anything like Rail Town before; it had never built a high rise commercial building, a residential building or a large scale development project. It did not provide CPR with a specific plan for the lands. The Participation Agreement identifies possibilities other than development, including that Remington will sell the land; in that case, can development be said to be "probable"? The 2002 Appraisal used a development approach to value the land, which focused on the sell-off rate for five subdivided lots into the market place. Further, the comparables in the 2002 Appraisal were not properties containing high rise commercial properties. Mr. Nimmo's memo references Remington subdividing and selling the land, not developing it.

[604] That evidence does not, however, change my assessment of what was reasonably foreseeable.

[605] As of 2002 Remington was a for profit developer with an interest in acquiring large parcels of land for mixed-use development. It made offers on – and acquired – the B Yard Lands, but also, within a few years, Quarry Park. That latter fact is not in and of itself relevant, but it corroborates Remington's evidence that this was a focus of its business activities at that time. Remington had commercial experience. It was a developer not a land reseller. What Remington had not yet done, does not change what it had done and was as of 2002. And what it had done and was contributes to the reasonable foreseeability analysis.

[606] Remington did not provide CPR with a specific plan, but this was a unique and long-term development opportunity, the specifics of which would develop over time with market conditions; the evidence across the trial suggests that no developer would have had a specific plan or, if they had, that plan would have required continual amendment after consultation with the City and other stakeholders, and in response to market conditions. Further, CPR had consulted with a development consultant twice, and received an appraisal from Altus of the

Interlink and 10th Ave Lands, all of which provided it with similar information about the development opportunities on the B Yard Lands.

[607] The Participation Agreement does identify other contingencies, but it also explicitly identifies development as a possibility, as does the 10th Ave Agreement itself. The 10th Ave Agreement speaks specifically to the type of development to occur – not residential. A reasonable person reading those documents would understand that the lost profits from being unable to develop the 10th Ave Lands was a loss that would flow naturally from the breach, and that would be in the reasonable contemplation of the parties. And, had they read those documents in conjunction with the 2002 Appraisal used to value the 10th Ave Lands, and the IBI reports, they would understand that the lost profits would probably be in relation to not being able to develop the 10th Ave Lands as part of a mixed-use development with a commercial focus.

[608] I put no real significance on the comparables selected by Altus, other than to note they were commercial comparables, rather than residential. Finding comparables to the B Yard Lands is challenging; the size and location proximate to downtown makes them unique. More significant in my view is the emphasis in the 2002 Appraisal on the corporate nature of the Calgary economy, the review of the Beltline office market and the identification of the highest and best use as "commercial/office uses oriented to downtown service providers".

[609] CPR submits that the fact that the 2002 Appraisal uses a development approach "demonstrates that CPR and Remington did not specifically contemplate any particular form of development at the time of contracting".

[610] This submission places undue emphasis on the approach used by the 2002 Appraisal. As noted in the appraisal, a development approach is used when "comparable market activity is limited or non-existent" which, given the size of the B Yard Lands, was an obvious issue for the appraiser. In addition, it was one of two approaches used by Altus; the other was the direct comparison approach, where land is compared to "an equally desirable substitute property". Part of the 10th Ave Lands – the 1.352 acre serviced parcel – was only assessed using the direct comparison approach.

[611] There was no evidence – fact or expert – to suggest that a land appraisal would ever be done based on a specific proposed development for land, other than insofar as appraisals identify the "highest and best use for the land". The appraisal is of land, not of a potential development on the land. As Mr. Remington said, he was buying the land "as is", based on its appraised land value, identified by an appraiser using appropriate appraisal methodologies. That he, as a developer, had the capacity to turn the land into something more valuable, was not relevant to pricing land purchased on an "as is" basis.

[612] CPR's submission seems to be, in essence, that unless Remington paid a price for the land that reflected the profit it would be able to make off the land, the loss of that profit is not a reasonably foreseeable loss. It would only be reasonably foreseeable if CPR had been specifically advised of it. That submission is not inherently unreasonable; the price paid for an item provides information about its value and, logically, about what might be lost if the item is not provided to the person it was contracted to be sold to.

[613] The difficulty with that submission here, however, is that CPR did have information which indicated what Remington was liable to lose in the event of contract breach. It knew Remington was a developer. It approached Remington because it was a developer, as IBI had

recommended. It knew that IBI viewed the lands as suitable for development with a commercial focus. It knew that the 2002 Appraisal identified the highest and best use for the 10th Ave Lands and Interlink Lands to be commercial development oriented to downtown service providers.

[614] Further, and more significantly, CPR did factor in the upside from development into the price for the land. By virtue of the Participation Agreement, when Remington applied for a development permit on the lands CPR would receive 50% of the increased value of the lands at that time. That increase in value would take into account the market effect on the land of the proposed development, while also not requiring CPR to take on any risks of the development.

[615] As a result, the methodology of the 2002 Appraisal, and that the land was priced as land, not based on a particular development of the land, does not alter my assessment of what was reasonably foreseeable based on the evidence as a whole.

[616] Mr. Nimmo's memo, which provides contemporaneous evidence of CPR's understanding as at 2002, caused me more concern. It does support the evidence of the CPR witnesses that they did not anticipate development as a likely outcome of the 10th Ave Agreement. On the other hand, the memo itself is not entirely consistent, noting later that "a strong development will unto itself create value". A subdivision is not a "strong development" that will itself create value. I do not know, objectively, why Mr. Nimmo would have had that impression about Remington's plans, given the nature of Remington's business and its interest in the B Yard Lands, although he may have derived this interpretation from the Altus appraisal's development approach to the appraisal. Also, Mr. Hyder's contemporaneous notes refer to CPR approving the "concept plan & sales" and "plans/uses", of it having a positive contribution to "planning/concept" with monthly meetings, and of the importance of precluding residential uses of the 10th Ave Lands, all of which suggests CPR's awareness that Remington had plans for the lands rather than simply subdividing and flipping them. Ultimately, Mr. Nimmo's reference in his memorandum to Remington's plans does not change my conclusion about what a reasonable person in the position of CPR would have understood about the losses liable to result in the event of a contract breach or, even, what CPR itself understood given the rest of his memo and Mr. Hyder's contemporaneous notes.

[617] CPR's submissions on remoteness focussed in particular on Remington's evidence about the losses it suffered by virtue of not acquiring the 10th Ave Lands. As discussed below, that evidence quantifies the profits lost by Remington as a result of its inability to develop three of seven proposed high-rise (14-15 story) commercial office buildings between 2007-2014. CPR submits that those buildings, and the broader concept plan of which they are a part, were not reasonably foreseeable in 2002. The specifics of Remington's claimed losses, and whether those specific losses are too remote, are addressed below. The general and principle based arguments of CPR on remoteness are, however, assessed here.

[618] CPR argues that, in the context of land development, losses must be specifically communicated to the defendant. Otherwise, the reasonably foreseeable losses are limited to the recovery of increases in the value of land. As counsel for CPR put it, "what is the ordinary course of things in a breach of land sale agreement context?...The delta between the value of the land at the date of breach and the purchase price". CPR relies on other development cases in which the courts found that the proposed development was specifically known to the defendant at the time the contract was entered into: ***Performance Industries v Sylvan Lake***, 2002 SCC 19 at para 73; ***Cottrill v Steyning and Littlehampton Building Society***, [1966] 1 WLR 753

(UKQB); ***New Horizon Investments Ltd v Montroyal Estates Ltd***, [1982] BCJ No 1481 (BCSC) at paras 17-19; ***WED Investments Limited v Showcase Woodycrest Inc***, 2021 ONSC 237 at para 97; ***Rousseau Group Inc v 2528061 Ontario Inc***, 2022 ONSC 486 at paras 231 and 325; ***Jenkins Road Developments Ltd v Wille***, 2001 BCSC 80; ***Pompeani v Bonik Inc***, [1997] OJ No 4174; ***Gurdev Holdings Ltd v Schmidt***, 2009 BCSC 551; ***Kipfinch Developments Ltd v Westwood Mall (Mississauga) Ltd***, (2008) 50 BLR (4th) 233 (ONSC); ***Apex Corp v Ceco Developments Ltd.***, 2005 ABQB 656.

[619] I do not agree that any such blanket rule applies to preclude recovery of losses arising from a lost opportunity in the land sale context. As the BC Court of Appeal noted in ***Trinden Enterprisees Ltd v Ramsay***, 2009 BCCA 125 at para 23, the analysis in land sale transactions is as in any other contract case: applying the principle excluding remote damages to the circumstances of that particular contract. To do otherwise would be to forget that remoteness is not, itself, the rule of recovery for contract breach. The rule of recovery is that a plaintiff should be put in the position that they would have been in but for the defendant's breach of contract. Remoteness constrains that recovery to prevent unfairness to the defendant. But it does not remove the importance of the starting point – that a plaintiff should be put in the position they would have been in had the contract not been breached. To categorically exclude damages that were, objectively, reasonably foreseeable simply because the contract involves land would be to prevent the recovery of but for damages in land sales cases, even when those damages were not, objectively, remote.

[620] Certainly, the communication of a specific development plan would support a claim that losses associated with that plan were not remote. But the absence of such a plan – an absence which was understandable given the size and nature of the property acquired here – does not excuse the Court from undertaking the first branch of the ***Hadley*** inquiry: were these damages what a reasonable person would have expected to arise naturally from breach of the contract?

[621] In making this point I am in no way suggesting that development losses are ordinarily recoverable in land sale cases. Each case turns on its own facts. I agree with CPR that a farmer who sold land to a developer would not be liable for any imaginable development in the event of a breach; most of the time the claim would be only for the difference in the value of the lands from the time of the contract to the date of breach. This case is unusual, however: the parties explicitly referenced development in the contract; CPR contracted for the benefit of some of the financial upside of development; the parties based the price of the land on an appraisal that contemplates commercial development as the highest and best use of the land; and, there is relevant and material evidence from or prior to 2002 about how the lands could be developed. It is the parties' agreement and the evidence about what was known about developing the lands, along with what Remington was and its business practices of 2002, which allows me to assess reasonable foreseeability through the first branch of the ***Hadley*** analysis. And it is that evidence which makes it reasonably foreseeable that, if CPR breached the 10th Ave Agreement, Remington would lose the profits associated with developing the 10th Ave Lands as part of a mixed-use development on the B Yard Lands, with a commercial focus.

[622] CPR also submits that a plaintiff having plans that amount to "development in the air" is not sufficient; the information available must provide the defendant with a "meaningful understanding that the probable result of the breach will be the claim that is being presented to the Court". I agree with the second half of this framing. However, in considering whether CPR had a meaningful understanding, I have considered the totality of the information available to

CPR, including the reports it had obtained from IBI, the 2002 Appraisal and, most importantly, the contract itself. The plaintiff does not have a common law legal obligation to explicitly identify for a defendant what would be its reasonably foreseeable losses in the event of a contract breach in order to recover those losses. After all, the plaintiff is not, any more than the defendant, expecting that the contract will be breached. The question has to be: what would CPR, objectively, expect to flow from the contract breach in the ordinary course, had it turned its mind to it? That assessment requires considering all the information available to the parties in 2002, not only what Remington said to CPR.

[623] CPR further submitted that the probable loss in this case on the 10th Ave Lands was commercial office low-rise podiums, not high-rise commercial towers. As noted, I will assess the remoteness of Remington's specific claim further below. Here, however, I think it important to emphasize that the remoteness inquiry does not involve identifying the single most likely loss to have been suffered by the plaintiff in the event of a contract breach, and then dismissing all other losses as remote. More than one sort of loss can flow from a contract breach in the ordinary course. If a house builder fails to construct a house in accordance with the standard with which it was contractually obligated to comply, the plaintiff can recover for any of the losses that would ordinarily flow from such a failure, not simply the specific type of loss that was the most likely to occur. That does not mean that every conceivable loss is recoverable; it simply means that for any loss the question is whether that loss was one that the parties could reasonably have anticipated to arise in the ordinary course, not whether it is the one the parties would have thought most likely to arise in the ordinary course.

[624] To hold otherwise would, again, shift the inquiry from what should be the focus of the analysis: what damages will put the plaintiff in the position they would have been in had the contract not been breached? Those damages must not be too remote, but to be recoverable they also need not be the single most likely sort of damage the plaintiff could have suffered. To require the plaintiff to establish that their loss was the most likely result of the breach would mean that plaintiffs who suffer reasonably foreseeable losses that they would not have suffered but for the contract breach would nonetheless be out of pocket. That result is not consistent with the principle of expectation damages.

[625] CPR emphasized that certainty as to Remington's potential losses was necessary to allow it to allocate risk appropriately in the 10th Ave Agreement. I have addressed this argument above, finding that CPR knew enough to be aware of the need to address this risk, yet chose not to do so. I add here only that the question of risk allocation is why this question is properly considered objectively, from reasonable people in the position of the parties at the time of contracting. Because the risk here is not only to CPR, but also to Remington. To say that Remington should suffer the loss and not be compensated for it, is fair when the loss was not reasonably foreseeable to the parties; to say that it should suffer the loss and not be compensated for it, when the loss was reasonably foreseeable, but not specifically highlighted for CPR, is not.

[626] CPR emphasized in particular the decision of Chief Justice Nemetz in ***New Horizon Investments Ltd v Montroyal Estate Ltd*****,** [1982] BCJ No 1481 (BCSC) at para 17-19. In that case Chief Justice Nemetz said:

> 17 The more difficult question is to assess the quantum of damages. Following ***Cottrill v. Steyning & Littlehampton Building Society***, [1966] 2 All E.R. 295 (Q.B.D.) the Plaintiff's damages should be assessed by reference to the profits

> which both parties contemplated the Plaintiff would make but for the breach. It is not necessary that this contemplation include a precise pre-estimate or calculation of these losses, only a "...contemplation of circumstances which embrace the head or type of damage in question": ***Worth v. Tyler***, [1973] 1 All E.R. 897 at 922 (Ch.D.). In this case, the head or type of damage is profit from subdivision development which was clearly within the contemplation of the parties. In this respect, see the advertisement, supra, and also "subject" conditions to the Interim Agreement and the development program undertaken by the Defendant before the sale.
>
> 18 In fact, the Plaintiff is not entitled to recover the profits which, at the date of breach, the parties then thought would probably be earned on the subdivision. What the Plaintiff is entitled to recover is the probable profits based upon the potential of the property at that date. But I cannot ignore what actually happened after the date of breach because those subsequent events are relevant in assessing the real potential of the property: ***Tabco Timber Ltd. v. The Queen*** (1970), 15 D.L.R. (3d) 748 (S.C.C. per Martland, J. at page 753)
>
> 19 If it were otherwise, I could only reduce the Plaintiff's calculation of its profits by the contingencies which, as of the date of breach, were reasonably within the contemplation of the parties. These parties, for example, did not contemplate a downturn in the market, or the possibility, let alone the likelihood, of defaults by purchasers and the subsequent foreclosure of some properties. I must take these realities into account, and I propose to do so.

[627] CPR suggested that this case shows that Remington had to establish that the type of damages – in this case, high-rise commercial office buildings – was within the contemplation of the parties. The precise quantification need not be anticipated, but the head or type of damages does.

[628] I agree that the head or type of damages recovered needs to have been within the reasonable contemplation of the parties at the time they entered the contract. As stated by the Chief Justice, the damages “should be assessed by reference to the profits which both parties contemplated the Plaintiff would make but for the breach”. The plaintiff may recover “the probable profits based upon the potential of the property at the date”. I do not, however, accept the inference of CPR’s submissions, that a plaintiff must demonstrate a singular head or type of damages as likely. Rather, the plaintiff must demonstrate that the loss they claim was a reasonably foreseeable type of damage at the time of contracting, a possibility that would be understood to arise naturally from the contract breach.

[629] I apply this analysis to the specific losses claimed by Remington after I assess and determine the appropriate categorization and quantification of those losses. That is, I will first consider what losses, on the balance of probabilities, Remington has established that it suffered as a result of the breach of the 10th Ave Agreement. I will then consider whether all or part of those losses ought to be excluded on the basis of remoteness.

What losses has Remington proven, on the balance of probabilities, that it suffered as a result of losing the 10th Ave Lands?

[630] The obligation to prove the loss arising from a contract breach on the balance of probabilities lies with the plaintiff; "the basic rule is that damages for lost profits, like all damages for breach of contract, must be proven on the balance of probabilities": ***Houwelling Nurseries Ltd v Fisons Western Corporation***, (1988) 37 BCLR (2d) 2 at 8 (per McLachlin JA, as she then was); ***Ticketnet Corp v Air Canada***, (1997) 154 DLR (4th) 271 at para 97 (ONCA), leave ref'd 161 DLR (4th) viii.

[631] As such, Remington must establish the losses it suffered as a result of the breach of the 10th Ave Agreement, assessed as at the date of contract breach.

[632] Remington's loss calculation is necessarily hypothetical; the 10th Ave Lands were not developed by Remington and have not been developed by anyone else. Remington's claim could also be described as a lost opportunity or lost chance – a lost opportunity to develop the lands to make a profit. At times, although not consistently, the parties described Remington's loss in those terms. I am not, however, persuaded that this is the appropriate characterization. Had Remington obtained the 10th Ave Lands it would have developed them; had it owned the lands, its ability to do so would have been entirely within its own control, subject only to market conditions and planning constraints. And those conditions and constraints would have shaped development, not prevented it. The issue is not, therefore, whether Remington would have had the chance or opportunity to develop the lands. The issue is, rather, had Remington acquired the 10th Ave Lands and developed them, how much money would it have made? The challenge is assessing Remington's losses given its inability to develop, not assessing the value of its lost opportunity.

[633] Because Remington's loss cannot be measured against an actual development, its calculation depends on opinion evidence about what would have happened had Remington been able to develop the 10th Ave Lands. Remington's experts used *ex post* information about what happened after 2007 to ground their analysis, and facts and data where available, but also provided the Court with opinion evidence about specific aspects of a hypothetical development – what it would have looked like, when it would have been started, what it would have cost, and how much revenues and profit it would have generated.

[634] What that means, in turn, is that I can accept an expert's opinion as accurate and reliable, and as the best answer provided to the Court on the question on which they opined while, at the same time, concluding that the opinion has a degree of uncertainty which makes relying on it unsafe unless some discount or adjustment is applied, either to it or to the damages as a whole. Each aspect – whether an opinion is accurate and reliable, and whether a discount is required – depends on the evidence as a whole. As Remington emphasized, uncertainties can run in both directions – making an estimate too low or too high.

[635] Further, the experts gave their opinions based on certain premises or assumptions. Given my reasons here, however, those premises or assumptions may not be accurate. As such, even if I accept the expert's opinion as accurate and reliable, some adjustment may be necessary to account for a variation between my findings here, and the assumptions underpinning the expert's opinion.

[636] As a result, my analysis involves the following steps:

1. Based on the evidence and the burden of proof, what is the answer to each question relevant to the quantification of damages?
2. Given the evidence as a whole, is it appropriate to apply a discount to account for uncertainty in that answer, or for any variation between these reasons and the premises on which the opinion was offered?
3. What level of discount is appropriate to account for that uncertainty and/or variations?

[637] This analysis resembles the part of a lost opportunity assessment where the Court assesses both the value of an opportunity and the likelihood of its occurrence, discounting the damages where necessary to reflect the possibility that an opportunity would not have been realized: ***IFP Technologies (Canada) Inc v Encana Midstream and Marketing***, 2014 ABQB 470 at para 277 (aff'd on this point, 2017 ABCA 157 at para 210); ***NEP Canada ULC v MEC OP LLC***, 2021 ABQB 180 at paras 1184-1185; ***Berry v Pulley***, 2015 ONCA 449 at paras 70-72.

[638] Remington provided expert evidence with respect to the each of the questions relevant to the quantification of damages.

[639] Mr. Lee and Mr. Shawcross testified with respect to the development that Remington would have undertaken in 2007 had the 10th Ave Agreement not been breached. Mr. Lee provided a concept plan for the development, along with the phased order in which the development would be completed.

[640] Mr. Lee, Mr. Shawcross and Mr. Brown testified as to the ability of Remington to obtain approval from the City for its proposed development and the time it would take to obtain those approvals.

[641] Mr. Magnussen testified about Remington's capacity to proceed with the Rail Town development and the attractiveness of the development in the Calgary market.

[642] Mr. Lee provided an estimate of the time it would take to construct the buildings on the 10th Ave Land. Mr. Crane estimated the cost of constructing the three buildings; Mr. Crane also incorporated a standard-design build construction schedule into his report.

[643] Mr. McDiarmid, a mortgage broker for Remington, and a fact witness not an expert witness, testified about Remington's ability to obtain financing, and the rate at which it can obtain financing.

[644] Mr. Norman testified about the market for commercial real estate in Calgary from 2007-2019. In particular, he estimated the tenancy absorption rate that would have been available to Remington had it begun construction of Rail Town in June 2008, and constructed office buildings during the 2007-2019 period on the phased schedule identified by Mr. Lee.

[645] Mr. Hofer estimated the inputs to allow the calculation of the value of the buildings that would have been constructed by Remington on the 10th Ave Lands during the 2007-2019 period.

[646] Finally, Mr. Davidson compiled the data and information provided by the other Remington experts in order to quantify Remington's loss.

[647] Remington also provided expert evidence from Mr. Wagar with respect to the value of the 10th Ave Lands in 2007, at the date of breach, and as of 2019. Because I have calculated Remington's damages based on lost profits, not land value, I do not summarize his evidence here. I also do not summarize the Defendants' land valuation evidence, except insofar as Mr.

Brunner offered an opinion about Remington's likelihood of developing the lands given the amount it paid for them.

[648] The Defendants did not attempt to quantify Remington's loss. Rather, they provided expert evidence directed at disputing aspects of Remington's quantification.

[649] Mr. Romanesky challenged the evidence of Mr. Lee, Mr. Shawcross and Mr. Brown with respect to the ability of Remington to obtain approval from the City for its proposed development in the time estimated.

[650] Mr. Delf challenged Remington's evidence about the market viability of the Rail Town development. He also provided his opinion about the ability of Remington to obtain planning approval for Rail Town. I find, however, that he was not qualified to provide that evidence, and I do not rely on his opinion in that respect.

[651] Mr. Brunner primarily testified with respect to land valuation, but also provided an opinion that the price paid by Remington for the 10th Ave Lands demonstrates that the lands were long term speculative development lands.

[652] Mr. Dyack provided an alternative quantification of Remington's loss.

[653] I have divided my analysis of this evidence into three parts.

[654] Part 1 will assess the issues of vision, timing and planning approval. It will summarize and analyze the evidence of Mr. Shawcross, Mr. Lee, Mr. Brown, Mr. Magnusssen, Mr. Romanesky and Mr. Brunner. It will also summarize and analyze fact evidence about the work done by Remington on the Rail Town development prior to December 2006.

[655] Part 2 will assess the costs, revenues and marketability of the 10th Ave buildings. It will summarize and analyze the evidence of Mr. Crane, Mr. Norman, Mr. Hofer and Mr. Delf.

[656] Part 3 will assess the quantification of Remington's losses. It will summarize and analyze the evidence of Mr. Davidson and Mr. Dyack.

[657] In each part I begin by summarizing the expert reports and oral testimony provided by the expert witnesses. I then analyze the evidence and determine the answers to the specific questions relevant to the quantification of Remington's losses, and also whether any discounts must be applied to Remington's loss claim, and the quantification of those discounts.

[658] Following that analysis, the subsequent sections address the issue of mitigation and the issue of any needed adjustment to the purchase price for the 10th Ave Lands used by Remington in calculating its loss.

[659] To anticipate, and for clarity, my conclusions are as follows:

1. I accept the evidence of the Remington witnesses on the vision, phasing and timing of Rail Town. I apply a 30% discount to Remington's overall quantification of damages to reflect, however, uncertainty about that analysis, and also to reflect my finding about the depth of the lands acquired by Remington east of 4th Street SE. That finding reduces the amount of land available for construction.
2. I accept the evidence of the Remington witnesses on the costs, revenues and marketability of Rail Town. There is, however, sufficient uncertainty on the revenue side to apply a 5% discount to Remington's overall quantification of damages.

3. I reduce Remington's losses by $11,351,800 to correct for the failure to adjust the amount of recoverable operating costs in the buildings that would have been constructed to reflect the vacancy rates in those buildings.
4. I reduce Remington's losses by $3,990,000 to account for the cost of removing the ENMAX transmission line.
5. I reduce Remington's losses by $1,705,364 to account for the cost of acquiring air rights over the CPR main line.
6. I reduce Remington's damages by $29,000,000 for mitigation. I am satisfied that the Meredith block can be treated as a reasonable substitute property through which Remington partially mitigated its losses.
7. Remington's damages will need to be adjusted to reflect the land acquisition costs once I have decided the issue of whether Remington acquired the 5.1 acres in the first subdivision application only, or whether it also acquired the Blue/Grey shaded portion from the 10th Ave Agreement. The calculation also depends on further submissions from the parties with respect to the value of the 10th Ave lands as at October, 2008, when the application for a development permit for Phase 2 would have been submitted.

[660] The quantification of the damages is thus:

Remington's lost profits, unadjusted	$322,700,000
30% adjustment for uncertainty re vision, timing and planning, and for reduction in the size of the parcel east of 4th Street SE	(96,810,000)
5% adjustment for uncertainty re revenues	($16,135,000)
Recoverable operating cost adjustment	($11,351,800)
ENMAX transmission line removal	($3,990,000)
Air Rights Acquisition	($1,705,364)
Mitigation	($29,000,000)
Land acquisition cost adjustment	TBD
Compensatory damages	**$163,707,836**

Vision, Timing and Planning Approval

Fact Evidence – Remington Work on Rail Town Prior to December 2006

[661] Remington contributed to the preparation and submission of the subdivision applications to the City up to and including November 2005. It began working in earnest on the pre-planning process for the Rail Town development in the spring and summer of 2006.

[662] That work had two central aspects. First, Remington was working with the City in the process of advancing the subdivision application and planning approvals. This meant dealing with the City's concerns in relation to the 4th Street SE underpass, the potential for the SE LRT to run through the 10th Ave Lands, and to deal with other concerns relevant to parks and green spaces.

[663] The City ultimately agreed that it would not deal with the 4th Street SE underpass and the SE LRT as part of the subdivision process but would rather deal with those later as part of the planning approvals. Ms. Lawrence testified that they pointed out to the City that since

Remington was going to be doing a comprehensive future development, not everything needed to be addressed at the subdivision stage.

[664] To obtain the City's agreement to this approach, Remington provided the City with a letter, sent on October 13, 2006, saying, "Remington Development Corporation shall, in the future, commit to submit a comprehensive subdivision plan further subdividing the 10th Avenue lands".

[665] Ms. Lawrence and Mr. Menzies were the key contacts for Remington with the City. Ms. Lawrence said her approach was to be in constant contact; she testified that this was necessary to make sure things moved along through the process. As an example, on October 20, 2006, Ms. Lawrence sent an e-mail trying to move Ms. Lupton on the approval decision. The subject line said, "Railtown – pester, pester :)"

[666] Second, Remington began working on developing a plan for Rail Town. It and the City created a working group to advance the project, involving representatives from Remington, the City, IBI and CPR. IBI had been retained by Remington to develop its vision for Rail Town.

[667] On September 27, 2006, the group had its first meeting, which was attended by Mr. Menzies and Ms. Lawrence from Remington, Mr. Shawcross and Mr. Lee from IBI, and representatives of the City of Calgary. The purpose of the meeting was to talk about the concept plan for Rail Town, and to discuss the subdivision. The City sent four representatives to the meeting, three members of the Centre City team involved in urban design, downtown policy and land use, as well as Ms. Lupton, who was the subdivision authority, and who would have been involved in the outline plan for future land use applications.

[668] Remington's plan at this point was to do a land use plan for the 9th Ave Lands, and a land use plan and outline plan for the 10th Ave Lands and the Interlink Lands. The 9th Ave Lands did not need an outline plan, Ms. Lawrence explained, because the development did not require internal roads.

[669] Remington's plans at this point included working with the City on moving the bus barns which lie between the Interlink Lands and the Elbow River. The goal was to incorporate the bus barn lands into the Rail Town development.

[670] Ms. Lawrence testified that the City participated in the planning process moving forward. At the time it was a unique process. Remington wanted to move on and develop these lands as quickly as possible. They wanted to include the City as land owner, but also work with parks and planning to understand what they were looking for as they moved into the approval process. The idea was that if those City representatives were included now, the information Remington needed would be obtained, they could identify how to deal with the issues, and then when they dealt with the land use application it would make that process move through the system more quickly.

[671] Remington was also meeting with political players. Ms. Lawrence, Mr. Menzies and Mr. Remington met with Mayor Bronconnier in late October, and walked him through their proposal, talking about timelines and the proposed subdivision. Mr. Remington gave the Mayor his commitment to work with the Mayor and the City on the 4th Street SE underpass.

[672] Ms. Lawrence's impression was that the Mayor was excited about the project, as were the other people with whom Remington consulted. Remington had met with the two ward councillors, and with the Victoria Park and Ramsay communities. They had done a traffic impact assessment, including scenarios with or without the 4th Street SE underpass. They had already

done a retail trade analysis. Ms. Lawrence did understand there to be an issue with respect to the future of the MacDonald bridge, and traffic flow in and out of Ramsay; Remington had, however, scenarios in development to allow them to address those concerns.

[673] IBI distributed its first visioning document to Remington and the other stakeholders in October 2006.

[674] Remington continued to work on the plans for Rail Town as part of the visioning process with the Province. Ultimately, however, that process did not come to fruition, although it did result in the circulation of further concept plans by IBI in January 2008.

Benjamin Lee

[675] Mr. Lee is an Associate Director and Senior Planner with IBI Group, where he has worked since 1999. He has a Masters in Environmental Design and Urban Design from the University of Calgary, and a Bachelor of Environmental Studies, Urban and Regional Planning, from the University of Waterloo. He specializes in, *inter alia*, urban design, development approvals, and community planning and facilitation.

[676] He has worked on design for the LRT Green Line. He also worked on the last phase of the Rocky Ridge Ranch, on the Morton lands' land use and outline plan approvals, on the UPTEN development, on the Shawnessy station transit-oriented development site, and on Quarry Park.

[677] He acknowledged that IBI does work for Remington, but on being asked if Remington was an important client of IBI said, "we try to make all our clients feel like they're important". On being asked about whether he was invested in Rail Town being developed, he said "it's a city-shaping project. I think any planner would – will be pleased to be involved in a project of that nature…any planner would embrace the opportunity".

[678] Mr. Lee was recognized as an expert in the general field of urban planning and in the specific field of urban design and the development approval process

[679] Mr. Lee provided a visual report to the Court which he explained through his oral testimony. The report first notes some of the context for the Rail Town development, including developments completed subsequent to 2007. He then mapped the ownership of the lands within Rail Town in 2002, 2005, 2007 (before and after the sale of the 10th Ave Lands to the Province) and as of July 1, 2010.

[680] Mr. Lee's report then set out his concept plan for Rail Town, which he suggested was a natural evolution of the Plans created through the visioning process prior to the expiry of the contract between Remington and CPR ("2007 Trial Concept Plan"). He noted in cross-examination that the focus was on plans conceived of by Remington prior to the involvement of the City.

[681] Mr. Lee testified that the 2007 Trial Concept Plan was a "revival of a preliminary concept that was legitimately being developed between 2005 and 2007 before Remington realized that CPR had sold a portion of the land to the Province". He noted that Remington, "predominantly an office developer at that time [2005-2007], was interested in office development adjacent to the rail corridor and mixing it with mixed use residential on the remaining land holdings". They had to adjust when they lost the land mass, but the 2007 Trial Concept Plan was created to "regenerate this circa 2006 Concept for the purpose of illustrating what Remington was seriously

considering at the time". He also noted that the concepts included greater density over time, as reflected evolving policy and market trends, but said that none of the concepts had unreasonable development yields.

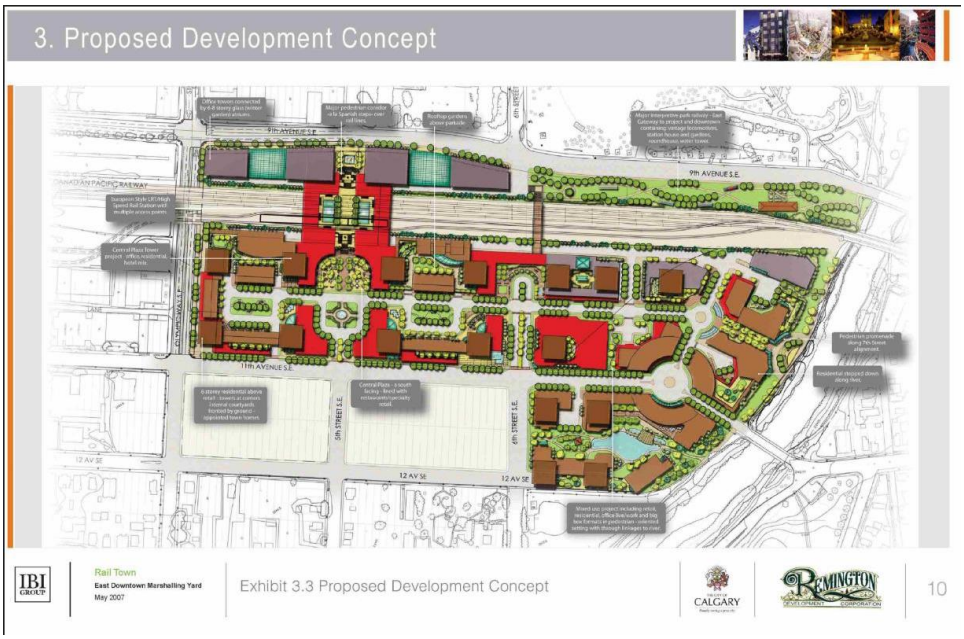
[682] In response to questions from the Court, Mr. Lee confirmed that he took what Remington would have been interested in doing in 2007, what would have been feasible given the City's interests, and what was workable in terms of a pragmatically functional plan, and from that created a development plan for the three pieces of land.

[683] Mr. Lee also confirmed that what the development would actually look like at the end of the day might be quite different depending on what the City had to say, what was feasible with CPR and in light of other things; it would have been an iterative process from this starting point.

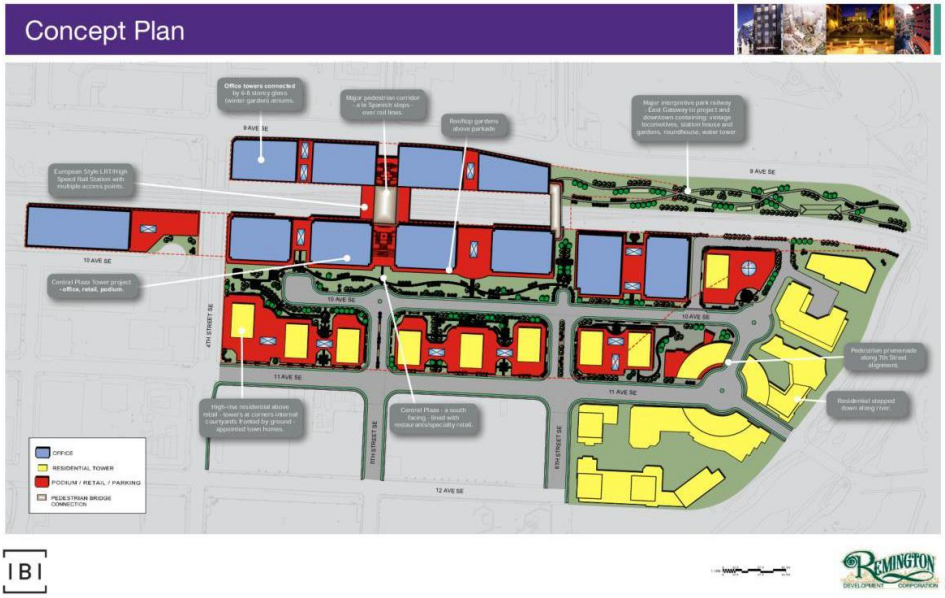
[684] One of the October 2006 Concept Plans, which continued to March 2007, is pictured here:

[685] Another October 2006 plan, which also continued to March 2007, is pictured here:

[686] The May 2007 Concept Plan is pictured here:



[687] The 2007 Trial Concept Plan is pictured here:



[688] The red squares on the 2007 Trial Concept Plan mark podiums which would be intended to include amenities and "animation and activity" on the ground level. The paired blue office buildings would have a central atrium or courtyard with vaulted ceilings (the "X" on the red podium is a skylight). The blue buildings reflect office buildings with floor plates of 25,000-27,000 square feet, with the one to the west of 4th Street SE being 40,000 square feet. The size of the building is dictated by design needs for an office building. The yellow squares indicate residential towers; they have much smaller floor plates than office buildings. The office

buildings would be 14-15 storeys, and the residential towers would be 25-35 storeys, although they could go as high as 40.

[689] The red crossing over the CPR main line is inspired by the Spanish Steps, with steps and stopping points along the way, and with a plaza on each side. There was also a secondary pedestrian crossing over the CPR main line at 6th street. The green in between the yellow and blue buildings would be a greenway going east to west to connect the development from the Elbow river towards downtown.

[690] On the three parcels as a whole, there would be 4.4% retail, 54.5% office, and 41.1% residential. On the south lands (i.e., excluding 9th Ave Lands) there would be 5.01% retail, 41.75% office, and 53.24% residential. Mr. Lee wanted to ensure that the fabric of the community complied with the overall goals of the City of Calgary for the area, noting that the City's plans varied somewhat on either side of the tracks.

[691] Mr. Lee said that the European LRT station reference identified an option for Remington to continue to work with the City to determine if they could integrate an LRT station, within the podium, beneath the building or in an alternative location. I understood Mr. Lee's evidence to be, in essence, that his drawings did not account for an external LRT station and would have to be adjusted if that had been pursued by the City as part of the Rail Town development.

[692] Based on these images, and the other evidence at trial (including a visual created by CPR showing the demarcation of the 10th Ave Lands), some of the salient differences between the 2006/2007 plans and the 2007 Trial Concept Plan are:

(a) The addition of an office building west of 4th Street SE.
(b) The only buildings on the 10th Ave Lands are office/commercial, rather than a potential mix of buildings including office, residential and hotel.
(c) The buildings on the 10th Ave Lands have a larger floor plate.
(d) The buildings on the 10th Ave Lands intrude less onto the Interlink lands.
(e) All parking is underground (the original 2007 plans may also have underground parking, but one note to the visual identifies a rooftop garden on parking).
(f) Greater proximity of the buildings to the CPR main lines (the 2007 Trial Concept Plan lists a European style LRT station, but it does not have the obvious location next to the CPR tracks on 10th Ave pictured on the 2006 and 2007 designs).
(g) Adjustments to the building design on the 9th Ave and Interlink lands.

[693] Mr. Lee also identified the phasing for the 2007 Trial Concept Plan:

[694] His phasing was premised on the belief that the development would begin with the lands closest to downtown, on what he saw as the existing urban fabric, and the logical connectivity of the development. He wanted to avoid "leapfrogging and picking something on a bit of an island". He noted, though, that the phasing could be adjusted depending on the market conditions and the goals of the developer.

[695] Mr. Lee then mapped out some further specifics of the buildings and development. He explained that the Floor Area Ratio (FAR) –the amount of buildable square feet on any square foot of land determined by a multiplier applied to the land – would be on average 7 for the lands south of the railway tracks, and 10 for the lands north of the railway tracks. Mr. Lee explained that FAR refers to the "developability that's afforded to a parcel of land…the floor area ratio refers to the size of the land as the base unit upon which to derive the developable density".

[696] He also explained that the FAR given to land applies to the land as a whole but can be used on only a portion of the land. So if a developer has two parcels, they could make one a park and apply all the developable density to the other. Or, in an example given by Mr. Lee, a developer could put the equivalent of three Bow towers on the 10th Ave and Interlink Lands, and that would consume the entire FAR for the site based on a 7.0 FAR. For that reason, having a large contiguous piece of land creates a significant amount of flexibility. He noted, however, that for the 2007 Trial Concept Plan they applied the 7.0 FAR as evenly as possible across the site.

[697] In terms of the placement by the railway, Mr. Lee noted that for the purposes of this exercise, and in particular where he is trying to apply the FAR evenly across the site, the boundary lines are somewhat arbitrary. They have room to work with, and could move the buildings further south if need be, while still maintaining the FAR.

[698] The buildings that he anticipated would be built on the 10th Ave Lands between 2007 and 2019, had a proposed buildable square footage of 545,000 (Phase 2), 400,000 (Phase 4) and 400,000 (Phase 5). For phases 4 and 5 Mr. Lee apportioned the square footage between the 10th Ave Lands and Interlink Lands, suggesting that, for Phase 4, 329,050 would be on 10th Ave

Lands and, for Phase 5, 342,345 would be on the 10th Ave Lands. He also allocated the office and retail space, with the vast majority of the buildable square feet of those buildings being for offices.

[699] Mr. Lee was cross-examined on the comment from City staff in 2006-2007 on the importance of having sufficient residential building to support a retail environment. He responded that in his view the City was saying that they understood what was being proposed and that the "proposed mix of uses is consistent with the Beltline ARP". He was also questioned about the extent to which the project relied on use of the City of Calgary bus barns to increase the proportion of residential development on the site; he explained in response why having a residential component in that area made sense. He was questioned about the fact that the 2007 Trial Concept Plan had 54.5% office space, while the May 2007 plan had 36.6% office space.

[700] Mr. Lee noted that a concept plan is illustrative not prescriptive, and that it is up to the developer and other stakeholders to determine the FAR they wish to pursue (within the City parameters) and the mix of building space they incorporate.

[701] The buildings on the 10th Ave Lands that would be built after 2019 would have a proposed buildable square footage of 416,000 (Phase 10), 349,827 (Phase 13), 296,000 (Phase 15) and 549,406 (Phase 17). Mr. Lee again portioned out the parts of those buildings that would be on the 10th Ave Lands. Those buildings were not incorporated into Remington's claim for damages.

[702] Mr. Lee's opinion then tracked the City approvals and construction schedules for each of Phases 1 through 5. He opined that the City would have given the land use approval by December 2007. Construction would begin on Phase 1 in June 2008.

[703] For Phase 2, the development permit would be applied for in October 2008, and would be obtained from the Calgary Planning Commission by March 2009, with the partial/foundation building permit issued in late May-early June 2009, and the full above ground building permit issued in late July-early August 2009. Construction would begin in early July 2009 and would be completed by May 2011.

[704] For Phase 4 and 5, the Development Permit would be approved by the Calgary Planning Commission by March 2011. The partial foundation Building Permit would be approved in late May-early June 2011, and the full building permit would be approved in late July-early August 2011. Construction would begin in early July 2011 and would be completed by May 2013.

[705] Mr. Lee explained that Phases 4 and 5 would be built together because, as a development project progresses, momentum is achieved, and a larger tranche can be built. Further, building those phases together allows the project to move towards the building of the overpass over the tracks.

[706] Finally, Mr. Lee set out the bridge crossing options to connect the 9th Ave and 10th Ave/Interlink lands. He identified the cost of the crossing, not including the cost of air rights, as ranging from $5,300,000 to $20,000,000 depending on the size and nature of the crossing (e.g., covered vs. open). He noted in cross-examination that these costs did not include all the architectural and other costs associated with construction of the Spanish Steps. It was an illustration only of the baseline costs.

[707] In Mr. Lee's oral testimony he further explained the City's approval process. He noted the particular importance of the development permit, the detailed site servicing plan and the

building permit for any given building. He said those three processes progress on a sequential but partially overlapping or concurrent basis; the final stage is the building permit, after which they can begin construction. A developer begins with the development permit, which includes the drawings and landscape drawings, and the servicing details. That is then submitted to the City and reviewed. The City will provide an approval with conditions, one of which will be the detailed site servicing plan. That then moves along, while at the same time the developer pursues the building permit. The building permit will be approved first for below grade, and then for above grade, and the detailed site servicing plan will be completed at around the same time. Further, while this is underway, and the building permit being pursued, the developer will be tendering and awarding the construction contract, and having the trades on line so that construction can begin on schedule.

[708] In cross-examination Mr. Lee acknowledged that in the May 2007 Visioning Document generated through the process with the Province it anticipated Council approval in April 2008. That timeline was, however, accounting for the subdivision application having been put on hold in November 2006.

[709] Mr. Lee said that construction takes between 18 and 24 months but is generally done in just under two. He described two years, which he used in his report, as a "good and reasonable average".

[710] Mr. Lee acknowledged in cross-examination that he does not work in construction administration, or design construction schedules. His work involved creating a reasonable time frame for construction, but not the detailed work. He also acknowledged that he did not cite any outside sources or citations, or plans of Remington from prior to 2007, for much of his analysis, such as the phasing, City approvals schedule and construction schedule.

[711] Mr. Lee also acknowledged that he did not provide a detailed analysis of the construction schedule or timeline. He did not specifically reference the 2008 financial crisis. He did not adjust for the construction of the 4th Street SE underpass, or the need to re-route the CPR mainline. He did not take into account any delays associated with the flood. He also acknowledged that his schedule would require Remington to be building three buildings in 2010, with another three buildings being built in 2012.

[712] Mr. Lee also acknowledged that he did not plan out construction after the oil crash in 2014, at which time there was a significant adjustment in development and development strategy, with a real move away from office building.

[713] Mr. Lee submitted a further expert report critiquing Mr. Romanesky's expert evidence. He identified a variety of issues with Mr. Romanesky's evidence.

[714] Mr. Lee suggested that Mr. Romanesky treated City plans that are conceptual and flexible as prescriptive and literal, and thus binding. In Mr. Lee's view, "planning policy itself does not dictate the viability of a project". Mr. Romanesky also considered policies that were not enacted as of the effective date. In addition, Mr. Romanesky misinterpreted aspects of the City's documents; he relied unduly on the City categorizing the 10th Ave Lands as a "Special Area" when the City Centre Plan contemplated the lands being a mixed-use space. In Mr. Lee's view, the point of calling it a Special Area was simply to alert developers of the need to be careful in relation to the location of the tracks. The linkages incorporated into Rail Town did just that.

Further, over time the Special Area lands have been rezoned to something that accommodates higher densities and have been developed to a higher density.

[715] In Mr. Lee's view, the City's policies and planning were converging in a manner favourable to Rail Town – in his view, "all the stars were aligned". In his testimony he said City policies are "intended to foster creativity and innovation in the art of city building and place making; it's not intended to stymie it".

[716] Mr. Lee claimed that Mr. Romanesky erred in viewing the City's focus on the East Village as inconsistent with Rail Town, when Rail Town would enhance East Village and would give rise to financial benefits that would allow the City to recover costs already invested; in addition, the City can pursue multiple priorities, and Beltline development has occurred during this time period.

[717] He also thought that Mr. Romanesky overstated the infrastructure challenges with the 10th Ave Lands. The 4th Street SE underpass was completed in 2010, and Remington cooperated with it. The Green Line LRT was not fully finalized, was one Remington could have accommodated and, given its ongoing inchoate status, would not have blocked Rail Town from being developed. The 5th Street SE underpass was not in consideration until after 2017 and is not a definitive plan of the City even now. The ENMAX transmission lines were not a major infrastructure impediment as "power lines are often relocated, buried and/or moved altogether" in developments like Rail Town. The open space connections are flexible and could be accommodated within the Rail Town development; they would not have been an impediment.

[718] In general, Mr. Lee assessed the infrastructure challenges as "standard" and "typical"; some things, like a proposed LRT, do not arise on every site, but developers deal with a regular laundry list of things the City wants incorporated. He was not saying Remington could ignore challenges like the LRT, but it could be dealt with. There were a number of ways for the City and Remington to deal with it, and it wouldn't involve the City asking Remington to stop and wait for the City to make a decision. He acknowledged the 2007 Trial Concept Plan did not propose a specific solution or resolution to the LRT placement question, and that it did not include any LRT tracks adjacent to the CPR tracks, although he contemplated it being integrated into the location of the Spanish steps, into the building or podium adjacent to the overpass. In general, he said there were different ways to accommodate it.

[719] His point was that as a planner he was not "trying to affix someone to a particular solution…as to say, there's the option, they'll consider it, but if that doesn't work, you know, they'll be looking to move it in a different alignment". He emphasized the importance for flexibility in the process. He said it was important to have an ability to be nimble and adaptive, and on being asked by the Court who should be nimble and adaptive he said: "Everybody involved in the process. So not only the developer, but the City as well."

[720] Mr. Lee also emphasized the support of the City for the Remington proposal, and the benefits that could be realized by the City through working with Remington on the project, including the contribution to the Community Revitalization Levy.

[721] In cross-examination, counsel for CPR explored with Mr. Lee the testimony and evidence he had given at the Surface Rights Board hearing with respect to the ability to develop the Interlink Lands, and the obstacle posed by the ENMAX lines for the development of those lands. His evidence before the Surface Rights Board was to the effect that the ENMAX lines were the

only impediment to development of the Interlink Lands, and that Remington was otherwise able to proceed. He was asked about inconsistency between evidence he gave at trial that they had not worked on planning on the lands, where at the Surface Rights Board he suggested they had worked on planning for Interlink. In argument, CPR suggested that "Mr. Lee was either overstating his work on the Interlink Lands in the SRB Hearing or understating the same work in this Trial". In re-examination Mr. Lee explained that he had not prepared any materials for a development permit on the Interlink Lands for Remington, and that his evidence at the Surface Rights Board was given within tightly defined parameters.

Stephen Shawcross

[722] Mr. Shawcross was recognized as an expert in the general field of urban planning, and in the specific field of railway development. Since 1990 he has been the Director of the Calgary Office of the IBI Group, where he has worked in a planning capacity since 1979. Through his work at IBI he has extensive experience in urban development and urban planning, having worked on the planning and design of large projects in the City of Calgary, including Garrison Woods, Quarry Park and the Chinook Station Area Plan, on projects across Alberta, including the Banff West Downtown Transportation Plan and the development of CFB Griesbach in Edmonton, and on railway lands developments across North America, including the CN Lands Redevelopment in Toronto (project manager) and the Santa Fe Railway in Los Angeles and Orange Counties (business plan development).

[723] Mr. Shawcross described IBI Group's involvement in railway land redevelopment projects as including, *inter alia*, feasibility analysis, initial planning, development of railway relocation plans, obtaining of municipal rezoning and permissions, infrastructure design, building design and project management.

[724] Mr. Shawcross also has personal knowledge of the history of the proposed Rail Town development, having been retained by CPR twice to do assessments of the property, in 1996 and 2001.

[725] Mr. Shawcross's primary expert report did three things. First, he explained the nature of the proposed Rail Town development. Second, he gave his opinion on Rail Town's viability. Third, he explained the effects of losing the 10th Ave Lands for Remington.

[726] He noted that Rail Town was to be the largest and most comprehensive master-planned mixed-use community in downtown Calgary. It was envisioned as a "24 hour, mixed-use development encompassing a wide array of activities – office, retail, entertainment, recreational and residential – in a master-planned setting". Rail Town would be connected to and bridge the East Village and Stampede Park, and would be a transit and transportation hub, incorporating both the LRT and a high speed rail station. It would be a pedestrian friendly environment, including a major European style square, and a Spanish steps style connection plus an additional connection over the railway. It would have inspirational architecture with an emphasis on brick and indigenous stone, footnoting "the past warehouse and historic rail uses". Its high rise residential buildings would reflect a modern aesthetic with emphasis on glass and steel; it would also incorporate active roofscapes with rooftop gardens and activity areas. The project would be designed with sustainability in mind, with most or all buildings being LEED certified.

[727] In his cross-examination on the history of the Rail Town development he said that it would benefit Rail Town to have an LRT station and a high speed rail station; it would offer

increased market dynamics. He also acknowledged that in the 2007 drawings, they had no development west of 4th Street SE, and the towers were set back from the railway to allow the LRT to run along the main line, and it contemplated development of the Bus barns. He acknowledged that the designs in 2007 contemplated the LRT and took into account the need for the 4th Street SE underpass, along with the potential for high speed rail.

[728] Mr. Shawcross also noted, though, with respect to the siting of the 10th Ave buildings, that they were not especially concerned with the specifics of the conceptual plans; when the land use is put in place, and you have direction about what can be included, then you may move buildings around, depending on the development permit.

[729] Mr. Shawcross in cross-examination acknowledged that his opinion incorporated the statement that the plan for Rail Town "includes an integral LRT and high-speed rail station and is envisioned as an intermodal transit hub", which had been part of the 2008 plan. He noted that the 2007 Trial Concept Plan said that it included an LRT, but it was unclear to him where the station was located. In re-examination he clarified that if Remington had acquired the 10th Ave Lands instead of the Province it would not have required high speed rail to be commercially viable or successful in its Rail Town development. He also emphasized that Remington would not have put Rail Town on hold to accommodate either high speed rail or the LRT.

[730] He agreed that the 2007 Trial Concept Plan had office towers, noting that if the developer had wanted to go to office towers they would necessarily have a larger podium or floor plate than would residential or other like buildings.

[731] In re-examination he emphasized the need for concept plans to incorporate flexibility, so that the developer can respond to changing market conditions, particularly given the volatility and variability of the Calgary market.

[732] He put this development in the context of other railway land redevelopments. In his oral testimony he noted their attractiveness and success, their ability to include a "full range of land use, amenities, and services" which makes them "fabulously attractive to the market". He described it as "your urban unicorn. The larger scale allows for place-making, the creation of market identity" which, in turns, gives it a "competitive advantage over one-off projects".

[733] In his view Rail Town was viable and achievable; he noted that in general rail land redevelopments are "attractive and successful". In the case of Rail Town, the project aligned with the goals of the City of Calgary, and as a large plot of land with a single owner it could be developed without land assembly costs, and with the possibility of creating a complete community with a "full range of land uses, amenities and services".

[734] He noted that the City has ended up investing $200,000,000 into the East Village, built significant new infrastructure projects including the 4th Street SE underpass, the 12th Avenue streetscape improvements, the Riverwalk and the new library. It had already committed an advisory team to Rail Town, which the City would not do unless the project was one they expected to support and expected to see implemented. He remained of the view that it would have been possible to have land-use approval by December 2007.

[735] He acknowledged in cross-examination that his opinion was based on the understanding that sanitary, storm and shallow utilities were in place to service the Rail Town development. They had been given information to this effect by the City of Calgary. He acknowledged contemporaneous information that the water mains would need to be upgraded, and booster

pumps would potentially need to be installed on site. In general, servicing in place does not mean that upgrades are not required; they usually are in a development project. What it means is that system grade changes are not required.

[736] Mr. Shawcross also acknowledged that the 4th Street SE underpass needed to be built, and the ENMAX lines would need to be removed, and the Telus and Shaw facilities would need upgrading.

[737] The removal of the 10th Ave Lands had, however, a "profound impact" on the development. It effectively made the concept of Rail Town impossible, making any connection between the lands long, expensive and potentially unsafe. He concluded:

> Overall, removal of the 10th Avenue parcel significantly diminishes the flexibility, functionality, aesthetics, sense of complete community, marketability and therefore, potential economic return of the project.
>
> The project essentially becomes two separate developments, both with diminished appeal and value and makes what was trying to be achieved much more difficult to accomplish.

[738] Mr. Shawcross acknowledged in cross-examination that his opinion was premised on Remington's ability to negotiate with CPR to obtain air rights, and that in the absence of air rights being obtained the project would become two separate developments.

[739] Mr. Shawcross also critiqued the evidence offered by Mr. Delf opining that Rail Town lacked ability (likelihood of approval by the City), suitability (the overall nature and attributes of Rail Town) and marketability (attractiveness to prospective tenants).

[740] In Mr. Shawcross's view Mr. Delf's areas of concern "are grossly overstated, unfounded and demonstrate a lack of understanding".

[741] With respect to the ability to obtain City approval Mr. Shawcross opined that Remington was "poised to obtain municipal permitting within a shortened timeframe". He observed that the basic infrastructure was in place, the process had already begun, the City was actively involved in the process, the Ward Councillor and local Community Association supported the project, and the City was motivated to see the project proceed given its own priorities. Mr. Shawcross also emphasized that the plan was structured to incorporate the potential LRT and high speed rail station. He noted that Quarry Park, despite its material challenges, was given unanimous Council approval within eight months of Remington submitting its land use application; in his view a similar time frame could have been accomplished for Rail Town.

[742] In his oral evidence with respect to the infrastructure project, Mr. Shawcross opined that the lack of clarity on infrastructure projects will not impede development:

> The notion that you're going to sit on your hands or the City will sit on its hands for an inordinate amount of time and stop development because they're waiting for something to happen doesn't occur in any jurisdiction in North America that I'm aware of. City building goes on. The noble art of city building goes on. And solutions are found to any issues that might arise. So suggesting that the lack of clarity on the Green Line that had been on the books for 15 years was going to hold anything up is a ridiculous comment.

[743] With respect to suitability, Mr. Shawcross noted the ability to develop a master-planned community on the land which made it competitively stronger than the one-off Beltline developments, its greater attractiveness than East Village, and its ability to occupy a unique market place between suburban and downtown developments. He likened it to Toronto's CN Lands, and to False Creek and Coal Harbour in Vancouver.

[744] In terms of Mr. Delf's suggestion that the location was problematic, Mr. Shawcross said in his oral evidence – "Specious…doesn't even start to really confer the lack of credibility of that concept". He emphasized in particular the size and scope of Rail Town. He noted that other railway projects were adjacent or peripheral to downtown, yet all had been highly successful; in this case, the development was a stone's throw from downtown.

[745] With respect to marketability Mr. Shawcross stated that as a master planned community it would be possible to develop Rail Town so as to make the parts attractive as well as the whole, and to develop it in a logical and progressive fashion. He viewed it as much easier to develop and market than Quarry Park.

Greg Brown

[746] Mr. Brown received his Bachelor of Environmental Studies, specializing in urban planning and regional planning, from the University of Waterloo in 1974. He received his MBA from the University of Manitoba in 1988. He has over 35 years of experience in the planning profession, but particularly in land development, community development, planning and consulting within the City of Calgary. He formed a consulting business in 1989 and began working with significant developers as the development industry recovered from the down turn of the first half of the 1980s.

[747] He has worked on a wide range of commercial developments, including in 1996 being retained by the Canada Lands Corporation on its redevelopment of Garrison Woods, Garrison Green and Currie Barracks. He also worked on the Deerfoot Trail Heritage Drive redevelopment of the former Cominco lands. Mr. Brown is semi-retired. He has previously given testimony on Remington's behalf as part of the Surface Rights Board hearing but has not otherwise done work for Remington.

[748] Mr. Brown was recognized by the Court as an expert in the general field of urban planning and in the specific field of the municipal approval process and land-use planning in the City of Calgary.

[749] Mr. Brown's expert report built on and in effect validated the expert evidence given by Mr. Lee with respect to the viability of Rail Town in relation to the City approval process, the amount of FAR that would have been achieved on the Rail Town lands, and the timing of the City approval.

[750] Mr. Brown's report included a number of assumptions on which his opinion was based. Those included that in November 2006 Remington would have moved expeditiously to obtain City approvals and would have begun construction as soon as possible. It would have sought a City team to focus on its applications, as it did with Quarry Park. It would have been able to address all environmental issues, to arrange for the removal of the ENMAX power lines and would have sought densities of 10 FAR on the 9th Ave Lands, and 7 FAR on the lands South of the tracks. He also assumed that Remington would have developed a project similar to what was envisioned in November 2006, namely a "24-hour multi-use development encompassing a wide

array of uses – office, retail, entertainment, institutional, and residential", which included an interconnection over the CPR tracks, and an integral LRT and high-speed rail station.

[751] Mr. Brown reviewed the municipal planning context as of January 2007. He observed that the City had been working towards urban intensification and redevelopment since 1979 and that the political will towards those goals had intensified since the election of Mayor Bronconnier in 2001. He noted that the City had pursued and obtained financing incentives for such development by virtue of the Rivers Community Revitalization Plan and Levy, which would have applied to the Rail Town development, and meant that the Rail Town's development would have resulted in increased revenues to the benefit of the City of Calgary. City policy and planning documents had set a base density framework of 5.0-7.0 FAR with an opportunity density of 7.0-11.0 FAR. Finally, he pointed out that the size and location of Rail Town would have directly contributed to the City's accomplishment of its objectives for the City in general and that area in particular:

> Remington would have had a large land assembly, if the disputed 10th Avenue lands had been transferred to Remington. This would enable a comprehensive and strongly pedestrian interconnective development across the CPR line linking the urban communities of Inglewood, East Village, East Victoria Park and the Beltline which could deliver to the City the visions that the City Council, Administration and public had been discussing and wanting to achieve for years.

[752] In testimony Mr. Brown clarified that he understood all of City Council, and not only Mayor Bronconnier, to be supportive of this type of development, and in particular the Councillors responsible for the lands in question, at that time Ms. Madeline King and Ms. Druh Farrell.

[753] Mr. Brown noted that servicing was sufficiently in place to enable redevelopment of the Rail Town project, and that the servicing Remington would have had to finance itself would have resulted in it receiving recoveries and endeavours from the City. In Mr. Brown's view, the "development servicing was both physically and financially feasible". He observed that there was an existing servicing and plan for future servicing for the 9th Ave Lands.

[754] With respect to infrastructure Mr. Brown observed that the functional design of the 4th Street SE underpass was completed by March 2007, and the land requirements would have been defined while the Concept Plan was being reviewed. Further, the Concept Plan would have been able to accommodate rights of ways or easements needed for the SE LRT. The lands had the benefit of existing roadways and right of ways, and Remington could have focused on the internal vehicle, cycle and pedestrian developments.

[755] The municipal reserve and the provision of public open spaces had been addressed in the subdivision application process, and the exact nature of the open space provision would be resolved during the application process. Mr. Brown also understood that Remington had plans in place to ensure the completion of the necessary remediation. He also observed that shallow utility issues would be resolved during the consultation process and would not impact the development intensity or timing of approvals. Mr. Brown observed that given the lack of local neighbours or residents, he did not anticipate any significant opposition that would delay approval.

[756] With respect to the density, Mr. Brown concluded that, given the City objectives, Remington's ability to link the East Village with East Victoria Park, and various bonussing alternatives under documents like the Beltline Area Redevelopment Plan, the City would have approved a 10 FAR on the 9th Ave Lands. He concluded that given the City's objectives, the precedent of the approval of the Arriva development, the ability to connect the East Village and East Victoria Park lands, planning documents circa 2007, and the evolution of planning documents after that time, he was of the view that the City would have approved a 7.0 FAR for the lands South of the CPR tracks.

[757] On the issue of timing, Mr. Brown said that given the importance of an application of this kind to the City, its contribution to recent City projects, and how the City approached the Quarry Park development, the City would have used a focussed application process supported by the Mayor and Council. He believed that members of the City administration would be "motivated to see issues resolved". Overall, he concluded that Remington would have received approval of its Concept Plan by the Calgary Planning Commission in mid-November 2007, and a land use redesignation from City Council in mid-November 2007. The Phase 1 Development Permit could have been approved by March 2008, and its Building Permit received in early June, with construction starting in July 2008. He said that later phases would have "flowed as the market opportunity enabled".

[758] In a Chart submitted to the Court, Mr. Brown specified the tasks that would be completed in order to obtain the approvals in the anticipated time frame, including pursuing concurrently the land-use designation, the development permit and the building permit. He explained that part of the City approval process would involve amendments to the Area Redevelopment Plan necessary to support the development. The Calgary Planning Commission would consider the Concept Plan, the amendments to the Area Redevelopment Plan and the land-use redesignation together. Those things are then considered by Council. He noted that his opinion on timing was created in conjunction with IBI; his expertise was in relation to the land-use designation and associated amendments; his opinion on the development permit was in conjunction with IBI; and, he relied on IBI in relation to the opinion on the building permit and construction start date, although based on his experience he assessed IBI's opinion as reasonable.

[759] Mr. Brown assessed the timing in part based on his experience with the redevelopment of the former CFB Calgary. He noted that that was a 110 acre redevelopment, so significantly larger, and that it was a complex site because it was situated closely adjacent to South Calgary. He said that that process, for Outline Plan, land use-redesignation, the community development plan and public consultation took 12-14 months; in light of that timeframe, the 12 months for Rail Town was reasonable. No Community Plan was required for Rail Town.

[760] Mr. Brown was questioned on, and acknowledged, the many things that could potentially unsettle his time frame, including lack of availability of parties to meet, delays in getting before Council and other similar issues. He was asked about the time frame for Remington's recent application with respect to the Interlink lands, which appears to have worked on a slower track than estimated for Rail Town. Mr. Brown said that City approval processes have become more formalized since 2007, although agreed that substantively receiving feedback from the City and needing to respond to it was a factor in both time frames. He also acknowledged that the removal of the ENMAX transmission lines would take time, although he did not understand it to be a material issue in terms of the City's approval process, given that all parties understood the lines

needed to be removed. He did understand that if it was contested through the Alberta Utilities Commission it could take three years to be dealt with.

[761] On being questioned by the Court about the 'window' for getting a project through City approvals to beginning construction, Mr. Brown said it could take anywhere from 17-26 months, although this estimate did not appear to factor in a disputed transmission line removal.

[762] Mr. Brown also agreed that a developer will propose to the City not just what they want, but also what they think the City will approve, and the process of articulating the plan is iterative. He agreed that a successful developer is going to respond to the City's wants, and a successful City is going to need flexibility to get things done. He noted also that even when a land use designation has been achieved based on a particular concept plan, it does not commit the developer to building the project exactly as submitted; it's not fixed in stone.

[763] Mr. Brown also agreed that if the City asked something of Remington, and obtained a concession or benefit from them, it would be likely to give something to Remington in return, and that the size of the Rail Town development created more flexibility for solutions on how to deal with things. He agreed that the most important factors for the success of a project is the commitment of the City to development and the ability of a developer to work with the City in an effective way.

[764] In general, Mr. Brown's report communicated the view that the Rail Town development as conceived by Remington in 2006-2007 would be an important and positive addition to the City of Calgary. He made this point in several ways, but perhaps most clearly here:

> The Remington Rail Town Project would have been the first intensification and redevelopment project in the last 30 years to straddle the CPR lines. The Palliser/Calgary Tower and Gulf Canada Square projects are the only other developments to straddle the rail lines and provide connectivity between 9th and 10th Avenues. As such it offered an exciting and compelling ability to connect north/south residential neighborhoods of East Village and East Victoria Park as well as [to] connect east/west the residential neighborhood of Inglewood with the downtown and the Beltline. When viewed in the larger community context, the Remington Rail Town Project, as part of the larger Rail Town Concept provided a pedestrian-focused and Light Rail Transit-oriented urban intensification development of the 'missing link' in the east end of the downtown/Beltline. With the assumed ongoing cooperation between CPR and Remington…the exciting above track pedestrian and open space linkage between the north and south sides of the track could be viewed as a substantial private sector redevelopment achievement for the Mayor, the City and all involved in in the urban intensification of the east end. Redevelopment of the lands on either side of the tracks was highly desirable, and above grade integration could be viewed as the 'icing on the cake'.

[765] Mr. Brown also offered a critique of Mr. Romanesky's expert report, again aligned with Mr. Lee's evidence. Mr. Brown disputed Mr. Romanesky's analysis of the City planning and policy documents and, as well, Mr. Romanesky's conclusion that the City would not have approved the Remington proposal in 2007.

[766] Mr. Brown agreed that the Municipal Development Plan from 1998 designated the Remington lands and the 10th Ave Lands a "special area". However, he suggested that the special area designation was because the creation of a mixed use development adjacent to the rail line required study and consideration prior to development; it "does not mean that they were not desired for timely intensification and redevelopment". He also noted that the 2009 Municipal Development Land identifies a special study area along the CPR line but appears, in the illustration of the CPR Special Study Area, to reference the 2007 Centre City Plan's "CPR Special Area", which states that the CPR Special Area "is envisioned as a mixed-use space that integrates the north and south sides of the track and has exciting linkages, places and landmark built forms".

[767] Mr. Brown rejected Mr. Romanesky's claim that the reference to a preferred linear park in the Beltline Area Redevelopment Plan would have precluded the development of Rail Town. He noted that the proposal was not mandatory, that there were numerous ways to achieve it, and Remington would have had no difficulty in doing so. He noted that the "City clearly wanted to maximize the use of these important lands in the area of the downtown. The Remington Concept Plans of 2006 and 2019 both incorporate all these components deemed appropriate and desirable by the City".

[768] Mr. Brown also rejected Mr. Romanesky's suggestion that the focus on East Village would preclude the development of Rail Town. The City's focus on the East Village was because it could not be developed without significant infrastructure investment to address the flood risk, infrastructure investment that was not required prior to the development of Rail Town. Rail Town required infrastructure upgrades, but that could be done "in a logical phased manner in tandem with the phased intensification of the lands". In Mr. Brown's view, "a prospect like the Rail Town Project would have been highly attractive to the City when it was strongly encouraging redevelopment in the Rivers District".

[769] Mr. Brown also disputed Mr. Romanesky's claim that the 2019 Rivers District Master Plan was inconsistent with the likelihood of development. In his view the linear park contemplated in the plan could have been achieved in conjunction with Rail Town. The 5th Street underpass was not contemplated in 2007 or, indeed, in any City documents through to 2018. As a result, it would not have been an issue relative to the approval of the Rail Town Concept Plan in 2007. With respect to the SE LRT, Mr. Brown opined that the different location proposed in 2019 was not relevant; had Rail Town proceeded the location would have been locked in at that time.

[770] Mr. Brown also emphasized the significance of the Centre City Plan from 2007, which was not statutory but was "visionary and strategic". As noted, it envisioned the CPR Special Area as a mixed-use development. The images in that report show the City envisioning an intense mixed use development with pedestrian connection, showing the harmony between the City and Remington's visions for the area. Mr. Brown suggested in testimony that with respect to the CP Special Area the City is "looking for something incredibly exciting and innovative".

[771] He also opined that the statement in the East Village Area Redevelopment Plan in 2005 that the Remington lands were an "Area Requiring Policy" should not be understood as a barrier to development of the lands, but only as a requirement that the plans for the lands south of 9th Ave also consider development north of 9th Ave, something which the Remington concept accomplishes.

[772] Mr. Brown emphasized:

> I believe the City would have seized the opportunity provided by Remington and the comprehensive Rail Town Project plan to solidify its long term vision for these lands during the planning approval process and take the necessary policy and land use amendments to Council in the fall of 2007 to ensure that Remington could commence development of a vision shared by both Remington and the City.

[773] Mr. Brown also suggested that had Remington acquired the 10th Ave Lands then, when the Centre City Mixed Use CC-X Bylaw was adopted in July 2007, and implemented in June 2008, it would have supported the CC-X designation being given to the 10th Ave Lands by the City, as it was to the Interlink Lands. While it applied a Special Purpose City and Regional Infrastructure district for the subject lands, this likely reflected the ownership of those lands at that time by CPR. In Mr. Brown's view, the FAR of 8 applicable to the Centre City Mixed Use CC-X district was more reflective of what would have been given to the 10th Ave Lands had they been owned by Remington and included in the Rail Town redevelopment.

[774] In brief, Remington would have simply applied for a land-use amendment, and the City would be likely to have welcomed that as more reflective of its vision for the lands.

[775] In his testimony Mr. Brown said that the CC-X designation applied to the 10th Ave Lands; however, that statement was not correct and was also not what he said in his submitted report, so I understand it to have simply been a misstatement on his part.

[776] In support of his position re the land-use amendment, Mr. Brown observed the Rivers District Community Revitalization Plan said that the land use designation for the land north of the CPR tracks "is anticipated to change during the period of the Community Revitalization Levy" and that the Beltline had a number of land use designations "that require amendment as they do not reflect the Beltline ARP policy direction".

[777] Mr. Brown said that either the 2007 or the 2007 Trial Concept Plan could have been approved by the City, that the "city would have been willing to approve both concepts since they both provided a high density, mixed use, highly integrated plan consistent with the City vision for the CPR corridor and the Subject/Remington lands". He noted that the different plans reflected the same general massing and intensity of development. He explained on being questioned by the Court that the point of a concept plan is to get the land use approved, and in that way it needs to conform with what the City in general is looking for. He also agreed with the proposition that ultimately what gets built will flow from the iterative work of the City, stakeholders and others to create something acceptable to stakeholders and expected to be profitable for the developer.

[778] Mr. Brown also acknowledged that a plan developed based on the developer's vision (as Mr. Lee explained his 2007 Trial Concept Plan was) rather than after consultation with stakeholders including the City (as the May 2007 Concept Plan reflects) is further from being approved. He said, however, that a developer who has a good consulting team and understands the City will be able to articulate a plan that might get approved. Ultimately, though, the process for a developer involves talking to the public, politicians and City administration to find a "happy middle ground so we can gain an approval".

[779] Finally, he reiterated his view that approval could have been achieved from the City by the fall of 2007 given that they did not require substantial infrastructure spending, that there was

no 5th Street underpass contemplated to be a barrier to development, that the LRT could have been addressed (and was in any event inchoate at that time) and that the removal of the ENMAX power lines was achievable either at Remington's expense, at ENMAX's, or on a shared basis. His bottom line was,

> In my opinion, on the effective date of March 2007, the Rail Town Project Concept, whether the 2006 or [2007 Trial Concept Plan], were not highly speculative as indicated in the City Trend Report. No planning or infrastructure issues would have held up planning or development approvals by the City. I believe the Rail Town project vision was consistent with the City's well-defined vision for the lands and would have been enthusiastically endorsed by City Council in late 2007.

[780] Mr. Brown acknowledged that in his Surface Rights Board testimony he said that the ENMAX powerlines significantly impact and limit the future development of the Interlink Lands. He also said that to get a development permit required the resolution of major issues, including the removal of the power lines. He also acknowledged that his evidence at the Surface Rights Board suggested that the development of Interlink was ready to proceed absent the ENMAX power lines.

[781] He also acknowledged that ENMAX applied to the AUC to remove the power lines in 2014, and that the AUC denied ENMAX's application on May 4, 2015. He said that he was aware that the AUC was advised in 2014 that Remington did not want to bury the lines but wanted them removed.

[782] Mr. Brown agreed that an LRT station requires about 18 metres (60 feet) of width to cover the tracks and the platform.

[783] Mr. Brown concluded his oral testimony by noting that the loss of the 10th Ave Lands, and the inability to acquire air rights, would be a great loss to the opportunity that was there with Remington's Rail Town proposal. The opportunity involved the bridging opportunities, the large tract of land, and the comprehensive development area called Rail Town. The loss of the 10th Ave Lands creates "a big moat". Prior to the loss of the 10th Ave Lands, they were all "trying to create something really helpful. So by people not getting along…you've lost something for the City of Calgary, for the citizens and…it ….would really be lost as a special place".

[784] Mr. Brown agreed that the City wanted residential development in the area but said that they also would have respected the agreement between CPR and Remington not to have residential development on the 10th Ave Lands. He also agreed that the City might want residential development to proceed first but suggested that the City would be responsive to the market opportunities that the developer is presenting, and its overall vision for the development. In Mr. Brown's view, as of 2007 there was more demand for commercial development than residential.

Randy Magnussen

[785] Mr. Magnussen provided evidence about real estate development. He currently serves as the Chair of the Board of the Calgary Municipal Land Corporation, of which he has been a member since 2015. He has worked in the Calgary real estate market for over 25 years, with a particular focus on the downtown real estate market. He has worked on site acquisition, leasing construction and ongoing property management on 28 buildings in Calgary, and 12 buildings

outside of the City. He sits on the Board of a number of real estate companies in the Calgary market.

[786] He had direct dealings with Remington when he was at Bentall Kennedy and the company purchased four projects comprised of eight buildings and 2M square feet from Remington. He has also been a business competitor with Remington over his career. He provided strategic advice to Remington on one occasion. Mr. Magnussen has known Mr. Remington for 30 years, and they are friends. He has no financial or business interest in Rail Town.

[787] Mr. Magnussen opined that Rail Town was a viable project. It was based on a sound planning concept and was coming into a very positive office market in Calgary in the 2007-2015 period. Further, Remington had the capacity to develop the project.

[788] He said that the loss of the 10th Ave Lands was damaging to the project because it removed the connectivity between the properties, and prohibited the development of a "comprehensively designed and well-planned community", leaving instead two segregated developments with little synergy.

[789] Mr. Magnussen said that the only development comparable to Rail Town was East Village; East Village illustrates how a development can succeed in challenging market conditions. In Mr. Magnussen's opinion, however, East Village had a disadvantage relative to Rail Town in that it was not developed by a single developer.

[790] He identified as important Remington's history of choosing knowledgeable and experienced consultants, and of working well with the City, and its positive track record and reputation in the brokerage community.

[791] Further, Remington's concept for Rail Town was likely to be attractive, particularly given the low vacancy rate that existed in 2007. Mr. Magnussen agreed that the market was volatile in this period, but between 2007 and 2013 approximately 13.7M square feet was added to the Calgary office market. It also had a significant increase in multi-family residences. Mr. Magnussen said, consistent with Mr. Norman's evidence (summarized below), that "Given Remington's track record and reputation it is reasonable to expect that if Railtown had started in 2008 it would have captured a portion of this activity".

[792] He was asked about 8th Avenue Place, a downtown office building; in Mr. Magnussen's opinion, the type of office space constructed in Rail Town would not be directly competitive with 8th Avenue Place. Rail Town would be AA buildings, while 8th Avenue was AAA.

[793] Mr. Magnussen emphasized the poor office product in much of the Central Business District and the Beltline, and Remington's ability to build high quality buildings that are likely to be LEED certified, and that as the single developer it could have had "an orderly flow of office product to be constructed in phases based upon demand".

[794] Mr. Magnussen suggested that neither the high speed rail – which would not have been in the discussion if the Province did not acquire the lands – or the SE LRT would be a problem. He said that the SE LRT did not have funding until much later. He said, consistent with the evidence of Mr. Lee, that "The City of Calgary does not sterilize large parcels of land for long periods of time to see what may or may not have happened". Once the City received the application for a development permit, they would have to deal with it.

[795] Mr. Magnussen anticipated that Remington would be able to complete lease transactions within six months based on his own experience of how long such transactions took place, and what he had been told about Remington's own activities.

[796] Mr. Magnussen compared Rail Town to Quarry Park, noting the complexity and challenges of that project, and that Remington successfully achieved that development, with Quarry Park now being considered "to be the preeminent live/work community in Western Canada".

[797] Mr. Magnussen acknowledged in cross-examination that he did not include information for vacancy rates after 2007, that he did not specifically compare Rail Town to other buildings that came on stream at the same time as it was scheduled to do, that there are differences between the location of Rail Town and Quarry Park, that issues had been identified with the Rail Town location in the 2006 Altus appraisal, and that he had not reviewed discussions between the City and Remington regarding the SE LRT in 2006. He also acknowledged the evidence he gave in the Surface Rights Board hearing about the problems created by the ENMAX powers lines for development on the Interlink Lands.

[798] In essence, Mr. Magnussen opined that Rail Town was an excellent idea put forward by a skilled developer in a market that, while challenging, would have allowed it to succeed.

Bryan Romanesky

[799] Mr. Romanesky received his degree in Urban Planning from the University of Quebec in 1996 and has worked in urban planning for the last 25 years. Since 2006 he has been the President and CEO of City Trend. Since 2010 he has also been the CEO of Permit Masters, which assists individuals to obtain building permits; he spends about 25% of his time on the Permit Masters business.

[800] Prior to forming City Trend, he worked for Brown and Associates, and he spent three years as a senior planner at the City of Calgary, and 3 years as a planner in the City of Drummondville.

[801] Mr. Romanesky has worked on a variety of development projects in the City of Calgary but has never worked on the type of larger scale project envisioned at Rail Town. The projects he has worked on have generally involved single buildings; he has never worked on a project with phases and multiple buildings. In the last ten years in the downtown area he worked on the storage facility at Crowchild and Bow Trail, and worked on a six story multifamily mixed use building in Kensington on 10th Street NW. He has also worked on some multi-family developments in Marda Loop.

[802] Mr. Romanesky was recognized as an expert in urban planning in the specific field of land-use planning, municipal approvals and urban design in the City of Calgary.

[803] In Mr. Romanesky's opinion, the 2007 Trial Concept Plan had no realistic probability of achieving approval from the City of Calgary within the time frame contemplated in the expert evidence of Mr. Brown and Mr. Lee.

[804] Mr. Romanesky identified two fundamental problems with the proposal's likelihood of approval. First, based on the City of Calgary's statutory and non-statutory planning documents that existed in 2007, and that were developed after that time, the 2007 Trial Concept Plan did not align with the City's priorities or vision for the 10th Ave Lands. Second, the infrastructure issues

that existed or were to come into existence in relation to the 10th Ave Lands would have precluded development in the manner contemplated in the 2007 Trial Concept Plan within the time frame suggested by Mr. Brown and Mr. Lee.

[805] With respect to the City documents, Mr. Romanesky noted that the Calgary Plan 98 identified the 10th Ave Lands as a "special area" which were not identified as part of the residential growth prioritized by the Calgary Plan. He explained that the Calgary Plan 2009, which provided a long term strategy for the future growth of the City, identified plans for the Centre City. Those included creating a vibrant mixed-use area, including densification of residential neighbours. The 10th Ave Lands, however, were identified as a special area and were not identified for redevelopment.

[806] Mr. Romanesky reviewed the Centre City Plan and identified that, in that plan, the 10th Ave Lands are identified as falling within the "CPR Special Area". He observed that the Centre City Plan stated that the CPR Special Area was "envisioned as a mixed-use space that integrated the north and south sides of the track and has exciting linkages, places and landmark built forms". The CPR Special Area is an acknowledgment of the unique characteristics of the lands adjacent to the CPR corridor, and is general and aimed at providing direction, rather than being proscriptive; they focus on encouraging connection and integration of the land adjacent to the corridor, while protecting that corridor. The neighborhood was to be a "mixed-use urban development with strong pedestrian connections to the surrounding neighborhoods and the Elbow River". The City also emphasized the 4th Street SE underpass and other infrastructure developments.

[807] Mr. Romanesky acknowledged in cross-examination that the Centre City Plan does envision development on the 10th Ave Lands, and that it contemplated that the 10th Ave Lands would be high density mixed-use. He noted that the lands on which development was contemplated extend beyond the 10th Ave Lands. He also agreed that the document said that the "CPR corridor will include areas to work, live, rest, and play. It will include at-grade, underground, and above-grade linkages and places such as vehicular and pedestrian underpasses, overpasses at the Plus 30 level and a variety of public and private open spaces and parks".

[808] Mr. Romanesky reviewed the East Village Area Redevelopment Plan as it existed in 2007 and noted that it identified the importance of the 4th Street underpass. He also reviewed the 2017 East Village Area Redevelopment Plan, which was amended to include the 9th Ave Lands.

[809] Mr. Romanesky acknowledged in cross-examination that density can increase when a developer brings forward a proposal for increased density, and that it is not uncommon to approach the City with a comprehensive project and request for rezoning. He also acknowledged that if Remington owned the 10th Ave Lands but, instead of developing them, it created a park and an LRT station, it would not lose the FAR associated with those lands, and could receive a bonus FAR elsewhere on the project.

[810] He also reviewed the Beltline Area Redevelopment Plan from 2006. In that plan, parts of the 10th Ave Lands are identified as urban mixed-use district. It provided for a density of 5-7 FAR. It indicated that the SE LRT would run across the 10th Ave Lands. It also suggested that a linear park would run along the 10th Ave SE corridor. He considered the 2019 Beltline Area Redevelopment Plan as well. That proposal includes the SE LRT, and also indicates an open space through the 10th Ave Lands.

[811] Mr. Romanesky reviewed the 2007 Rivers District Community Revitalization Plan and the 2019 Rivers District Master Plan. He identified that the 2007 plan involved significant City investment on the East Village, rather than on the Beltline and that it reiterated the importance of the 4th Street SE underpass. The 2019 plan includes the 10th Avenue linear park and the SE LRT, and also posits the building of the 5th Street SE underpass.

[812] In cross-examination Mr. Romanesky acknowledged the financial incentives to the City for development within the Rivers District by virtue of the community revitalization levy, which meant that the City received taxation dollars that would ordinarily go to the Province, and that that incentive would apply to development in Rail Town. He agreed the levy operated when the City had private development, and that its purpose was to encourage development within the Rivers District; private development was necessary for the City to achieve its goal of raising $12-18,000,000,000 in revenue. He also acknowledged the statement in the City's River District Revitalization document in favour of development of the Victoria Park neighborhood, and its reference to "creating a mixed-use Rail Town adjacent to the CPR tracks".

[813] Mr. Romanesky reviewed the City of Calgary land use bylaw. He observed that the bylaw in place in June 2007 designated the 10th Ave Lands as a Direct Control District, which materially limited the development on those lands. He noted that a new bylaw was approved in July 2007 and implemented in 2008. Under that bylaw, the 10th Ave Lands were largely designated "Special Purpose – City and Regional Infrastructure". The 9th Ave Lands were redesignated in 2012; the Interlink Lands are designated Centre City Mixed-Use District.

[814] Mr. Romanesky made the following observations based on this review, and on his knowledge regarding the infrastructure projects on the Remington lands:

1. The 2007 Trial Concept Plan "[i]n many respects…does not accord with the municipal plans, priorities and land use bylaws that were in place at the Effective Date. Nor does it account for the uncertainty associated with planned infrastructure projects".
2. Because of construction of the 4th Street SE underpass, the 9th Ave Lands could not have been developed until 2012, which is inconsistent with the phasing proposed by the 2007 Trial Concept Plan.
3. The uncertainty associated with the placement of the SE LRT corridor and station would delay Remington's plan for development; "Until such time as the alignment is confirmed, Remington won't have the ability to plan development that can adequately integrate this major public project". Based on the SE LRT uncertainty, and its priority to the City, development of Phase 2, 4, 5, 10, 13, 15 and 17 would have been premature as at June 2007. He opined that he "would consider development of the Subject Lands and the [Interlink Lands] in proximity to the LRT Station and Corridor to be premature until such time as the exact location is confirmed and design details available".
4. The 5th Street SE underpass usurps the Rail Town concept of pedestrian crossings and is a more efficient option. Moreover, and more generally, "The 5th Street SE underpass is a good example of how the vision set out in the [2007 Trial Concept Plan] was premature. Certainly, the infrastructure program managed by CMLC was not advanced enough in 2007 to allow for a feasible concept to be prepared with confidence".
5. The development was premature given the ENMAX transmission lines did not yet have a relocation plan in place. This is reinforced by the proposal in 2017 for a linear park under the transmission line. In Mr. Romanesky's view, "Phases 4, 5, 10, 13, 15, 16 and 17 could not be built because of the presence of the transmission line".

6. The 2007 Trial Concept Plan was premature given the priorities reflected in Rivers District Master Plan, which does not contemplate their development until 2029-2039.

[815] Mr. Romanesky explained in his testimony that while he looked at policies after 2007, this was for the purpose of understanding the policies as at 2007 through looking at their later evolution; he asserted that excluding the post-2007 policies from his analysis would not have changed his opinion. He acknowledged in cross-examination that the evolution after 2007 occurred in the context of the Province owning the 10th Ave Lands, not Remington.

[816] Mr. Romanesky acknowledged that all plans and policies are ultimately subject to decisions by Council and the Mayor. He also acknowledged that if a developer is keen, and has a market for its proposal, the developer can work with the City to resolve infrastructure issues. He suggested, though, that there is a risk of costs and delays in that event.

[817] He also acknowledged that while he had looked at some of the correspondence between Remington and the City from 2006-2007, he "didn't use the correspondence in 2007 to inform [his] opinion". He also did not take into account the planning process that Remington and the City had undertaken at that time, since to him it did not show the issues he was pointing out had been resolved. He said that while you can have conversations, "until you have approval and something tangible, things can change". He was looking at the policies in place at the effective date to "provide the best context I can".

[818] He also said that in saying that the City's focus was on the East Village, he was not claiming they were not focused on these lands, he was just saying that "the focus and the priorities were the East Village". In his view, the East Village succeeded because the City focussed on it; they were looking at things, but "those priorities, those focus had an impact on where development was occurring, and it was to make East Village successful, and that's my opinion". He rejected the position of Remington's witnesses that the City was focussed on East Village because it required greater public infrastructure support to be developable, although he was taken to the Rivers District revitalization document which said that upgrading the infrastructure in the East Village was necessary to attract investment.

[819] Mr. Romanesky maintained that Remington was "offbeat" the City's goals, and for it to have succeeded would have required it to invest greater cost, face greater risk and risk delay.

[820] In relation to the SE LRT Mr. Romanesky suggested that if Remington was trying to develop a Rail Town concept then it would make sense to create the flow and structure of a development around a rail station, whether LRT or otherwise. It was important, as he understood the 2007 plans to do, to have a station, and to create flow, so that there was pedestrian movement through the space. In his view the 2007 Trial Concept Plan did not do this; it had come very far from what was intended and, in Mr. Romanesky's view, they would have had a difficult time getting it approved.

[821] In cross-examination he agreed that the 2007 Trial Concept Plan noted the LRT, and that it was possible that the construction could go through the buildings, but he said that it was not illustrated on the plan, and the corridor was not incorporated. He said that Remington would need to work with the City to pin down the location of the LRT; the City would not sit on their hands but working out how to resolve the LRT issue would cause delay.

[822] Mr. Romanesky criticized Mr. Brown's report for assuming that the ENMAX line would be removed. At the effective date there was no relocation line, and the City's current planning policies envision the use of the transmission right of way as an open space.

[823] He also suggested that the City would not have prioritized Remington over the City plans created for the community as a whole. In his view, the general timeline proposed by Mr. Lee, with the approval and construction of six office towers in a seven year period (2007-2014) was not realistic.

[824] Mr. Romanesky noted the example of the Eau Claire market development, where they created a project without sufficient residential density to support it, and the project was not a success. For Rail Town it would have been important to build residential construction first to ensure the appropriate density. He noted that East Village had focussed on ensuring sufficient density, and that there were no office towers in that space. He also noted that the 2007 Trial Concept Plan had no transformative public infrastructure projects to bring people to the community.

[825] Mr. Romanesky questioned whether the FAR included in the 2007 Trial Concept Plan was achievable given the City plans and policies applicable to the lands as of June 2007. He also suggested that the City's focus on the East Village, and its infrastructure priorities, meant that Rail Town was not as aligned with the City priorities as Mr. Brown's report suggests. He concluded:

> It is our opinion that the [Brown] Report is unrealistic. Mr. Brown makes several assumptions which affect the outcome of his opinion. The number of unresolved planning issues and infrastructure projects at the Effective Date is significant. The 6 issues below are the most substantial:
>
> - the LRT Station and Corridor;
> - the 4th Street SE underpass,
> - the 5th Street SE underpass,
> - the ENMAX transmission line,
> - the advancement of planning prior to 2017, and
> - the focus from CMLC and the City of Calgary on East Village.
>
> These unresolved planning issues and infrastructure projects should be considered to evaluate the feasibility of development in 2007. These infrastructure projects are major and need to be properly integrated into development plans and schedules. This would not have been possible in 2007.
>
> …it is our opinion that the feasibility of the Railtown Concept 2019 at the Effective Date is highly speculative.

[826] He acknowledged in cross-examination that the 4th Street SE underpass functional design was completed in February 2007, and that Remington was cooperating with the development of the 4th Street SE underpass. The concept plans that he has reviewed incorporated the 4th Street SE underpass in their design.

[827] He was asked about why he took into account the 5th Street SE underpass, which is first mentioned in 2019, but does not take into account the 2020 documents which show the LRT alignment moving from 10th Ave to 12th Ave. He said that the 5th Street SE underpass was an

obvious issue given that it can only be built prior to or as part of development, and that the LRT alignment issue was something that had to be resolved, wherever it was ultimately located.

[828] He was asked about the ENMAX lines, and the point that the River District 2007 document noted that the line was incompatible with redevelopment; he said he did not know about whether the lines could be buried.

[829] In cross-examination, he was asked to compare the May 2007 and 2007 Trial Concept Plan. He acknowledged that both have four office towers on the 9th Ave Lands. Both have two crossings over the CPR tracks. Both have a central plaza on the main pedestrian crossing, although he suggested the 2007 one was larger. Both have an east to west green space along 10th Ave. Both have residential development on the Interlink Lands. If it is assumed that the towers on the 10th Ave Lands in the May 2007 plan are an office/residential/hotel mix, then both concepts have either an office or an option for an office on the 10th Ave Lands.

[830] Mr. Romanesky was asked by the Court to clarify whether his opinion was that the 10th Ave Lands could not be developed, that the 2007 Trial Concept Plan would not work but another plan might have worked, or that the 2007 Trial Concept Plan would work but not in the 2007 time frame. Mr. Romanesky said in his response that he understood the 10th Ave Lands to be earmarked for LRT development and park space. He thought the 2007 plans were on the right track with those priorities. The 2007 Trial Concept Plan was not what was contemplated by the City and not consistent with what it intended. He went so far as to suggest that the 10th Ave Lands "could be used for development but not for building itself". He said that the lands were "valueless" in relation to building; the land could be a part of the development, with an open space, an LRT station and a pedestrian crossing, but towers could not be built.

[831] In further questioning from the Court, Mr. Romanesky said that if Remington had worked with the City and resolved the ENMAX issue, and had resolved the LRT issue, and had built along the lines of the May 2007 plan, with the assumption that the larger light brown buildings were commercial buildings, it "would be, sort of, to me the alternative to get to the finish line quickly". The issues in that case would largely be one of timing – "I think if there was a really strong intent from the developer at the time, they would be able to start creating resolution for the other issues that we have on the table and get to something similar to this". With a motivated developer and hard work something like what Remington had initiated in 2007 "would be reasonable".

Liam Brunner

[832] Mr. Brunner testified that when the cost of the 10th Ave Lands is compared to the price paid for other lands in the immediate vicinity, it is apparent that a considerable discount was incorporated in the accepted offer price for the 10th Ave Lands. In Mr. Brunner's view, this price demonstrated that the lands were "long term speculative development lands".

[833] As he put it:

> Implicitly and explicitly, the price paid for the subject lands and the discount it represents compared to pricing for land ready for development reflects the additional time to development. This is the time it will take to develop more readily developable lands in better locations, before the subject lands. This is also the time it will take for all of the more well located medium and high density office and mixed use residential lands to have their inventory absorbed.

[834] In Mr. Brunner's view, based on the price paid for the 10th Ave Lands, it would have taken 15-18 years for the 10th Ave Lands to be developed.

Assessment: Vision, Timing and Planning

Does the 2007 Trial Concept Plan reflect what Remington would have proposed to the City but for the breach of the 10th Ave Agreement?

[835] I find that the 2007 Trial Concept Plan reflects what Remington would have proposed to the City but for the breach of the 10th Ave Agreement. In my view Mr. Lee was an independent expert whose evidence can be properly relied upon by the Court. The inconsistencies with his Surface Rights Board evidence were on matters not squarely relevant to the issue before me (since that evidence focussed on the Interlink Lands) and were sufficiently explained by the different factual context within which his evidence was provided. I agree that Mr. Lee seemed sometimes eager to please, but I judged that tendency as reflecting his lack of experience as a witness, rather than a lack of independence. Moreover, in key respects, including with respect to the suitability of the 2007 Trial Concept Plan, his evidence was corroborated by other witnesses including Mr. Shawcross, Mr. Brown, Mr. Magnussen and Mr. Crane.

[836] Further, both Mr. Lee and Mr. Shawcross occupied the unique vantage point of having been involved with the Rail Town project from August 2006. Mr. Shawcross testified as both a fact and expert witness, while Mr. Lee testified only as an expert. However, Mr. Lee's expertise now was also his expertise when he was part of the team retained in August 2006, and I think it significant that the same consultants – IBI – have proposed the plans for Rail Town in 1996, 2001, 2006, 2007 and at trial. That continuity in advisors, and the continued reliance on their vision for Rail Town, supports my conclusion that the 2007 Trial Concept Plan reflects what those consultants and Remington would have put forward in 2007 had the 10th Ave Agreement not been breached.

[837] I also was persuaded by the substance of Mr. Lee's evidence and his explanation for why he took the approach he did. The 2007 Trial Concept Plan is a defensible evolution from those discussed in 2006-2007, at the first stages of the development process, and that were presented to the Court in evidence.

[838] The differences between the plans were also not as material as suggested by the Defendants. I note here the visioning statements from the November 2006 IBI Visioning document, which Mr. Brown reproduces in his report:

- Major pedestrian corridor – similar to City of Rome Spanish Steps over the rail lines to provide north-south connectivity between the East Village to Stampede Park and the predominantly residential Victoria Park area.
- Pedestrian-oriented sidewalks and main floor retail along 9th Avenue to provide east-west connectivity between Inglewood and the downtown.
- 9th Avenue development buffering the East Village residential area from the noise and visual intrusion of trains and the tracks.
- Vehicular and pedestrian access from 9th and 10th Avenues to the future South East Light Rail Transit station and the potential high-speed provincial rail station.

- Higher intensity development within walking distance to support the City Light Rail Transit network.
- Predominantly higher intensity residential development in East Victoria Park south of the rail line as desired in the Beltline Area Redevelopment Plan.
- Central plaza on 10th Avenue faced with restaurants and retail uses to provide an active public place along the north-south pedestrian corridor and rail crossing.
- Strongly focussed street-oriented development within the entire project area with associated outdoor open spaces.

[839] Each of these descriptors also applies to the 2007 Trial Concept Plan, except that the 2006-2007 plans had a greater percentage of residential, such that the "predominantly higher intensity residential development" descriptor applies less aptly to the 2007 Trial Concept Plan, and the 2007 Trial Concept Plan flagged the SE LRT location but did not explicitly provide for vehicular and pedestrian access to the SE LRT station. As also noted by Mr. Lee, however, the 2007 Trial Concept Plan could be adjusted to include more residential development, and to accommodate the SE LRT location, whether through a building or by adjusting the building location.

[840] The evidence supports Mr. Lee's position that Remington was primarily a commercial developer in 2007, and also that the market conditions in 2007 justified emphasis on commercial development. As documented by Mr. Hofer, in 2006-2007 Calgary had an extremely low vacancy rate, and minimal new supply. Further, in the period from 2000-2007 the vacancy rate never exceeded 6%, and in most years new supply was under 1 million square feet. Mr. Magnussen's evidence also confirmed the nature of the office market at that time and up until 2014.

[841] Further, I accept Mr. Lee's evidence that the FAR of 6.0 in the 2007 plans was a placeholder selected as the middle of the permitted range, and that Remington would, in reality, have sought the highest FAR it could have obtained. It is the difference in the FAR that is the most material difference between the plans; it is what permits imagining buildings at higher density levels in the 2007 Trial Concept Plan.

[842] Having said that, I acknowledge the Defendants' position that the 2007 Trial Concept Plan can be interpreted as designed to maximize the revenue attached to the 10th Ave Lands. The large office developments on the lands are different from the plans presented in 2006-2007 and, visually, the 2007 Trial Concept Plan is less appealing than any of the plans put forward in 2006-2007.

[843] Further, the 2007 Trial Concept Plan assumes that the lands included in the third subdivision application were part of the 10th Ave Agreement. While it may be the case that, absent the sale to the Province, those lands would have been sold to Remington, I have found that they were not included within the scope of the 10th Ave Agreement, and as such cannot form part of Remington's claim for damages.

[844] I emphasize as crucial, however, Mr. Lee's clear and consistent acknowledgement that the 2007 Trial Concept Plan was an idea not a blueprint. The final configuration of the buildings

was likely to be quite different. The plan could be adjusted to move buildings further from the tracks or to accommodate the SE LRT elsewhere, or to reflect the narrower depth of land obtained by Remington. They could be adjusted for different green spaces or open spaces, and building uses could be changed from office to hotels or residential accommodation (subject to the terms of the 10th Ave Agreement). The key factor in any concept plan is its FAR; once the FAR is established for the tract as a whole, it can be deployed in different places to accommodate the City's needs along with the developer's vision and concept for profitable development. The FAR is the most significant driver of profitability, because it increases the number of square feet that can be developed and sold.

[845] Some adjustment must be made to recognize that the 2007 Trial Concept Plan assumes that Remington would achieve 40 feet of land adjacent to the tracks that I have found that it did not, but that adjustment is consistent with the flexibility inherent to, and needed for, any concept plan.

[846] I also note that the uncertainty associated with the 2007 Trial Concept Plan would have applied equally to the 2006-2007 plans; I accept Mr. Lee's evidence that all development projects require a nimble and adaptable approach by the developer and others attached to the project. As is the case with the 2007 Trial Concept Plan, the 2006-2007 plans do not provide a detailed blueprint; they were preliminary and flexible, designed to facilitate discussion with the City and other stakeholders, not to constrain Remington's plans going forward.

[847] In addition, those plans appear to incorporate the 40 feet of land in the third subdivision application. Again, while that difference needs to be accounted for, its inclusion does not render the 2007 Trial Concept Plan unreasonable or implausible.

[848] Further, it would be an error to put any weight on the aesthetic appearance of a drawing when that appearance only loosely captures the aesthetics of the final actual development.

[849] I also accept that had CPR not breached the 10th Ave Agreement, it and Remington would have reached an agreement for air rights to allow Remington to construct the pedestrian corridor over the tracks featured in all versions of the concept plan. Where Remington owns the lands on both sides of the tracks it is likely to be the only viable purchaser for the air rights. CPR has a normal corporate-commercial profit motive to support the sale of air rights. At that time, prior to CPR's contract breach, it and Remington had a productive and supportive working relationship. At numerous points, including when CPR put the subdivision on hold, and when CPR repudiated the agreement, Remington worked constructively with CPR, rather than creating conflict or division. In those circumstances, I find that CPR, acting rationally, would have entered into a for-profit market based agreement with Remington for the air rights, allowing this vision of Rail Town to proceed.

[850] I do not think the fact that the building west of 4th Street SE was not included on the 2006-2007 concept plans has any significance. The building west of 4th Street SE stands alone; it is connected to the Rail Town project by virtue of how the lands were to be acquired and who acquired them. Because of the physical separation created by 4th street, however, and because of the size of that parcel, the project is a stand alone commercial development. The 2002 Altus appraisal described it as ready for immediate development. There would have been no need to include it in the concept plans brought to the City, because there would have been nothing unusual about the process for obtaining approval to construct it. That Remington planned to develop that part of the 10th Ave Lands was shown by its insistence that that parcel be no

narrower than 100 feet. Given the attractive market for office development in 2007, the proximity of the lands to downtown, and the proximity of the recently approved Arriva development, I am satisfied that Remington would have included those lands for development in 2007.

[851] I do not view the adjacent ENMAX substation as significant. As was clear from the trial evidence, and in particular the cross-examination of the Defendants' witnesses, that the size of that parcel of land is large enough to provide Remington with options to reduce the visual burden of the substation. It would not be the first downtown office development in Calgary adjacent to an ENMAX substation.

[852] In general, and subject to the need for an adjustment to reflect the difference in land size, I view the 2007 Trial Concept Plan as a realistic reflection of what Remington would have brought forward to the city had the 10th Ave Agreement not been breached.

Would the City have approved the 2007 Trial Concept Plan?

[853] I accept the evidence of Mr. Lee and Mr. Brown and find that the 2007 Trial Concept Plan would have been approved by the City. The basis for that conclusion is, first, that Mr. Lee and Mr. Brown have more relevant experience than Mr. Romanesky. Mr. Romanesky has never brought forward a phased large scale project of this nature through the City planning process. Mr. Lee and Mr. Brown have.

[854] Further, in substance I found Mr. Lee and Mr. Brown's review of the City planning documents to be more persuasive. Mr. Romanesky paid inappropriate but also selective attention to City documents from after 2007; I was troubled by his emphasis of the potential for a 5th Street SE underpass on the one hand, while ignoring the later shift for the SE LRT to 12th Ave on the other. His explanation, that the 5th Street SE underpass was an inherently likely project, was unpersuasive.

[855] I also agreed with the critique of Mr. Brown that Mr. Romanesky tended to treat City policies as binding rules and requirements, rather than as policy statements which included significant flexibility and the capacity for the City to endorse innovative projects that align with the City's overall objectives. I found Mr. Brown's interpretation and explanation of those policies and their meaning to be more persuasive, and I adopt it here. As an example, I accept Mr. Brown's position that the City would have been open to numerous ways to incorporate a linear park in Rail Town, that the 2007 Trial Concept Plan was consistent with the City's direction and that, in any event, it could have been adjusted relatively easily if the City thought adjustments necessary.

[856] Mr. Romanesky in particular did not put enough emphasis on the significant financial benefit for the City in approving a development such as Rail Town. I do not suggest that the City would allow financial incentives to create bad policy, but where a project aligns with the City's objectives, has already received an observable commitment of City resources and energy, as well as political interest, and also brings a material financial benefit, the City has good reason to approve that development. In general, Mr. Romanesky paid insufficient attention to the information showing the City's interest in the Rail Town project.

[857] Given the evidence of the other experts, I disagree with and reject Mr. Romanesky's position that the Remington's project was "offbeat" the City's goals; I agree with Mr. Magnussen, Mr. Brown, Mr. Lee and Mr. Shawcross that Rail Town was well aligned with the

City's interest in intensification, developing the East Village, and revitalizing Victoria Park and the Stampede area. As Mr. Brown said, it would have provided the "missing link" between a number of inner City communities. Mr. Magnussen is also well positioned to comment on the alignment between Rail Town and the City's goals, and I accept his evidence in that respect.

[858] I also accept Mr. Brown's evidence that the City's focus on East Village related to the unique challenges of that development and would not have precluded the development of Rail Town.

[859] In addition, Mr. Romanesky treated the LRT as a dealbreaker, when, as of 2007, the City did not yet have the budget to construct it. I accept that the City would have wanted to ensure that the overall Rail Town development left it with the option to incorporate the SE LRT at a later point. But I agree with Mr. Shawcross, Mr. Brown and Mr. Lee that the City would have approached that issue flexibly and in a way that would not have impeded Remington's development. The size of the lands that would have been owned by Remington would have provided it with numerous options to incorporate the LRT line.

[860] Further, given that based on my findings Remington does not acquire the 40 feet of land proximate to the CPR main line, there remain in this scenario other options for the City in siting the SE LRT, noting that 60 feet is required for a LRT station.

[861] I also accept the evidence of Mr. Brown that the City would have approved the highest available FAR for the 10th Ave Lands. I do not put any significance on Mr. Lee's selection of the midpoint of 6 in the original documents, and I agree that given the overall direction of the City's policies, and the location of the lands, the City would have approved a FAR of 7 on the lands as a whole.

[862] I also found Mr. Romanesky's position on approval to be incoherent. In particular, I do not think it is logically possible to view the 2007 Trial Concept Plan as having no realistic possibility of being approved in the time frame proposed by Remington, while also saying that the 2007 versions of the plan had a reasonable chance at approval. In particular, if Remington would not "have the ability to plan development" until the LRT "alignment is confirmed", that would block any of the plans from being approved; the LRT alignment had a tentative location in 2007, but it was far from being confirmed. Similarly, the 5th Street SE underpass would be an issue for any of the versions of Rail Town proposed by Remington, as would the ENMAX transmission lines. If Mr. Romanesky had maintained what seemed to be his initial position, that no version of Rail Town could be approved in the 2007 time frame, that would be extreme, but it would have been coherent. In the end, however, that did not seem to be his position.

Can the 2007 Trial Concept Plan properly be used as the basis for a calculation of damages?

[863] Having found that the 2007 Trial Concept Plan fairly reflects what Remington would have proposed absent the 10th Ave Agreement, and that the City would have approved it, I have a defensible basis for using the 2007 Trial Concept Plan as the basis for a calculation of damages.

[864] The issue, however, is that a significant part of the reason why I have made these findings is based on the evidence of the Remington experts that the plan was flexible and could be adjusted as needed to address the City's concerns. As such, I need to consider the additional question of whether the City's approval would have affected the construction of the three buildings used by Remington to quantify their loss claim.

[865] The three buildings used by Remington are three of seven on the 10th Ave Lands in the 2007 Trial Concept. 82% of Phase 4, and 86% of Phase 5, would be on the 10th Ave Lands, with the remainder of those buildings being on the Interlink Lands. The placement and exact size of each of those buildings could have been affected by City directions with respect to the placement of the SE LRT or other requirements. That they are what Remington proposed, does not mean they are precisely what Remington would have constructed.

[866] In addition, given my findings on the land size, some adjustment to Phase 4 and Phase 5 would be necessary to account for the narrower depth of the 10th Ave Lands.

[867] I am nonetheless persuaded that they ought to be used as the basis for Remington's loss calculation. That is for five reasons.

[868] First, there is no possible concept plan Remington could have presented that would not have faced similar arguments or issues. Remington cannot show me what the City would have approved, because it never had the chance to bring forward its plans to the City.

[869] Second, and for similar reasons, I do not know what the plan the City would have approved looks like. I can spot the possibility that this plan might not have been approved as written but I cannot determine definitively what they would have approved.

[870] Third, while it may be the case that each of these buildings may have been smaller and may have had a greater proportion of their footprint on the Interlink lands, it is also the case that Remington has not included in its calculation a significant part of the construction that would have occurred on the 10th Ave Lands. It is claiming its losses based only on the first stage of its construction. That means that I want to be cautious about reducing that claim unnecessarily or unfairly.

[871] Fourth, as Remington pointed out, as long as its FAR of 7.0 was approved for the 10th Ave Lands, it would have had the ability to use that FAR somewhere, even if it did not use it here. By including these buildings 'as is' in its calculation, I am capturing the FAR associated with the 10th Ave Lands, FAR that would have been available for Remington regardless. Subject, again, to the adjustment to account for the smaller size of land acquired.

[872] Fifth, I can address the uncertainties with respect to what the City would have ultimately approved through the application of a discount to Remington's loss calculation. I can also use a discount to account for the smaller parcel of land acquired. I do not need to change the basis on which that calculation is done.

Would the City have approved the 2007 Trial Concept Plan, and the buildings on the 9th Ave and 10th Ave Lands, in the time frame estimated by the Remington witnesses?

[873] I accept the evidence of Mr. Lee and Mr. Brown with respect to how long it would have taken the City to approve the 2007 Trial Concept Plan. I rely on their relevant experience upon which they base their opinion, the commitment the City had already made to the development process, the alignment between Rail Town and the City's objectives, the financial benefit to the City from Rail Town, and the example of Quarry Park.

[874] I acknowledge Mr. Romanesky's concern about the SE LRT, and agree that there is a possibility that it could have delayed the City's approval. I do not think that concern is sufficient to justify me rejecting Mr. Lee and Mr. Brown's evidence, particularly given the preliminary

nature of the SE LRT in 2007 and given that, based on my findings, Remington did not acquire the 40 feet proximate to the CPR main line east of 4th Street SE. It does, however, factor into my assessment of the proper discount to be applied to Remington's plans.

[875] I do not view the 4th Street SE underpass as likely to have had any effect on the approval of Remington's project, or the timing of that approval. The scope and nature of the underpass was well understood and had been taken into account by Remington in its plans.

[876] I also do not view the later proposed 5th Street SE underpass as relevant to what would have occurred in 2007. I have no evidence to suggest it was a factor in that earlier time frame.

Would problems other than City approval have delayed the beginning of Rail Town?

[877] The issues other than the City approvals that could have delayed the beginning of Rail Town included the removal of the ENMAX lines and the relocation of B Yard. With respect to the ENMAX issue, the Defendants emphasized the ongoing litigation between ENMAX and Remington about the transmission lines, the fact that the lines were still on the Interlink Lands and the 10th Ave Lands today, and the position of Remington at the Alberta Utilities Commission in 2014 that it was opposed to the lines being buried. The Defendants also noted the length of time it would take for Remington to work through the regulatory process if it took the position that ENMAX had to move the transmission lines. With respect to B Yard, CPR's evidence showed that it entered into a memorandum of understanding with the City on January 14, 2009 in which the City agreed to pay to move B Yard as part of its construction of the 4th Street underpass. B Yard moved to Manchester in 2010-2011.

[878] I am satisfied that the ENMAX lines would not have affected the development of Rail Town in a 'but for' analysis. Had Remington acquired all of the lands, including the 10th Ave Lands, I am satisfied that it would have made the decision to deal with the lines itself or come up with another solution to the issue. Mr. Remington testified that he was given a cost estimate in the range of $4,000,000 to bury the lines, and in the context of the construction of Rail Town, that would have been a reasonable expense. The evidence at the AUC hearing in 2015 was a cost of $13,300,000. Again, over the whole of Rail Town, this would have been a reasonable expense. Mr. Remington and other witnesses also testified that burying transmission lines is not an unusual or complex issue for a developer, and I accept their evidence in that regard. I also note that Phase 1 of the development of Rail Town (which is on the 9th Ave Lands) did not require the ENMAX lines to be gone, which would have given Remington some timing flexibility in this regard.

[879] I also note Mr. Cooper's evidence that when they removed the 138 kV lines on 24th Street SE for the Quarry Park project, it took about 15-16 months.

[880] With respect to B Yard, under Clause 16.04 of the 10th Ave Agreement, CPR had an obligation to remove all railway ties and tracks on the lands by December 31, 2004, which was nine months after the Agreement's deadline for obtaining approval of the tentative plan of subdivision (March 31, 2004). That deadline was obviously extended by virtue of the contract extensions but, given the extension was to the subdivision requirements, CPR would have had a contractual obligation to remove B Yard within nine months of the expiry of the extension of the contract on June 15, 2007 – i.e., by March 15, 2008.

[881] I note here, although it is only tangentially relevant, that I reject CPR's suggestion that Remington's correspondence about a contract extension on June 15, 2007 suggests that, absent CPR's breach of the contract in December 2006, Remington would still have requested an extension. I do not accept their submission in this respect. That the parties were, as CPR put it, "not in a position to simply close the sale in June 2007" was as a result of CPR's breach of the contract. It has no relevance to the timing of closing in the 'but for' scenario where CPR did not breach the contract.

[882] I also do not accept CPR's submissions suggesting that Remington would have requested an extension for any other reason; by August 2006 it was actively working towards beginning Rail Town, having retained IBI and formed its advisory group. Ms. Lawrence was "pestering" the City about the subdivision approval, and she and Mr. Menzies were working hard to bring matters forward. Had that approval been received, I find that Remington would have progressed matters forward as expeditiously as it could.

[883] Having said that, Remington had shown a demonstrated willingness to work with CPR and to accommodate its concerns. It is possible that Remington would have done so here. None of Phases 1, 2 or 3 would, however, obviously have been affected by the presence of B Yard so, in the 'but for' scenario, I am less persuaded that this factor is significant. It also seems problematic to reduce Remington's damages because, had CPR not breached the contract, Remington would have been reasonable and accommodating towards CPR.

[884] CPR submitted that the construction of the Phase 2 building west of 4th Street would have been delayed by the LRT issue, or by virtue of the 4th Street SE underpass. I am not satisfied, however, that the evidence supports drawing that conclusion given the uncertainty around the LRT in 2007 and given the location of the Phase 2 building relative to the 4th Street SE underpass. CPR submitted,

> The prospects for a Phase 2 office tower are further undermined by the presence of a massive ENMAX substation located immediately to the west. As a sophisticated developer, it does not make sense that Remington would have focused its efforts in the second phase of the Rail Town development on a building located on a site that was earmarked for the SE LRT, directly adjacent to the ongoing 4th Street underpass construction project, and directly adjacent to a large electrical substation. It just defies logic.

[885] The problem with this submission is that it does not take into account the proximity of Phase 2 to the downtown area, the construction of the Arriva building two blocks away, the large size of the property on which it was to be constructed, that the 4th Street SE underpass construction was a temporary issue, the logic in undertaking construction while construction is ongoing in the area, or the advantages of constructing early on a property unaffected by potential delays in moving B Yard. I do not view the evidence of Remington's experts on this point as illogical.

[886] I also note that Remington acquired the lands west of 4th Street SE for development. As earlier noted, it made special provision in the 10th Ave Agreement to ensure they were deep enough to develop. The substation was there in 2002. So were the rail lines. Had Remington not thought these lands worth developing, it did not need to acquire them. The evidence did not suggest that Remington took those lands to accommodate CPR, or simply because they were "part of the deal".

[887] Another external factor that could potentially have delayed construction was the fact that Remington was working on the Quarry Park project at this time, and there are potentially limits in how quickly a company can expand. On the other hand, this assertion by CPR was speculative, and was not supported by persuasive evidence. As discussed below, Mr. Davidson's testimony documents that the construction of the initial phases of Rail Town would have been an increase in Remington's construction activities, but only incrementally.

[888] Ultimately, I am satisfied that the issues of potential delay in Remington's construction of Rail Town, like questions around the City's approval, are appropriately addressed through a discount to account for uncertainty, but not through a change in my conclusions regarding the timing of Remington's approvals and its ability to advance Rail Town. The possibility of delay is insufficiently certain to warrant a shift in my analysis.

[889] I note here that I place no reliance on Mr. Brunner's evidence that the price paid by Remington for the 10th Ave Lands shows that they would not have developed the lands for an extended period of time. His evidence was theoretical, drawing inferences about how people *would* behave despite contrary factual evidence about how people in fact *did* behave. In 2006-2007 Remington was actively working to bring Rail Town forward, working closely with the City and with IBI. The factual record contradicted the suggestion that the lands were held by Remington for speculation and long-term development. I understand the logic of Mr. Brunner's theory but cannot accept it in preference to the facts.

Would construction have been completed in the time frame estimated by the Remington witnesses?

[890] Remington did not provide a witness with specific expertise in construction timing. Mr. Lee estimated that it would take two years to construct Phase 2 on its own, and also estimated two years to construct Phases 4 and 5 together. Mr. Crane, in estimating construction costs, provided an estimate of the time for construction. In his estimate, which he described as conservative, he identified a completion date six months later than Mr. Lee's for Phase 2, and two months later for Phases 4 and 5.

[891] The Defendants did not provide any alternative construction schedules.

[892] I view Mr. Crane's evidence (summarized below) as largely corroborative of Mr. Lee's, noting in particular that Mr. Crane's estimates included numerous contingencies, and also identify the point that Remington had the ability to accelerate construction if needed.

[893] I also note Mr. Davidson's evidence, that while Rail Town would have been an incremental increase in Remington's construction activity over this time period, it was not an increase beyond what it had shown itself capable of building historically. In 1999-2001 it constructed over 4M square feet; the addition of Rail Town would not have taken it over that amount in any of the years in question. This suggests that there is reason to believe that Remington would have been capable of constructing these buildings on an ordinary construction schedule.

[894] As a result, I accept Mr. Lee's construction schedules, noting that uncertainty in the construction schedule can be addressed through an appropriate discount.

Does the assessment of damages require an uncertainty adjustment or other discount in relation to the vision, approval and timing of Rail Town?

[895] As the assessment to this point makes clear, I was impressed with the Remington witnesses, and accept their evidence as providing an accurate evaluation of Remington's vision, its prospects of approval and the timing of approval and construction.

[896] Having said that, however, and contrary to those witnesses and to the evidence of Mr. Davidson, I do not view it as appropriate to accept those opinions without accounting for the uncertainty inherent in a predictive analysis. The witnesses gave their best assessment of what *might* have happened, but there is no way for them to determine what *would* have happened.

[897] Further, while I have accepted their evidence, I do acknowledge the legitimacy of some of the concerns identified by the Defendants' witnesses with respect to the timing and approval of the project. Also, and more significantly, the Remington witnesses were clear that part of the basis for their opinion was the ability of Remington to adjust its plans to the requirements of the City and the market. Even on their evidence, it is clear that the project that would have been built by Remington might have looked quite different from what is portrayed on the 2007 Trial Concept Plan.

[898] In addition, some adjustment must be made to reflect the fact that the 2007 Trial Concept Plan incorporates the lands in the third subdivision application, while I have found that only the lands in the first subdivision application were determined to be surplus for the purposes of the 10th Ave Agreement.

[899] In my view, the two most significant financial risks to Remington were with respect to the timing of the projects, and the ability of Remington to obtain the 7.0 FAR applied for. I view the timing risk as more material; I view a reduction in the approved FAR risk as not especially likely. I find that it is appropriate to apply a discount to Remington's damages calculation to account for this uncertainty.

[900] To calculate the appropriate discount to reflect these issues I reviewed Mr. Davidson's sensitivity analysis and, in particular, the effect on Remington's revenues from the project had each phase been delayed by one year. In that analysis, Remington's earnings on the three buildings would have been $269,900,000 rather than $322,700,000, a decrease of 16%. I have also considered the difference between a FAR of 7, and a FAR of 6, which is a decrease of 14%. The FAR difference cannot directly be used to discount the profits, since I have no evidence about the effect of a reduction in FAR on overall profitability. Also, as noted, I view the FAR risk as not especially material.

[901] I have also remained cognizant of the partial nature of Remington's claim, and that this discount is to account for uncertainty, not to adjust Remington's claim downward on the same basis as if the risks had materialized.

[902] Finally, I have taken into account that of the 1,345,000 square feet to be constructed across Phase 2, 4 and 5, of which 1,217,000 was on the 10th Ave Lands, approximately 320,192 square feet may not have been built on the 10th Ave Lands given the exclusion of the lands from

the third subdivision application, a reduction in the range of 26%.[1] I say "likely not have been available" because the precise effect of the reduction in land on the size of Phases 4 and 5 is not established by the evidence before me. It is quite possible, for example, that the FAR would have been transferred from the east side of the 10th Ave Lands to allow for taller buildings of equivalent square footage. That would allow more commercial density closer to downtown which is consistent with the highest and best use contemplated by the 2002 Altus appraisal. It would decrease the amount of reduction calculated here, or potentially eliminate it.

[903] Further, as the Remington experts also emphasized, the 2007 Trial Concept Plan was designed to be flexible, to approximate Remington's plans, and in that way to provide a coherent basis for the calculation of damages. It was not a firm prediction of what Remington would have done. It does not purport to be a precise calibration of Remington's loss. Such a calibration was not possible given the inherently speculative nature of a 'but for' loss analysis.

[904] In the result, I have determined that the appropriate discount to Remington's claim to account for uncertainty in timing and in the nature of the approval, and to reflect my decision that only the lands in the first subdivision application were declared surplus, is 30%. This amount is empirically supported by (although not equal to) the quantification of the timing effect for profitability, the effect of a possible reduction in the FAR and the effect of the loss of land on the square foot available to be constructed in Phases 4 and 5. It is a discount for uncertainty, not a change in the method for calculating Remington's loss, as undertaken by Remington's experts. It also takes into account that Remington's claim only captures part of its lost profits on the 10th Ave Lands, which cautions against an undue reduction to Remington's claim. Fundamentally, it reflects my conclusion that timing and approval are the most significant uncertainty risks in relation to Remington's damages calculation, and that an adjustment to reflect the reduction in the 10th Ave Lands from what is incorporated in the 2007 Trial Concept Plan is required.

[905] These adjustments reduce Remington's damages claim by $96,810,000, which reduces Remington's overall damages claim at this point in the analysis to $225,890,000.

Costs, Revenues and Marketability

Robert (Jack) McDiarmid

[906] Mr. McDiarmid is a partner at Montrose Mortgage Corporation; he has worked in their Calgary office since 1995. Montrose is a mortgage broker, and their business is to arrange financing for borrower clients. He works for both investors and borrowers, with a focus on real estate and construction. Mr. McDiarmid had completed over 50 loans for Remington since 1998; since that time, he has also developed a personal relationship with Mr. Remington (albeit one which Mr. McDiarmid described as very business focussed).

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[1] 82% of Phase 4 is on the 10th Ave Lands; 86% of Phase 5 is on the 10th Ave Lands. If the land is reduced from 140 feet to 100 feet, that is roughly estimated at 5/7 (0.714) of the size of that portion of the building. The effect of this mathematically is:
Square footage on 10th Ave Lands in 2007 Trial Concept Plan: 545,000+328,000+344,000 = 1,217,000
Reduction in square footage total: 1,217,000 – ((400,000-(328,000*.714)) + (400,000-(344,000*.714)))
Calculation of reduction: 1,217,000 – ((400,000-234,192) + (400,000-245,616)) = 1,217,000-165,808-154,384 = 896,808.
Percentage reduction in square footage on 10th Ave Lands: (1,217,000-896,808)/1,217,000 = 26%

[907] Mr. McDiarmid testified that he had always been able to obtain funding for Remington, including for various brownfield developments, and without any presales or committed tenants. Mr. Remington has never had to provide a personal guarantee to access financing.

[908] Mr. McDiarmid reviewed various loan agreements with the Court, which showed Remington obtaining financing for rates as low as prime plus .35%, and as high as prime plus 2%. Mr. McDiarmid advised that lenders will provide financing for up to 75% of the value of the project, which can be up to 90% of the cost, but can also be lower than 90% of the cost.

David Crane

[909] David Crane is the Senior Director responsible for the prairie offices of Altus Group. He trained as a civil engineer in Britain and obtained his diplomas and certificate in building studies there. Mr. Crane is qualified as a Professional Quantity Surveyor by the Canadian Institute of Quantity Surveyors and is a member of the Royal Institute of Chartered Surveyors.

[910] Mr. Crane's professional work requires estimating and monitoring the construction costs during the design process, and to assist in the financing of development costs with third-party funding. He validates numbers provided by a developer to ensure the risk is removed on behalf of financial institutions. He has been involved in construction cost work for larger projects in Calgary like the Bow Tower and Telus Sky, but a general feature of his work is its quantity; on a monthly basis he works on between 50 and 75 projects. Over his lifetime, he had completed tens of thousands of construction cost reports.

[911] While Altus Group has done work for Remington, Mr. Crane personally has not.

[912] Mr. Crane was recognized as an expert in cost consulting and quantity surveying.

[913] Mr. Crane provided a nominal cost estimate for office Towers 2, 4 and 5 from the 2007 Trial Concept Plan. He estimated the cost associated with below grade parking, on and off-site servicing, hard and soft landscaping and all associated soft costs. His report did not include land acquisition and associated costs, bridge costs (if required), hazardous and contaminated soil removal, operating and maintenance expenses after completion of the building, phasing of works and out of normal working hours cost, or GST. His estimate assumes that Phase 2 has a Gross Construction Area of 545,000 square feet, and that Phases 4 and 5 were 400,000 square feet each. It assumed that Phase 2 would require 518 underground parking spaces, and Phases 4 and 5 would each require 380 underground parking spaces. It assumed that each tower required a site development (landscaping) of 16,893 square feet.

[914] The cost includes the cost of a general contractor, so that if Remington decided to hire someone else to build the project that cost was provided for. It also included a development management fee in the event Remington hired a third party to manage the development cost.

[915] Mr. Crane applied unit rates based on historical data for this type and nature of the project, and used assumptions based on experience with projects of a similar type, size and standard of quality. He assumed that the procurement would be a stipulated lump sum approach, and that Remington would tender construction to at least five general contractors and at least three major subtrade/supplier bids in all trade categories. His estimate is based on fair market pricing, and not a prediction of the lowest bid. The effect of a stipulated lump sum contract is to put the risk of cost overruns on the contractor, not the developer, unless the design changes. Mr. Crane also included an architectural fee of 1% of the total design cost and included a construction contingency for unforeseen conditions that might require a change to the lump sum

contract. He also included a soft-cost contingency, and an interest reserve in the event the construction was delayed

[916] Mr. Crane explained in his testimony that in the ordinary course he does not use detailed construction drawings when making estimates; he estimates based on the project and his experience and can make estimates with little or no information about what is being planned. The costs themselves are taken form the Altus construction cost guide, which the firm publishes for each year; Mr. Crane used the guides for 2009 and for 2011. The guide provides a range of costs, and he chose the mid-point of the cost for his estimates. He took into account factors specific to Calgary and this location, for example its proximity to the river. He assumed that the buildings were standard developer-style downtown office development, and no accelerated building schedules. He did not factor in any costs associated with the buildings being adjacent to the CPR tracks, or for above-grade flooding.

[917] In response to questions from the Court, Mr. Crane stated that their costs estimates are very conservative, and traditionally the actual costs tend to be 3-5 percent lower than the estimates. They provide risk-adverse data to financial institutions. They want to ensure that the financing is no more than necessary but also, and importantly, that it does not end up with the developer running out of money and unable to complete the project.

[918] The estimate used 2009 nominal dollars for Phase 2, and 2011 nominal dollars for Phases 4 and 5. His report identified quarterly cash flows for each project.

[919] The total cost for Phase 2, as at June 15, 2009, was $188,331,124 or $345.56 per square foot, with an additional financing cost of $20,932,201 bringing the total to $209,263,325 ($383.97/sf). The total cost for Phases 4 and 5 as at June 15, 2011 was $245,068,220 or $306.34 per square foot, with financing costs of $8,144,006 for a total cost of $253,212,225 ($316.5/sf).

[920] These estimates assumed that 100% of the construction costs were being financed.

[921] Mr. Crane noted in questioning from the Court that assuming no material changes to the scope and nature of the project (e.g., no changes in the height of the building, or to shift it from an A to a AAA building), the margin of error for his estimates is 6-10% +/-.

Peter Norman

[922] Mr. Norman has a BA in Economics from Trent University, and an MA from the University of Guelph. He is a real estate and land economist, and Vice President and Chief Economist at Altus Group. He has been with Altus since 1998, and previously worked for the Bank of Montreal. He performs feasibility studies for new developments, including economic impact studies and fiscal impact studies, and municipal finance studies.

[923] Mr. Norman was recognized as an expert in real estate economic analysis, including the modelling of absorption.

[924] He does analysis of absorption for municipalities engaged in planning, and also assesses real estate investment opportunities for institutional investors and developers.

[925] Altus Group has done work for Remington, but Mr. Norman personally has not. He was not aware of the economic value of Remington’s work for Altus, so cannot compare Remington to other clients for whom the Altus Group does work.

[926] Mr. Norman testified regarding the absorption rates that would have applied had Remington been able to begin construction of Rail Town in June 2008, and had constructed office buildings during the 2007-2019 period in the phases identified by Mr. Lee.

[927] Mr. Norman reviewed the overall Calgary economy from 2007-2019, the amount of new office supply added to the Calgary market during that time period, and the absorption rates for office space during that period. Mr. Norman identified new office supply rates and absorption rates for the Calgary market as a whole, and for the Central City (downtown and Beltline) in particular.

[928] The assessment of absorption rates requires assessing how quickly the buildings on a site will be able to get tenants based on the market supply and demand for the period in question. Mr. Norman makes the assessment based on vacancy rates during the time period (office space not currently occupied by workers on which rent is not being paid (i.e., not including situations like the pandemic where lease space is unused) and new supply which is new square feet of office space brought into the market less space removed from the market. Absorption measures demand for a particular building. Market absorption is calculated on a net basis – it is new tenancies less lost tenancies, so that if new building A takes on 100K of new tenancies, and building B loses 100K in tenancies, the absorption rate across those two buildings is nil, even though building A may have 100% absorption.

[929] Mr. Norman discussed the concept of flight to quality, which he defined as the movement of tenants to higher quality work spaces. Mr. Delf, the Defendants' expert, defined flight to quality as people taking advantage of the opportunity to obtain higher quality spaces at lower cost in a declining market. Mr. Norman described that concept as a flight to value, which he said explained why new buildings will fill up even in markets with relatively high vacancy.

[930] Mr. Norman then posited the effect of a hypothetical Rail Town on absorption rates in the City Centre, and also the percentage of the City Centre absorption that Rail Town would have received. He calculated the absorption rates for Rail Town over the 2007-2019 period as a whole, and then allocated Rail Town's absorption to those years in which absorption rates in the Central City were positive.

[931] Mr. Norman observed the overall growth of the Alberta and Calgary economy during the 2007-2019 period, including the two periods of economic downturn in 2008-2009, and in 2014-2016. While in general Calgary and Alberta have outperformed the Canadian economy, in both those periods they had a worse economic outcome. He noted also that Calgary outperformed the Alberta economy in only 4 of the 12 years between 2007-2019; otherwise, Calgary's growth was similar to or lagged the province as a whole. He noted that, as of 2019, Calgary's GDP was supposed to advance at a rate of 2.1% through 2019-2021.

[932] Mr. Norman then provided data and analysis with respect to the performance of the Calgary office market. He noted the wide variations in the market during the 2007-2019 period, with times of limited supply and low vacancy (e.g., 2006-2008), and times of much greater new supply (2008-2009) and of much higher vacancy (2015-2019). He also noted the performance of the Central City submarket. As with the market as a whole, there was significant variation in the absorption rates and vacancy rates over the 2007-2019 period, with strong absorption between 2007-2012, except for 2008-2009, and poorer absorption rates from 2012-2017, reaching its lowest level in 2014-2015. Mr. Norman observed that there had been some recovery in the market after 2017.

[933] Mr. Norman identified that there was 21.7M square feet added to the Calgary office market in 2007-2019, and 7.7M square feet of absorption, and in the Central City 14.4M square feet was added, and 2.7M square feet of absorption. It should be noted that the amount absorbed does not reflect the amount of the new space absorbed, since tenants in new buildings may have relocated from older buildings. He noted that the Central City accounts for 62% of the new supply in the Calgary market, and 32% of the absorption.

[934] Mr. Norman explained in his oral testimony that his data came from the Altus Insite Database, which is a commercially available building by building database for office buildings, which can be aggregated across specific markets. The database can be accessed by subscription. Altus also relies on an investment trends survey, which is a tabulation of surveys of real estate investors and market professionals in markets across Canada, including Calgary. The investor survey considers capitalization rates (cap rates), internal rates of return, value per square foot for the building, and lease rates.

[935] To assess the effect of Rail Town, Mr. Norman assumed that the overall absorption would remain the same, at 7.7M square feet. He described this as a "very conservative approach", since it is possible that Rail Town would be a form of economic development that could attract new tenants to the City.

[936] Mr. Norman predicted that the effect of Rail Town would be two-fold. First, it would increase the percentage of absorption that went to the Central City from 32% to 57%. Second, he predicted that Rail Town would receive 68% of the total Central City absorption (i.e., 68% of 57%). As a consequence, he predicted that Rail Town would absorb 3M square feet of office space between 2007-2019, for an annual average absorption of 250,000 square feet per year.

[937] He justified his position by explaining that new buildings usually provide a temporary boost to a sub-market's share capture of absorption, giving examples of how the addition of buildings such as the Trans Canada Tower, 8th Avenue Place and The Bow materially increased the absorption in the Central City, with an uplift of 25-45 points. He opined that an increase of the Central City's absorption of 25% (from 32% to 57%) was a reasonable estimate of the effect of Rail Town, using a conservative analysis of the potential upside of a new project of that type and magnitude. He also explained that he thought it appropriate to apply that upside to all phases of Rail Town on the basis that the development bump would linger or apply across the different phases of the project; it would be cumulative over the entire period.

[938] Mr. Norman was questioned about the fact that after the completion of Phase 1 of Rail Town, in 2010, very few of the ultimately desirable features of Rail Town would yet be in place; instead, it would be one building located on the West end of the 9th Ave Lands, without the rail crossing or other Rail Town amenities yet completed. He said that he assessed tenants as able to look at the "whole of the potential…as well as what was there at the time when making their choices".

[939] He was asked about the issues in the community, and with the East Village and East Victoria Park in the 2006-2007 period. He acknowledged that could detract from the marketability of the lands. He also noted though that the transitional aspect of the land signifies improvement and investment, offering some attraction for the "braver souls…who make that decision and go in there". He did not account for the effect of these issues with the area in conducting his analysis. To the extent he considered transition issues, he would have seen it as contributing to potential demand.

[940] He also did not account for any issues with access to the Rail Town community; he assumed there would be no access issues. He also assumed that the ENMAX lines would be removed.

[941] In response to questions from the Court Mr. Norman noted that Rail Town can be understood as a grand vision, that would have been exciting. He also emphasized in re-examination that,

> A grand redevelopment, by definition, is changing the ground conditions of everything – well, on the subject site and having an influence on the development and transition of the lands around it. Often big master plans have to start in derelict areas 'cause those are the areas that are – that don't already have productive uses on them. And that's – that's part of the nature. You've got to start somewhere.

[942] Mr. Norman also observed that rail land redevelopment is a known feature in urban markets, and that it is not "unusual for cities to go through big planning processes for former rail yards or former industrial districts or both. And if you can get a visionary developer involved that can bring a big master plan forward like this, that's usually a good success factor on those plans".

[943] He allocated Rail Town's absorption to specific years based on the construction schedule but also on the assumption that "market effects on the subject site of these wider market swings would be to see positive absorption during the expansion years, but no-change in occupancy during the negative years". In essence, Mr. Norman calculated an overall absorption amount for Rail Town for the 12 year period, but then allocated it to specific years based on Rail Town's construction start date of June 2008 and first availability for occupancy in May 2010, and also based on whether overall absorption was positive during that year. In his view this assumption of no decrease in occupancy during the downward swings was reasonable given that initial tenants of Rail Town would be locked in for 5 to 10 years.

[944] He also noted that in any given year he limited Rail Town's absorption to 600,000 square feet, which in his view was a reasonable amount of absorption for one year.

[945] Mr. Norman agreed that applying the globally derived number in a particular year might overstate or understate the absorption available to Rail Town in that year, depending on the other new supply coming into the market, but agreed with the Court that for simplicity it is easier to apply a consistent bump across the years, noting the caveat that he did not give Rail Town absorption in years when absorption was negative.

[946] Mr. Norman acknowledged that his analysis did not include a side by side comparison between Rail Town and other large office spaces that came on line in the 2007-2019 period, such as The Bow and 8th Avenue Place. His analysis was for Rail Town in relation to the overall market, not in relation to one particular development or group of developments. He did not look at any detailed features proposed for the Rail Town buildings or development. He did not review or consider the 2007 Trial Concept Plan when preparing his report and did not take into account the phasing schedule in that Report.

[947] He also acknowledged that the unique nature of Rail Town makes assessing how it would have performed in the market somewhat challenging but suggested that at the same time it was constructing buildings in a central location, which was not that unusual, and this ameliorates the

challenges in making predictions. At the same time, though, Mr. Norman's predictions were based on Rail Town being an exciting new development and thus creating more absorption in the Central City and having a greater share of that absorption.

[948] Mr. Norman made further predictions of the absorption forecast for Rail Town from 2019-2046. In his forecast, Rail Town would have absorbed 144,020-321,150 in office space a year, with an annual average absorption of office space of 220,693, and a total office space absorption of about 6M square feet from 2019-2046. Mr. Norman noted that this was a much more typical analysis for him; the other analysis, which required grafting Rail Town onto existing data with significant temporal variability, was complicated. However, he did note that the back casting analysis did use the same tools, and same general approach, it just incorporated more real world data.

[949] Mr. Norman agreed with the Court on questioning that the absorption analysis is challenging because it requires trying to put some exactitude into the numbers while working in a hypothetical situation.

[950] Mr. Norman also submitted a reply to the expert evidence of Mr. Delf. He had three central criticisms of Mr. Delf's analysis. First, Mr. Delf asserted that Railtown could not have succeeded because it would not have been able to start building at the start of the development cycle. However, Mr. Norman observed that Mr. Delf does not explicitly say when the development cycles begin, implicitly recognizes several development cycles in the 2007-2019 period, and does not explain why, if Remington did miss the first development cycle, it could not have taken advantage of a later one.

[951] Mr. Norman also suggested that Mr. Delf's definition and analysis of development cycles was simplistic and inaccurate. In general, Mr. Norman observed, office markets "do have cycles, but typically much longer in duration and they are defined by the cumulative impacts over time of supply and demand that leads to notable changes in vacant space availability". The data shows that there were two market cycles in Calgary, one with gradually increasing supply in 2005-2012, with modestly rising vacancy in 2009-2011, followed by very weak demand from 2012-2018 coupled with higher vacancy rates. He noted that within those cycles, 40-50 new office buildings were brought to market, with the result that in some years new supply was higher than in others.

[952] Mr. Norman reiterated that his analysis was based on the cycles and data from 2007-2019, including the variations and weakness in the absorption rates. Specifically, that 80% of the absorption available to Rail Town would have been between 2009-2012 and 2017-2019.

[953] Second, Mr. Norman critiqued Mr. Delf's reliance on the location of Rail Town as precluding successful development of the property. He noted that Mr. Delf's assertion that it was too far from the Central Business District and could not succeed was not supported by specific evidence and does not take into account the evolution of other Cities, where the downtown has been expanded over time. Further, he suggested that Mr. Delf overstated the distance from downtown, not taking into account that Rail Town was a comprehensive development and tied together the existing Central Business District with the East Village and Victoria Park revitalization areas. In Mr. Norman's view, Rail Town was well positioned to attract the flight to quality market in these time periods; it would have brought properties to market to a significant extent in those periods when there was flight to quality market trends (2010, 2011, 2016 and 2019).

[954] Mr. Norman acknowledged in cross-examination that the expansion of business districts in Edmonton and Toronto has included the incorporation of major publicly funded infrastructure, and in particular arenas.

[955] Mr. Norman suggested, however, that the Central Business District is more of a marketing idea than a market phenomenon; cities grow, and they often do so because of major developments outside the traditional boundaries. That can lead the "amorphous boundary" of the Central Business District to expand.

[956] Third, Mr. Norman critiqued Mr. Delf's reliance on the Cushman and Wakefield reports, suggesting that doing so meant that Mr. Delf relied too heavily on broker analysis which has limitations as high frequency data and as data designed for client consumption. Further, he suggested that Mr. Delf used the data selectively and not always accurately. He commented that "When the CW commentary suggests times are good the Delf commentary is that Railtown's location or lack of development permits would have prevented it from taking part in the good times, and when times were bad, Railtown would have suffered with the rest". He suggested that Mr. Delf does not provide meaningful analysis to support those conclusions.

Jacob Hofer

[957] Jacob Hofer is the senior director in the valuation branch of the Altus Group. He supervises other appraisers, and also engages in consulting work for a broad range of clients in the commercial real estate and investment real estate area. He is an accredited appraiser with the Appraisal Institute of Canada, and a member of the Royal Institute of Chartered Surveyors. He has worked as an appraiser for 32 years, including 21 years in Calgary. He estimates that he has done valuations of about 60% of the office buildings in downtown Calgary.

[958] Prior to this litigation, he had not done any work for Remington.

[959] Mr. Hofer was recognized as an expert in appraisals with particular expertise in the valuation of commercial buildings in downtown Calgary.

[960] Mr. Hofer's expert report estimated the inputs to allow the calculation of the value of a 300,000-500,000 square foot Benchmark office building on the 10th Ave Lands for each of the years 2008-2016. The benchmark building was a "typical Class A office building with underground parking, main floor retail component and with design and finishes consistent with modern office developments in Central Calgary".

[961] Mr. Hofer determined that a 5% discount should be used to calculate the net rentable area for the benchmark building. He identified the discount based on the average discount across 10 buildings in Calgary. That is, that 95% of the gross building area would constitute the net rentable area.

[962] Based on the City of Calgary Land Use Bylaw, Mr. Hofer determined that the building would need 1 parking stall per 1000 square feet of net rentable area; he observed that this is consistent with the amount in similar Beltline office buildings. Using a 70/30 split between gross above grade versus below grade building area he calculated that the building would require 450 square feet per parking stall.

[963] Mr. Hofer's benchmark buildings had a 7.0 FAR.

[964] Mr. Hofer then calculated the inputs necessary to calculate the value of the benchmark building using the direct capitalization method.

[965] First, using lease data from 12 newly constructed buildings in 2009-2016, which he adjusted to ensure comparability to the benchmark, along with 8 leases comparables from each of the years in question, he determined the base rent that could be charged by the benchmark building in each of 2008-2016. Mr. Hofer noted that in assessing the comparables he took into account that Rail Town would be a comprehensive mixed use development.

[966] Based on that analysis, Mr. Hofer determined that the range of rent across the 2008-2016 period was as follows:

Input Variables	2008	2009	2010	2011	2012	2013	2014	2015	2016
Approximate Range									
Base Rental Rates - $ per sq ft	$31 to $33	$31 to $33	$31 to $33	$32 to $34	$33 to $35	$33 to $35	$33 to $35	$29 to $31	$27 to $29
Concluded									
Base Rental Rates - $ per sq ft	**$32.00**	**$31.50**	**$32.50**	**$33.00**	**$34.00**	**$34.50**	**$34.50**	**$30.00**	**$28.00**

[967] In cross-examination regarding 8th Avenue Place, Mr. Hofer stated that his adjustment for that property (which he assessed as superior) was ameliorated by leasing issues that the property had towards the end of its development. He agreed that even with the physical and location advantages, there were still some leasing issues. He noted that his adjustments were not very large for any of the buildings, and agreed with the comment of the Court that the variation in rents across the buildings was not enormous – from $24.72/square foot at the bottom to $34.69/square foot at the top as an unadjusted one year average in Q4 2009-Q1 2010 time frame (i.e., the top rent in that time period was 39.5% higher than the bottom rent in that time period). When the absolute least expensive ($24.72 in Q4 2009) was compared to the absolute most expensive ($39.94 in Q1 2016) the difference was 61.6%. Further, in his 8 comparables from each year from 2008-2016, the range of rents was smaller, with the largest difference between the high and low rent being 33%, and the smallest difference being 13%.

[968] Mr. Hofer also assessed rental trends across eight other buildings, that were not new builds. In that trendline, the average rent varied from $32-$35 per square foot until 2014, when it dropped, reaching a low of just over $26 per square foot in 2016.

[969] Second, Mr. Hofer reviewed the range and trend of parking rates in the central Calgary market from 2008-2016. He reviewed reported parking rates for 121 office properties in central Calgary, considering both reserved and unreserved stalls. He also assessed parking rates for buildings closer to the benchmark building. Noting that demand for unreserved stalls typically outweighs demand for reserved, he weighted the average of unreserved/reserved on a 65/35 basis. Based on this analysis, Mr. Hofer determined that the range of parking rates across the 2008-2016 period was as follows:

Input Variables	2008	2009	2010	2011	2012	2013	2014	2015	2016
Approximate Range									
Parking Rates - Per month per stall	$325 - $375	$350 - $400	$350 - $400	$360 - $410	$360 - $410	$375 - $425	$375 - $425	$375 - $425	$365 - $415
Concluded									
Parking Rates - Per month per stall	**$350**	**$375**	**$375**	**$385**	**$385**	**$400**	**$400**	**$400**	**$390**

[970] Third, Mr. Hofer estimated the miscellaneous income per square foot that could be generated from sources such as storage rent, tenant services, signage and antenna licensing. He reviewed the miscellaneous income earned in a number of downtown buildings in Calgary, choosing one property per comparable year. The miscellaneous income varied widely, from

$0.13/square foot to $0.46/square foot. He selected an average rate of $0.30 per square foot of net rentable area for the Benchmark building.

[971] Fourth, Mr. Hofer determined the vacancy allowance given the historical vacancy rates in Calgary, and the vacancy rates across the 2008-2016 period. He focused on vacancy rates during a stable market on the premise that a building would not be commenced in an unstable market, selecting the 10 year period prior to the 2015 spike in vacancy rates. That period had an average vacancy rate of 5.4%. Given that the Benchmark building was a new building, and as such could be anticipated to have a lower vacancy rate, Mr. Hofer chose a vacancy allowance of 3-5%, with a 3% rate in 2008 and 2011-2014, and 5% in 2009-2010, and 2015-2016.

[972] On cross-examination he acknowledged that the result of this was that in some years his vacancy allowance was significantly lower than the actual vacancy rate in Calgary in that period, for example in 2014 he used a 3% vacancy rate but the actual vacancy was 7.5-9.5%.

[973] Fifth, Mr. Hofer estimated the recoverable operating expenses using data from the Calgary market as well as from buildings comparable to the Benchmark building. The general market data, which covered 138 office projects, showed recoverable operating costs as on average $15.09 in 2008 gradually increasing to $20.27 in 2016. The operating costs on the comparable buildings averaged $16.92 in 2008 and increased to $23.35 on average by 2016.

[974] Based on this data, Mr. Hofer identified the recoverable operating costs for the Benchmark building as $17.00 in 2008, and gradually increasing to $23.25 by 2016.

[975] Sixth, Mr. Hofer estimated the unrecoverable operating expenses, which includes items such as legal fees and advertising. The Altus Group generally makes an allowance of .25-.5% of effective gross income to capture this amount, with the Calgary office historically applying .25% of effective gross income. Mr. Hofer adopted the usual Calgary office rate, using .25% of effective gross income to calculate the unrecoverable operating costs.

[976] Mr. Hofer agreed in cross-examination that Duff and Phelps incorporated the unrecoverable operating cost calculation from his data but did not apply Mr. Hofer's vacancy allowance to the recoverable operating expense.

[977] Seventh, Mr. Hofer estimated the capitalization rate appropriate for determining the value of the building given its potential year one income. The income of a building divided by its capitalization rate determines the building's value; the lower the capitalization rate, the higher the value of the building. In general, a robust market for commercial real estate will produce lower capitalization rates. Having said, the capitalization rates in Calgary across the subject period fall on a relatively narrow band, ranging from 5.13% to 8.02%, with an average of 6.38% and median of 6.25%.

[978] Mr. Hofer determined the capitalization rates across the 2008-2016 period by using the Altus Insite survey of real estate investors and market professionals in relation to Class AA office buildings in the Calgary market, and by looking at actual sales data across the time period. The trend lines of both data were similar. Mr. Hofer's determination of the capitalization rates for the Benchmark building based on that analysis was as follows:

Input Variables	2008	2009	2010	2011	2012	2013	2014	2015	2016
Approximate Range									
Overall Capitalization Rate	7.00% - 6.00%	7.25% - 6.75%	7.50% to 6.25%	6.25% - 5.75%	6.00% - 5.50%	5.75% to 5.25%	5.75% to 5.25%	6.00% to 5.50%	6.25% to 5.75%
Concluded									
Overall Capitalization Rate	**6.00%**	**7.00%**	**6.50%**	**6.00%**	**5.75%**	**5.50%**	**5.50%**	**5.75%**	**6.00%**

[979] Mr. Hofer explained in his oral testimony that, in addition to the general market conditions, a capitalization rate would be affected by the length of a lease and a tenant's ability to pay, as well as the age of the building, its location, its vacancy rate and tenant roll over risk. In general, the capitalization rate reflects the quality of the investment.

[980] He was asked about whether the capitalization rate he selected was appropriate in light of the specific comparables such as the Centre 10 building, a building in the beltline that on leasing he had judged as superior, but which had a higher capitalization rate than what he predicted for the Benchmark building. Mr. Hofer noted some issues that had arisen on Centre 10 from their shift mid-construction from being a residential building to office.

[981] In questioning from the Court Mr. Hofer said he was highly confident with respect to the capitalization rates for 2011 and 2014, being sure that it would be possible to achieve those rates at that point in time. He said that once he knew the timing he was "absolutely certain" that those capitalization rates would have been achievable.

[982] Mr. Hofer provided a summation of the capitalization rate achieved by Remington on eight buildings it had sold during the subject period, which shows that it had generally achieved an advantageous capitalization rate. Even though a number of the buildings were sold in a difficult economic time, and they were suburban, the capitalization rate on average for the eight buildings was 6.25%. Mr. Hofer suggested that this evidence shows that Remington was in general able to achieve capitalization rates at the bottom end of the range.

[983] Finally, Mr. Hofer estimated the selling commission for the building, which he determined would be 0.50% of the sales price across each year. This was based on interviews showing that commissions are on a sliding scale of 0.5% to 1.5%, with the lower end applying to larger readily marketable properties. The characteristics of the Benchmark building warranted using the lower end of this range.

[984] Mr. Hofer's final assessment of the data was:

Input Variables	2008	2009	2010	2011	2012	2013	2014	2015	2016
Concluded									
Gross to NRA Ratio	5.0%	5.0%	5.0%	5.0%	5.0%	5.0%	5.0%	5.0%	5.0%
Base Rental Rates - $ per sq ft	$32.00	$31.50	$32.50	$33.00	$34.00	$34.50	$34.50	$30.00	$28.00
Parking Rates - Per month per stall	$350	$375	$375	$385	$385	$400	$400	$400	$390
Miscelleneous Revenue - $ per sq ft	$0.28	$0.29	$0.29	$0.30	$0.31	$0.32	$0.32	$0.31	$0.30
Vacancy Rate - % of GPI	3.0%	5.0%	5.0%	3.0%	3.0%	3.0%	3.0%	5.0%	5.0%
Recoverable OP Costs -$ per sq ft	$17.00	$17.50	$17.50	$18.00	$19.00	$20.50	$22.00	$23.00	$23.25
Unrecoverable OP Costs - % of EGI	0.25%	0.25%	0.25%	0.25%	0.25%	0.25%	0.25%	0.25%	0.25%
Overall Capitalization Rate	6.00%	7.00%	6.50%	6.00%	5.75%	5.50%	5.50%	5.75%	6.00%
Selling Commissions- % of Sale Price	0.50%	0.50%	0.50%	0.50%	0.50%	0.50%	0.50%	0.50%	0.50%

NRA – Net Rentable Area
GPI – Gross Potential Income
OP – Operating Costs
EGI – Effective Gross Income

[985] Mr. Hofer also filed a reply report critiquing Mr. Delf's report. His reply was directed at his understanding of Mr. Delf's opinion, namely, that "Mr. Delf…in effect, proclaims that market conditions were such that it would not have been conducive to start or complete an office building in the Rail Town project in the central Calgary market at any point from 2007 to 2019".

[986] Mr. Hofer's reply report shows the number and size of new buildings started in Calgary in each quarter from 2002-2017. The analysis shows that new buildings were started in every year except 2008-2009, and 2014-2015. The size of the average building was 309,845 square feet. He also showed new buildings completed in each year. New buildings were completed in every year, and on average 0.61 buildings were completed per quarter. He also observed that of the 48 buildings completed, 6 had less than 50% of the net rentable area leased by the time construction was completed.

[987] Mr. Hofer acknowledged in cross-examination that the building schedule of IBI would have meant that Rail Town buildings would have started in years when no other office buildings began construction. He also acknowledged that his data did not include completions or starts for 2017-2019.

[988] Mr. Hofer further identified the number of new office buildings started from Q1 2007 to Q4 2019 in the Central Calgary market. This data showed 24 buildings were started, and the average building size was 405,460 square feet. Again, buildings were started in each year except 2008-2009 and 2014-2015. Mr. Hofer identified the number of new office buildings completed from Q1 2007 to Q4 2019 in the Central Calgary market. Thirty-nine buildings were completed in that period, with completions in every year. He noted that 82.5% of the newly created space was leased by the time construction of the buildings was complete, and of the 39 buildings 5 had less than 50% of the net rentable area leased by the time construction was complete.

[989] Mr. Hofer's conclusion following this analysis was that the Delf Report was "subjective opinion with little fact based support for those opinions". He also observed that the factual data he provides contradicts Mr. Delf's conclusion that the market conditions precluded starting or completing an office building, noting that during that time period 24 buildings were started and 34 were completed. Rather, Mr. Hofer data noted that "market data suggests that market conditions were suitable for new office development during the 2007 to 2019 time frame" and that it is reasonable to conclude that Rail Town "would have participated in the expansion of supply in the Central Calgary market".

[990] In questioning from the Court Mr. Hofer was asked about general factors that affect risk. He agreed with the Court that the factors creating uncertainty in planning a real estate development include market risk, both natural resource pricing and general financial market conditions, 'acts of god' (e.g., flood etc.) and factors specific to the project. Those risks can play out in terms of timing – how long it takes to bring the project to market – and in terms of the maximum profitability the project can achieve. Mr. Hofer noted, however, that a development project usually has a relatively short window – it takes about 3-3 ½ years from start to finish. That is, he suggested, a time period within which its success can be gauged. He noted in particular the ability of a developer to move between markets – e.g., residential to office or office to residential – based on where the demand currently lies.

Lawrence Delf

[991] Mr. Delf has a B.Comm from the University of Calgary and has worked in the area of commercial real estate in Calgary for the past 41 years. He was the Senior Vice President Development at Cushman and Wakefield for five years and has had a variety of other commercial real estate experience. He is a licensed real estate broker. His experience includes office leasing, retail leasing, industrial leasing, land sales and acquisitions, investment sales and consulting. He estimated that he has been involved in approximately 1,000 real estate transactions over his career in Calgary. He acknowledged that the vast majority of his experience is in the office leasing market in the Central Business District.

[992] Mr. Delf was recognized as an expert in commercial real estate leasing, brokerage, and marketing in the Calgary office market.

[993] Mr. Delf's report assessed the ability of Rail Town to obtain municipal approval; the suitability of Railtown in relation to the requirements and desires of typical tenants between 2007-2019; and, the marketability of Rail Town in relation to other competing approved projects.

[994] Mr. Delf opined that Rail Town would not be able to get a development permit in 2007, and construction could not have begun in 2008. He noted the issues related to the lack of building and development plans, and issues of existing infrastructure, as well as the possibility that tenants might want changes which would require a revised development permit.

[995] He also did not view Remington as sufficiently experienced to develop major high-rise buildings, particularly given that it had multiple projects in various stages of development during the subject-period.

[996] Mr. Delf further opined that Rail Town was not a suitable project for the market. He referenced in particular its location, being neither in Calgary's Central Business District nor in the suburbs. He did not think it would attract tenants who wanted the amenities of downtown, nor tenants who wanted the convenience of the suburbs. He also viewed it as less attractive than either the greater Beltline or the East Village since they had fewer complications and would be likely to be developed prior to Rail Town.

[997] He disagreed with Mr. Norman's assessment of absorption, taking the position that the analysis was insufficiently supported, and did not take into account demand for Rail Town relative to other options during the time period.

[998] He acknowledged in cross-examination that he had not analyzed Mr. Norman's numbers in relation to the Cushman and Wakefield data he cited.

[999] In cross-examination, on being asked about Mr. Nimmo's assessment at the time of the 10th Ave Agreement about the possible benefits of developing the site, he said that he generally agreed except that he was less persuaded that there was scope for growth of the downtown into a new area given the overall office capacity.

[1000] He also acknowledged that he had not considered the successful development of former railway lands in other cities like Toronto.

[1001] Finally, Mr. Delf opined that the time frame for Remington was negative throughout 2007-2019. He reviewed Cushman and Wakefield reports for 2007-2019, suggesting that 2007 "was not a good market to be trying to pre-lease new space", the reports "paint a very gloomy picture for 2008 going into 2009", the "bad news exacerbated in 2009", that 2010 had "selective

positive momentum" but that it would not have benefited Rail Town given its location, that 2011 was positive but the construction of 8th Avenue Place was announced which Rail Town would not have been competitive with. 2012 was positive but Rail Town "was still challenged as it is neither competitive with the CBD nor associated with the suburban market" and other projects took the demand. 2013 was positive but "Railtown was in no position to start, and RDC missed the development cycle". By 2014 the market was "in serious distress", and 2015-2019 were "a great time to be on the sidelines".

Assessment: Costs, Absorption, Revenues and Capitalization Rates

Would the office space constructed in Phases 2, 4 and 5 have been absorbed into the market?

[1002] I accept Mr. Norman's evidence on absorption. While I had some concerns with his methodology – calculating the absorption available to Rail Town over a longer block of time, and then allocating it on an average basis to years with positive absorption – on the whole I was satisfied that his analysis was careful, sound and conservative enough to be reliable. In my view, the quantitative basis for Mr. Norman's evidence supported the reliability of his analysis.

[1003] I note that the Defendants did not provide any useful alternative evidence on this point. They relied in argument on the evidence of the land appraisers and of Mr. Hofer, each of which testified at various points about leasing issues on specific buildings, and about challenges in the downtown office market in Calgary at various points in time. But that evidence does not, in my view, qualify or rebut Mr. Norman's conclusions and analysis. They were comments made in the context of a land appraisal, or about specific buildings in Mr. Hofer's analysis. They were not part of an expert analysis of absorption in the commercial real estate – of what, in general, would likely have occurred with the addition of Rail Town, given what else occurred during that time frame. None of those other witnesses had Mr. Norman's expertise and experience in absorption analysis; they were not purporting to do an absorption analysis of the market as a whole.

[1004] Mr. Delf testified, but his evidence about market absorption was impressionistic. I found his analysis of the Cushman and Wakefield data unpersuasive. It seemed to actively avoid drawing any positive conclusions about Remington's chances – in a good year Remington wouldn't benefit, and in a bad year it would experience the collective distress.

[1005] With respect to his evidence on the marketability of Rail Town, Mr. Delf's experience has been almost entirely with the Central Business District, and his clients are quite probably not the target market for a development in the Beltline/East Victoria Park.

[1006] Further, Mr. Delf's analysis was described by himself as "qualitative," yet it did not enjoy any of the hallmarks of reliable qualitative data – for example surveys of commercial tenants, or analyses of trends of patterns in the real estate market in Calgary or analogous cities. It was simply Mr. Delf's personal opinion about how commercial tenants are likely to behave in relation to an opportunity like Rail Town.

[1007] I recognize that Mr. Delf's opinion is based on years of experience in the real estate market, but that does not make it more than one person's opinion, or give it analytical robustness or reliability. This is particularly the case given that Mr. Delf has no experience in real estate development either as a developer or as a consultant working with developers to bring projects to fruition, and given that his clients are almost entirely in the Central Business District. He suggested that because of the size of the floor plates of the Rail Town buildings, Mr. Remington

was attempting to lease those buildings to Central Business District clients. That assumption seems problematic, however, given the location of the buildings, and that they were not intended to be the AAA buildings usually constructed in the Central Business District.

[1008] Having said that, I do acknowledge that Mr. Delf raised a number of legitimate concerns with Rail Town and its development. While, as Ms. Hayes noted in her cross-examination, his assessment was "harsh", he is correct that Rail Town is not in the downtown core, and it is not in the suburbs. The area in which it was being built had not yet been redeveloped, and had a variety of social and economic challenges as of 2007. The air rights have not been obtained, and while I have found that they would be, a 30 foot crossing is more complicated and challenging than a plus 15; the pedestrian crossings contemplated for Rail Town have no equivalent in the City. Phase 2 is adjacent to the ENMAX substation which would remain even after the transmission lines are buried or gone. Until the whole development was finished, the amenities and benefits of the broader project would not yet be realized; would an early tenant be attracted to a development which, at that point, was inchoate? Would they want to rent adjacent to a construction site, one likely to be that way for as long as 20 years? Rail Town's location is not especially drivable at the present time and is not as yet on the LRT line (although not especially far from either the Stampede station or City Hall). And, in general, Mr. Delf makes the accurate observation that Calgary has a greater amount of office space per capita than do most Canadian cities.

[1009] Nonetheless, given my concerns with Mr. Delf's evidence, and in particular in relation to his more limited experience, his reliance on personal experience, and his unpersuasive use of the Cushman and Wakefield Data, I prefer the evidence of Mr. Shawcross, Mr. Brown and Mr. Magnussen in relation to the vision and possibilities of the Rail Town development.

[1010] I also prefer the evidence of Mr. Norman with respect to absorption, even taking into account the comments made by other witnesses about the challenges faced by specific buildings and in the market as a whole. Mr. Norman's analysis was data driven and conservative, and appropriately and persuasively incorporated and reflected general market trends. Further, the example of Quarry Park shows that highly successful developments can occur in unpromising and unexpected locations. Some of the issues Mr. Delf identified may not have been as troubling as he portrayed them to be. As previously noted, for example, the land on which Phase 2 was constructed was a full city block, and FAR could be deployed to hide the substation using a berm or landscaping, while still constructing a building with the square footage contemplated by the 2007 Trial Concept Plan. And, in general, a novel and innovative project will succeed not because it does things the way they have always been done, but because it does things differently. This point is, as a number of witnesses observed, borne out by the successful rail town developments in other cities.

[1011] In sum, I am satisfied that Mr. Norman's analysis of absorption accurately reflects what would have happened had Remington been able to acquire the 10th Ave Lands in 2007, and to develop them as part of the larger Rail Town development. Any concerns with Mr. Norman's analysis can be addressed through the uncertainty discount analysis.

What would it have cost to construct Phases 2, 4 and 5?

[1012] I accept Mr. Crane's evidence as providing an accurate estimate of the costs of constructing Phases 2, 4 and 5. It is clear from his report that certain items have not been included (e.g., GST and land costs and reclamation costs) but the estimates are created in

accordance with his usual process. He makes rational and even conservative assumptions, including 100% financing, use of a general contractor and use of a development manager, as well as contingencies for construction and soft costs. He uses the mid-point of the construction estimates. In my view the only thing that could materially affect the estimate is a shift to the timing of construction, although the effect of that shift could be positive or negative depending on the cost schedule in place at the time at which construction in fact begins.

[1013] I also note that the Defendants did not provide any alternative evidence on the issue of construction costs. They took issue with aspects of Mr. Crane's analysis but provided no expert evidence of their own to refute his conclusions. This reinforces my confidence in the accuracy of his analysis and opinions.

What revenues would Phases 2, 4 and 5 have earned, and what capitalization rate would have applied to determine the sale price of each building?

[1014] I accept Mr. Hofer's evidence as providing an accurate estimate of the revenues that would have been earned by Phases 2, 4 and 5, and the capitalization rate that would have applied to determine the sale price of each building. I note his careful review of the underlying data, and his use of secondary analysis on key issues such as rent. I also have relied upon his assertion that once he knew the year, he felt certain in identifying the appropriate capitalization rate.

[1015] I also note, again, that the Defendants did not provide any evidence on the calculation of the revenue inputs with respect to Rail Town. They took issue with aspects of Mr. Hofer's analysis, and challenged in general the marketability of the buildings, but they did not provide their own expert analysis of the revenues for a benchmark building. As was the case with Mr. Crane, this reinforces my confidence in the accuracy of Mr. Hofer's analysis and opinions.

[1016] I observe that because Mr. Hofer conducted his analysis on an *ex post* basis, he was able to use actual data for the years in question, which grounds his analysis more accurately than would be the case if he had given his projections on an *ex ante* basis, looking only at 2007 forecast data.

[1017] CPR focussed its cross-examination of Mr. Hofer largely on the validity of his comparables, particularly with respect to lease rates, parking and the capitalization rates. Based on Mr. Hofer's confidence that once he knows the time he knows the capitalization rate, I accept his capitalization rate. The timing risks have already been addressed in the uncertainty discount determined previously. With respect to the lease rates and parking, I acknowledge the issues raised by CPR in cross-examination about whether Mr. Hofer's analysis and selection of the comparables risked overstating the lease rate. It is arguable that the weighting he applied to obviously superior products was not high enough, while he assessed inferior products as more inferior than they were.

[1018] In the absence of alternative evidence, however, and given my general confidence in the testimony of Mr. Hofer, I remain satisfied that his evidence establishes the revenues and capitalization rate on the balance of probabilities. Any concerns can be effectively addressed with the uncertainty discount analysis.

Does the assessment of damages require an uncertainty adjustment or discount in relation to the costs, revenues and capitalization rates for Phases 2, 4 and 5?

[1019] I do not view any uncertainty adjustment as required with respect to construction costs; in my view, Mr. Crane's analysis was careful, routine and reliable. While the time of construction could affect costs, the directional variability (that they could go higher or lower) makes me reluctant to impose any discount for uncertainty.

[1020] With respect to absorption, however, and base rent, I am satisfied that the analysis has sufficient uncertainty, and is sufficiently optimistic, that some discount for uncertainty is appropriate. This is not, to be clear, because Mr. Hofer's analysis was less reliable than Mr. Crane's. Rather, it is because the variability and uncertainty for rent, particularly with the exact contours of a building being unknown, brings me to the conclusion that there is inherently more uncertainty and risk in that calculation. Further, with Mr. Norman's evidence, I view his methodology of calculating an absorption over the period and then distributing it on an averaged basis to years with positive absorption, while well defended and accepted by me, to inherently contain more uncertainty.

[1021] In quantifying that discount I have focused on the range of possible rents, noting that the rents chosen by Mr. Hofer fall at or slightly below the median for Central Calgary comparables in each of 2011 and 2014. I have also considered that I am only quantifying for uncertainty, not to adjust the actual calculation done by the Remington experts, which I have accepted as reliable.

[1022] On that basis, I am satisfied that a 5% additional discount to Remington's original damages number is appropriate, which reduces that number by $16,135,000.

[1023] That reduces Remington's overall damages claim at this point in the analysis, including the reduction already imposed for uncertainty in relation to timing and approvals, to $209,755,000.

Quantification of Remington's Losses

A. Scott Davidson

[1024] Mr. Davidson is the Managing Director of the Toronto office of Duff and Phelps, and leads the Canadian disputes, investigations and valuation practices. He has extensive experience with loss quantification and business valuation. He has testified in a broad variety of cases, and before a variety of courts and tribunals. He has a BBA from the Ivey School of Business and is a CPA (CA) and a Chartered Business Valuator.

[1025] Mr. Tupper reviewed some of Mr. Davidson's past experience as an expert witness, noting that Mr. Davidson's evidence has not always been preferred or accepted by the Court, particularly where Mr. Davidson had relied on other expert evidence that the Court did not accept.

[1026] Mr. Davidson was recognized by the Court as an expert in financial loss quantification and business valuation.

[1027] For the purposes of this hearing Mr. Davidson's role was to compile the data and information provided by the other Remington experts in order to quantify Remington's loss. Mr. Davidson was questioned about his reliance on the Remington experts; he said that he did rely on

their evidence, but also that he reviewed their qualifications and the basis for their opinions. He did not, though, himself reassess their calculations or retain someone else to do so.

[1028] First, he took the evidence of Mr. Lee and Mr. Brown to determine the buildings on the 10th Ave Lands that would be constructed during the 2007-2019 time period (i.e., Phase 2, Phase 4 and Phase 5), and to identify the date on which construction on the buildings would commence and finish.

[1029] Mr. Davidson was questioned on this point in cross-examination, on whether it would have been more appropriate in a 'but for' analysis to use the plans as they existed in 2007, rather than a plan developed later in 2019. None of those earlier plans included a building west of 4th street (i.e., Phase 2), and they incorporated room for the SE LRT south of the mainline tracks. He responded, "insofar as I think [the 2007 plans] demonstrate that Remington would have developed the property, I agree with you. I'm not sure that they necessarily dictate exactly what the order of operations would have been, if I can put it that way, if you know what I mean by "order of operations" in terms of a rollout of that development".

[1030] Mr. Davidson also acknowledged that he had not seen any *pro formas*, business plans, strategic plans, budgets or forecasts for Rail Town created in 2007; he understood that it was too early in the process for those to have been developed.

[1031] Mr. Davidson did not include any loss quantification amounts for later construction on the 10th Ave Lands, or for any ripple effects from loss of the 10th Ave Lands on the 9th Ave Lands or Interlink Lands. He also apportioned out amounts related to Phases 4 and 5 for the percentage of those buildings that were on the Interlink Lands; that is, the only losses quantified for Phases 4 and 5 were for the proportion of the building on the 10th Ave Lands.

[1032] Second, Mr. Davidson took Mr. Norman's evidence about the square footage of absorption into the Calgary market reasonably attributable to the Rail Town project. Mr. Norman's analysis was used to determine the timing of the cash flows from the buildout of each phase of the 10th Ave Lands. He determined that of the 3,000,000 square feet of absorption attributable to Rail Town from 2007-2019, 1,217,000 would be developed on 10th Ave between 2007 and 2014, across three buildings.

[1033] Mr. Davidson explained that in his view the cumulative absorption amounts were what was relevant to his analysis; he was focussed on how many square feet in aggregate the project is bringing to the market, and whether there is sufficient absorption on a cumulative basis to absorb that space as it is completed and brought to market. He thus considered the absorption impact of buildings not included in the loss quantification, as well as the absorption of those that were, so as to ensure that there was, on Mr. Norman's analysis, genuinely absorption available for the 10th Ave buildings. Mr. Davidson assumed in general that unused absorption could be carried forward.

[1034] Mr. Davidson was questioned by the Court about his proposition that absorption unused in one year could be carried forward to a future year given Mr. Norman's evidence that in years where absorption was negative he posited that there would be zero absorption available to Rail Town. Mr. Davidson said that that was not his understanding of Mr. Norman's evidence, but he also agreed if Remington had not brought things to market in a timely way it is possible that there may have been more absorption issues than provided for in Mr. Davidson's analysis.

[1035] Third, he took Mr. Crane's inputs relating to the construction costs and financing and other carrying costs that Remington would have incurred, by year, for the Phase 2, 4 and 5 buildings. He did not add GST to Mr. Crane's data because he understood that Remington would receive an input tax credit which netted out the GST and would thus not pay any GST out of pocket. He also noted that the cost he included for the land acquisition was provided by counsel, not by Mr. Crane; the $9M as he understood it was the acquisition cost plus an incremental amount that would have been payable under the Participation Agreement. Further, he explained that with respect to the rail crossing, he took the three estimates of construction costs from Mr. Lee's report, averaged them and allocated 30% to the 10th Avenue Lands.

[1036] He did not have an estimate for the cost of the crossing based on a construction estimate or detailed plan for the crossing, and he did not include a cost for air rights.

[1037] Mr. Davidson also provided the Court with a calculation showing that if Remington had used a floating prime rate for financing, as is its ordinary practice, it would have reduced its financing costs by about $10,500,000 from what is included in Mr. Crane's analysis for Phase 2, but it would have increased by $1,500,000 for Phases 4 and 5, with a net reduction of $9,000,000. In his calculations, however, Mr. Davidson used Mr. Crane's costs, and did not adjust for the use of a floating prime rate.

[1038] Fourth, he took Mr. Hofer's analysis to identify the inputs required for the quantification of revenues (including the lease rates and capitalization rates) that Remington would have realized by year from the sale of the Phase 2, 4 and 5 buildings. The construction costs would be incurred in the years preceding the completion of the buildings in 2011 (Phase 2) and 2014 (Phases 4 and 5).

[1039] Mr. Davidson reduced income to reflect unrecoverable operating costs, but he did not factor the vacancy rate into the recoverable operating costs (that is, he did not make a deduction for that portion of the recoverable operating costs that would not be recovered due to vacancy). He said that if the Court found that adjustment to be necessary, it would reduce the operating income and thus the sale price.

[1040] With this data, including a stipulated amount of $9,000,000 for the acquisition of the 10th Ave Lands, Mr. Davidson quantified Remington's losses as $322,700,000 exclusive of interest. Remington would have earned $106,000,000 of that in 2011, when it would have received $315,000,000 from the sale of the Phase 2 building, from which it would have repaid the costs of borrowing. It would have earned the other $226,000,000 in 2014, when it would have sold the Phase 4 and 5 buildings.

[1041] For each building he determined the sale price by determining the gross income (revenue from all sources less deductions based on the vacancy rate deduction and unrecoverable operating costs), applying a capitalization rate to the gross income to determine the sale price, and then deducting a commission from the sale price.

[1042] Mr. Davidson presumed that all construction costs would be financed with borrowing. He also noted that Mr. Crane's costs were standard third-party market costs, and that while Remington's track record might have resulted in lower construction costs, his report relied on the costs as calculated by Mr. Crane. In addition to those costs and the financing costs, Mr. Davidson included, as noted above, an amount of $4,00,000 related to the construction of a rail crossing,

based on the proposition that the allocation of that cost should be in part to the three buildings included in the report.

[1043] Mr. Davidson also assessed the reasonableness of his calculation by comparing the 43% profit margin it generated to the profit margin earned by Remington on sixteen of its development projects from 2006 through 2018. On those projects Remington earned an average profit margin of approximately 31%, with a low of 11% and a high of 45%. The weighted average profit margin was 27%. Seven of the sixteen projects had a profit margin of 35% or higher; only two fell below 20%.

[1044] To identify the comparables Mr. Davidson asked Remington for a list of office projects it had completed and sold, and for metrics associated with those sales such as square footage, the selling price and the costs, so that he could calculate the profit and profit margin for each project. He acknowledged in cross-examination that a number of the buildings included were constructed after 2007 and that, in general, he assessed his results against financial information about Remington from after 2006 (and before 2018).

[1045] In Mr. Davidson's view, the comparables show that the 43% profit margin derived for Phases 2, 4 and 5 was reasonable given the low capitalization rates in the Calgary market between 2011 and 2014 and noting that a modest reduction in those rates can drive a significant increase in the selling price of a building. He also noted the high lease rates and low vacancy rates in the Calgary market at that time.

[1046] Mr. Davidson pointed out that he calculated the profit margin for Rail Town using the historical cost of the land, rather than the market value of the land at the project start date, which is the basis on which the other Remington profit margins were calculated. Had he deducted the market value of the 10th Ave Lands as at the project start date the profit margin would have been lower.

[1047] He also noted that some projects, like Quarry Park, have higher servicing costs than Rail Town would be likely to have.

[1048] Mr. Davidson explained in testimony that while it is appropriate to compare the profit margin he derived to Remington's ordinary profits as a reasonableness test, it would not be appropriate to use Remington's ordinary profits as a basis to value the buildings on the 10th Ave Lands. In his view it would be too broad, by which I understood him to mean imprecise.

[1049] Mr. Davidson also analyzed Remington's financial capacity and the net equity it generated, which he took from their financial statements. He assessed Remington's financial capacity in terms of its assets and real estate for development, its earnings before management fees and depreciation/amortization (i.e., its cash flow) and its constructed square feet from 1995-2017. That analysis showed Remington engaged in substantial activity and generated significant cash flow; it demonstrated that Remington was a profitable business during the time period in question. It also indicated that Rail Town would have been an incremental increase in Remington's construction activity, rather than one that would have taken its activity beyond what it had, historically, shown itself capable of building. For example, in 1999-2001 Remington constructed over 4M square feet, and in 1996-1998 it constructed over 2M square feet; with the addition of Rail Town in 2008-2010 it would have constructed about 1.8M square feet, and in 2011-2013 and 2014-2017 it would have constructed about 3M square feet.

[1050] His point from this analysis is that Rail Town was a significant change to Remington's overall business activity, not a dramatic or unreasonable one. He noted in response to questions from the Court that the point of the exercise was not just to test the results, but to "have comfort that Remington was a real business. That they were an active and successful developer. That they had the capacity to undertake this…to the extent I could assess it from a business and financial perspective".

[1051] In cross-examination Mr. Davidson was asked about whether the $322,700,000 in profit exceeded all of Remington's other projects combined over that same period; he said that he did not recall, but it was a significant amount.

[1052] He was also asked about the corporate profitability of Remington, which Mr. Tupper suggested to him was on average, in 2006-2018, 14.03%. That profitability included amounts like management fees, depreciation and amortization which are not included in the profit calculation for specific projects. Mr. Davidson said he had not done the math, but it wouldn't surprise him; he just did not think it conveyed anything meaningful in relation to the profitability of Rail Town.

[1053] In his testimony Mr. Davidson explained the difference between a profit margin, and an internal rate of return. A profit margin is the revenues generated from sale of a building less costs, divided by the selling price. An internal rate of return is the annual return generated on a project measured against the initial cost or investment in the land.

[1054] Mr. Davidson also critiqued the reports prepared by Mr. Dyack. In terms of Mr. Dyack's critiques of his own analysis, Mr. Davidson said that he had read the expert evidence from the Defendants' other experts (Mr. Delf, Mr. Romanesky and Mr. Brunner) and nothing in those reports had led to him changing his conclusion.

[1055] Mr. Davidson also observed that while he maintained the position that an *ex post* analysis was the more accurate and representative approach to calculating the loss, it was not certain that the results of an *ex ante* approach would have been lower, had one been properly applied. He noted, for example, that as of 2007 neither the financial crisis nor the 2014 decline in oil prices were known, and at that time capitalization rates were in decline.

[1056] Mr. Davidson advised the Court that, contrary to Mr. Dyack's evidence, the *ex ante* approach is not the most common approach to the quantification of losses. He noted that by using hindsight you "are better able to narrow the range of variables and have regard to actual facts and circumstances in the market and otherwise in order to develop the inputs that go into the lost profits quantification".

[1057] Mr. Davidson rejected Mr. Dyack's assertion that he (Mr. Davidson) had assumed a profit margin of 43%, noting that it was the output of his analysis, not an assumption underlying his analysis. Further, in his view it remains a reasonable outcome when compared to Remington's other projects when all the projects are analyzed in context. He pointed out that the properties added by Mr. Dyack, to show Remington having a lower profit margin, were not comparable. They included industrial and residential properties.

[1058] He also emphasized that it was inappropriate to compare the 43% profit margin derived from his analysis to the rate of return calculated by Mr. Sharp in his expert report; in Mr. Davidson's opinion they are different metrics, and there is no use in comparing them.

[1059] With respect to the internal rate of return, Mr. Davidson agreed that his analysis resulted in a 139% internal rate of return for Rail Town but said that this was in part because of using a $9,000,000 acquisition cost for the lands, rather than the market value of the lands; it reflected a relatively low initial capital cost.

[1060] He also rejected Mr. Dyack's suggestion that he had failed to take into account mitigation, stating that their analysis was that mitigation was not possible given that Remington did not own the 10th Ave Lands to develop them. That Remington achieved other business success during the time period is not evidence of mitigation of this loss. He observed that Mr. Dyack has not identified an incremental project that Remington either could have accomplished, or did accomplish, by virtue of not developing the 10th Ave Lands; in Mr. Davidson's view, the evidence of Mr. Shawcross and Mr. Magnussen suggests that there were no comparable development opportunities to mitigate the loss.

[1061] He noted in this respect that Mr. Crane's costs include general contractor and developer fee costs, which meant that Remington could have developed the project as a passive owner, which shows the lack of relevance of the other activities Remington engaged in during that time frame. That is, he suggested that Remington could have, through use of a general contractor or developer, completed the Rail Town projects without compromising the other activities it engaged in during this time frame.

[1062] He rejected the suggestion that he ought to have added in general and administrative expenses of $1,000,000 per year noting that this was inconsistent with Remington's evidence about how it manages its business, was not calculated by Mr. Dyack based on sound analysis, and allocates the entire amount to the three buildings on the 10th Ave Lands, rather than across the Rail Town project as a whole. He also noted that Mr. Dyack ignored such expenses as unduly speculative in his *ex ante* calculation, but wanted to add them to Mr. Davidson's calculation, which Mr. Davidson suggested was "inconsistent" and "self-serving".

[1063] Mr. Davidson acknowledged in cross-examination that Remington had a steadily increasing amount of general and administrative expenses, reflecting its development of Quarry Park and other business activities. He said, though, that the issue was not whether Remington had increased general and administrative expenses associated with Rail Town, but was whether those expenses were sufficiently captured in Mr. Crane's analysis. He explained that Mr. Crane's cost analysis was conservative, and in any event already included a general contractor cost and a developer fee. Had Remington done those tasks itself it would not have incurred those costs "let alone any further G&A costs".

[1064] Mr. Davidson also justified his decision not to apply a discount rate to his calculation. He noted that the reliance on hindsight distinguished his analysis from a typical business valuation where hindsight is inadmissible, and discounting thus required. In his testimony he explained that in his view his calculation reflected "probabilized amounts"; they arose from expert evidence on the likelihood and probability of development and took into account market circumstances in each year. That gave him "comfort around the various inputs and their reasonability and their probability".

[1065] He pointed out, for example, that Mr. Norman's analysis took into account what was actually built in the market, and the supply and capacity of the market, and Mr. Hofer's work took into account actual lease rates in the market. Further, some of the potential risks – e.g., Mr.

Remington dying – are known not to have transpired in the 2007-2019 period, and so do not need to be accounted for.

[1066] In re-examination Mr. Davidson said that if he was going to apply a discount rate it would be in excess of a risk-free rate but would be a modest premium given that they had the benefit of hindsight in assessing the loss. They know the construction costs, the leasing rates and the cap rates, which reduces a great deal of the risk inherent in the calculation. In his view it would be a single low-mid digit.

[1067] He acknowledged in cross-examination that his calculation valued the loss as at 2019; it did not apply a discount to bring that loss back to 2007: "I treated all of those amounts as a past loss"

[1068] With respect to Mr. Dyack's own analysis, Mr. Davidson's criticized its unreasonableness and the lack of evidence to support Mr. Dyack's proposition that Remington would have not developed the 10th Ave Lands in any way during the 2007-2019 period, and that if it had developed the lands it would not have begun doing so until 2029 at the earliest, with revenues being realized in about 2032. He pointed out that this position was not consistent with Mr. Dyack's own concession that Remington was a successful development company, with Remington's successful track record during the period or with Remington's own position that it would have done so.

[1069] Mr. Davidson opined that Mr. Dyack, and the other Defendants' experts, placed too much emphasis on the lack of development activity by Remington on the Rail Town lands to this point in time, noting that Remington could not develop the Rail Town property as it would have done but for the breach, given that it lost the 10th Ave Lands due to CPR's breach: "It goes without saying that Remington could not develop what it did not own".

[1070] He criticized Mr. Dyack's *ex ante* calculation of the damages both as inappropriate given the nature of the loss in these circumstances (in which Remington lost the opportunity to develop the lands altogether) and given the availability of hindsight evidence about what had happened in the 2007-2019 period. Further, he explained that, even if doing an *ex ante* calculation, some effort must be made to value the loss, which Mr. Dyack did not do. Mr. Davidson noted, for example, that a valuator could take into account information about Remington's profit margins, profit per square foot or internal rate of return as of 2007; Mr. Dyack did no such analysis.

[1071] Mr. Davidson suggested that the "cost recovery" amounts identified by Mr. Dyack were unreasonable, amounting to $0.53 per square foot of the Phases 2, 4 and 5 developments, and $0.27 per square foot across the 10th Avenue lands as a whole.

[1072] He criticized Mr. Dyack's *ex post* calculation on multiple grounds. First, it assumed that the lands were acquired in 2021, thereby eliminating any loss to that point in time, and effectively treating this as a case in which specific performance had been awarded, although in that scenario the quantification of the lost profit would be moot because Remington would have the land. In Mr. Davidson's view, an *ex post* analysis takes into account facts subsequent to the breach; it does not require analysis to start as of the date of trial.

[1073] He also explained that if you do assume that the lands were acquired in 2021 for their 2008 cost of $9-10M, then there is an immediate lost profit to Remington from not having been able to acquire the lands in that way, given that by 2021 they were worth many multiples of their 2008 value.

[1074] Second, in his view Mr. Dyack did not sufficiently support the dates he selected for when development would have occurred, apparently relying only on the 2019 Rivers District Master Plan predicting when development would likely have occurred, rather than the opinion of the Defendants' own experts. Mr. Davidson noted that the effect of these dates was to posit that Remington would have banked the lands for well over 20 years which, Mr. Davidson suggested, was not plausible.

[1075] Third, Mr. Dyack transposed Duff and Phelps' damages calculation to a future date without making any adjustment to account for financial circumstances (or even inflation) applicable at that future date, and then additionally added a discount rate to those numbers, thereby seriously understating them even on Mr. Dyack's own logic. He transposed the $105,000,000 that Mr. Davidson calculated would have been earned by Remington in 2011 to 2032 without any adjustment, when even only adjusting for inflation would have put that amount at $160,000,000; this issue was exacerbated by Mr. Dyack then applying a 25% discount rate to the $105,000,000.

[1076] Fourth, Mr. Davidson suggested that the discount rate used by Mr. Dyack was erroneously calculated and inflated. It relied on comparator companies which were not comparable, applied a small company risk premium without explaining why such a premium would apply to a specific development like Rail Town, used a company risk premium which was poorly supported and does not explain its methodology for grossing-up the cost of equity to a pre-tax level. Mr. Davidson also noted that at one point Mr. Dyack stated that the discount rate is an assumption (Schedule C), as a result of which he was unsure as to whether Mr. Dyack was calculating the discount rate, or assuming it.

[1077] Mr. Davidson also pointed out that Mr. Dyack's loss calculation created an unreasonable outcome in light of the value of the underlying land and given that, at its highest, Mr. Dyack's *ex post* calculation would assess the lost profit for the Phase 2, 4 and 5 buildings at $8 per square foot, and for the 10th Ave Lands at $4/square foot. As Mr. Davidson put it, under Mr. Dyack's *ex post* analysis, "Remington would be better off if Railtown (including the 10th Avenue Middle Land) was never developed".

[1078] Mr. Davidson also emphasized on the timing issue, that while the oil prices went down considerably in 2014-2015, the effect of a delay on timing would not have been catastrophic. In addition, if Remington was faced with delay, it had the ability to accelerate at a cost that would not have been excessive. Mr. Davidson provided a sensitivity analysis, in which he took Mr. Hofer's inputs for each year and calculated the different outcome of his loss quantification that would result in that instance. In the analysis, the costs and other variables stayed the same (including the absorption) but the lease rates, capitalization rates and vacancy allowance changed to reflect the different year the project came to market. Mr. Davidson's analysis in this respect was referenced earlier in the calculation of the discount to reflect uncertainty in timing.

James Dyack

[1079] Mr. Dyack earned his B.Eng at UNB in 1993, and his MBA from Western in 1999. He has worked as a consultant and valuator, and from 2004 has worked exclusively in the area of valuations. He worked at Deloittes from 1999-2013, and from 2016-2018. He owned an oil field services business from 2013-2016. Since 2018 he has been a partner in MNP's Calgary office. He is a CPA (CMA) and a Chartered Business Valuator. He has done a number of real estate valuations in Calgary, in the range of 15-20, including 3 real estate breach of contract matters.

[1080] Mr. Dyack was qualified as an expert in financial loss quantification and business valuation, including financial loss quantification and valuations in real estate matters in the Calgary area.

[1081] In Mr. Dyack's view, the only loss suffered by Remington was $420,000-$750,000, which was his assessment of Remington's out of pocket costs as of June 2007. He identified the costs based on identifying eight iterations of conceptual plans for Rail Town, and assumed that each iteration cost $20,000-$50,000. He also identified seven iterations of purchase and sale documents prepared; he assumed those cost $25,000-$35,000 each.

[1082] Mr. Dyack described this as an *ex ante* approach to damages: the assessment of the lost money or opportunity suffered by Remington as a result of CPR's breach measured as at, and based on information available at, the date of breach, i.e., June 2007. An *ex post* approach also considers the loss as at the date of breach but relies on and incorporates information learned after that time (for example, the 2008 financial crisis).

[1083] Mr. Dyack explained the incorporation of the thrown-away costs into a lost profits analysis by saying "it would be reasonable to expect a plaintiff to recover the money spent moving the concept forward, beyond those costs that would be for typical scoping". He rejected, however, the idea that there were incremental overhead costs incurred by Remington noting that they would be difficult to measure accurately and that they used IBI for the conceptual plan.

[1084] In his *ex ante* analysis Mr. Dyack measured the loss that Remington suffered from not having the 10th Ave Lands from 2007-2019 as zero. He based this conclusion on the "highly uncertain" timing for the Rail Town development; that it was "unknown" when the lands would have been developed; that there were no financial details for the development in June 2007; and, the assertion that the information relied on by Remington's experts is hindsight.

[1085] In his examination in chief Mr. Dyack situated this conclusion in part by responding to Mr. Davidson's observations about the low risks associated with real estate properties, noting that while that may be the case for developed real estate, it is not the case with land purchased for development. An unbuilt building cannot have a capitalization rate; that is not how you measure risk on a building not yet constructed – "you can't apply cap rates to something that's not built".

[1086] Mr. Dyack's report did not explicitly say that his determination in his *ex ante* analysis was that Remington would have made no profits attributable to the 10th Ave Lands between 2007-2019, but that was, effectively, the conclusion of his analysis given he measured those damages as zero.

[1087] Mr. Dyack also supported his position by saying that Remington could mitigate because it had the money it did not spend acquiring the 10th Ave Lands to spend on other projects. He noted that Remington owned other land for development during this period, highlighted its high levels of project activity during the time period, and its strong financial performance. Mr. Dyack said, "Based on our analysis of Remington's project activity, revenues and earnings, it appears that Remington refocused their attention on other projects after the Alleged Breach".

[1088] In testimony he noted that had Remington invested the $9,000,000 and earned the rate of return calculated by Mr. Sharp of 23.9%, then over 15 years it would have earned $224,000,000 on a compound basis, and $113,000,000 after tax.

[1089] Mr. Dyack said that even if measured on an *ex post* basis, Remington's lost profits would range from nothing to $10,002,092. To calculate the analysis on an *ex post* basis Mr. Dyack assumed that the lands were acquired in 2021, for the price they were sold for pursuant to the 10th Ave Agreement. He took the costs estimated by Mr. Crane for 2011 and 2014 but transposed those costs to a period of time beginning in one of 2029, 2034 or 2039. He did not adjust the costs to account for inflation between 2011-2014 and 2029-2039. Mr. Dyack then calculated Remington's profits by applying a 43% profit margin and, as an alternative, a 25% profit margin, to Mr. Crane's cost analysis. Finally, he applied a 25% discount rate to the profits he calculated that Remington would have earned. He based this discount rate on his calculated return of equity for Remington.

[1090] Mr. Dyack's conclusion was that, in most scenarios, the development would have had a negative valuation, in only a few would the discounted value of its profits be positive, and at most the profits would be $10,002,092. He concluded with respect to his *ex post* approach, "Based on our analysis of review and Calgary's planning documents, there is enough risk related to the timing [to] conclude that the lost profits under an *ex post* approach are nil".

[1091] Mr. Dyack also critiqued Mr. Davidson's report. First, he challenged the selection of the December 31, 2019 assessment date as insufficiently justified. Specifically, he noted that usually the expert is given an instruction as to the date of assessment; he noted that Mr. Davidson did not identify his instructions as to an assumed date of assessment. As such, Mr. Dyack said, Mr. Davidson should have provided the Court with its assessment of lost profits at the date of breach as well as at the 2019 assessment date.

[1092] He also suggested that Mr. Davidson should have been hesitant to rely on the other Remington experts, noting that Mr. Davidson "should have looked into how much progress had been made on the Railtown development up to the D&P Loss Quantification Date". Failing to look at the lack of development on the 9th Ave and Interlink Lands by 2019 amounted to a selective approach to hindsight. He further criticized the Remington experts through summarizing the positions of Mr. Delf and Mr. Romanesky.

[1093] Mr. Dyack opined that the profit margin "assumption" that underpins Mr. Davidson's analysis was "excessively optimistic and its use acted to grossly overinflate the alleged lost profits". I interpret this criticism as suggesting that Mr. Davidson's analysis generates a profit margin that is unrealistic and, as such, the analysis is problematic.

[1094] To support this position Mr. Dyack included "additional project summaries from the PwC Report for illustrative purposes" in the calculation of Remington's historical profit margins. As Mr. Dyack acknowledged in cross-examination, however, those projects were not commercial buildings, but were instead projects like warehouse developments in Edmonton.

[1095] Mr. Dyack also suggested that Rail Town was likely to underperform compared to Remington's other projects, saying, "Rail Town is a far more complex site and is bound to have issues not experienced with Remington's other large developments like Quarry Park. Whereas Quarry Park was essentially an open field, Rail Town is a tight downtown location that inherently introduces risk related to access, storage and ground water".

[1096] Mr. Dyack also questioned the Internal Rate of Return generated by Mr. Davidson. I again take this critique to be directed at the reasonableness of the output of Mr. Davidson's analysis. He noted that the return of $322,000,000 on a $9,000,000 investment in land was

extremely high relative to Remington's other projects. In Mr. Dyack's view this was not reasonable given, in his analysis, that Remington ordinarily earns about $20,000,000 per project.

[1097] Mr. Dyack said that Mr. Davidson ought to have assessed the *ex ante* approach as well as the *ex post* approach. Had they done so, he said, Mr. Davidson's conclusion would have been much lower. It would have discounted Remington's future cash flows to the date of breach to account for uncertainty.

[1098] Mr. Dyack criticized Mr. Davidson for not taking into account whether Remington could or did mitigate its loss. He suggested that Remington can refocus its efforts; it had "numerous other opportunities" and earned profits throughout the time period. He noted the increase in Remington's activities from 2007-2019, including projects it had built and lands that it had acquired. In Mr. Dyack's view, Remington "found alternative projects that enabled them to generate substantial profits despite the alleged breach".

[1099] Mr. Dyack also criticized Mr. Davidson for not including incremental general and administrative costs associated with the project, and for assuming a rate of return of 43%, which was much higher than Mr. Sharp's rate of 23.9%. As previously indicated, Mr. Davidson's response to this criticism was that he calculated a profit margin, not a rate of return, which is not comparable to the rate of return calculated by Mr. Sharp.

[1100] In general Mr. Dyack suggested that Mr. Davidson's "conclusion is not reasonable."

Assessment: quantification of loss

What is the appropriate quantification of loss?

[1101] Subject to the uncertainty discounts already noted, and some specific adjustments discussed in this section, I accept Mr. Davidson's quantification of Remington's loss. Mr. Davidson agreed with my description of him as "the math guy"; his evidence was that he took the inputs from the other Remington's experts and used those inputs to quantify Remington's loss. Since I have accepted the evidence of those experts, it follows that I accept Mr. Davidson's quantification relying on those experts' calculations.

[1102] The Defendants might suggest that, since I imposed an uncertainty discount where Mr. Davidson did not, I have effectively rejected his evidence. In my view, however, Mr. Davidson's explanation for why he did not impose a discount was not unreasonable. I did not ultimately accept it, but my disagreement certainly does not cause me to doubt his expertise. I found him to be a thorough and helpful witness, particularly in response to questions from the Court. He was willing to engage on conceptual questions about the calculation of damages in this case, and also to acknowledge different ways of approaching the issues.

[1103] That being said, I have considered the following specific further points in relation to potential adjustments to Mr. Davidson's quantification of Remington's loss.

[1104] First, I accept Mr. Davidson's approach to the bridge crossings, in which he took the estimates of the costs of different rail crossings, averaged them, and apportioned 30% to the 10th Ave Lands, based on the square footage developed through 2018. I accept the validity of his averaging methodology as accounting for the fact that such costs would be incurred, while also recognizing that the precise nature of the costs was uncertain. Given that the square footage of Phases 4 and 5 would potentially be reduced by the reduction in the land size, Mr. Davidson's 30% apportionment may be too large – that is, a lower deduction would be appropriate. Given

the uncertainty as to how precisely the reduction in land size would have affected Remington's development, however, I accept the 30% apportionment as reasonable in the circumstances.

[1105] Second, it is necessary to make an adjustment to reflect the fact that some recoverable operating costs may become unrecoverable given the vacancy rate, which Mr. Davidson agreed would reduce the sales price, but which he did not account for. CPR submitted that, given Mr. Hofer's evidence, the effect of this would be to reduce the sale price for Phase 2 by $4,800,000, and of Phases 4 and 5 by $3,854,000 each. Remington did not raise any concerns with the accuracy of that calculation in its reply brief. However, given my finding re the reduction in the 10th Ave Lands available to construct Phases 4 and 5, it is appropriate to reduce the reduction for those phases by some amount. While not capable of precise calculation (given the lack of evidence regarding how exactly the reduction in land size would have affected Phases 4 and 5), I apply a reduction of 15% to the proposed adjustment, to $3,275,900 per building. As such, I find that the amount of Remington's loss calculated by Mr. Davidson should be reduced by a further $11,351,800.

[1106] Third, I have considered whether it is appropriate to adjust Mr. Davidson's calculation upwards to reflect his evidence that, in fact, Remington's financing costs would have been lower than the amount projected for by Mr. Crane. I have chosen not to do so, however, because the conservatism of Mr. Crane's analysis is part of the reason why I did not feel it necessary to apply any uncertainty adjustment to his quantification of Remington's costs.

[1107] Fourth, Mr. Davidson's quantification must be reduced to reflect the cost of removing the ENMAX transmission lines. I accept the cost estimated by the Alberta Utilities' Commission in 2015 of $13,300,000. While this cost may be higher than what would have been incurred in 2007, it is also sourced from outside the parties to this litigation and is the most reliable evidence I have on this point. Using Mr. Davidson's 30% allocation ratio (which, again, may be somewhat overstated, but I view as a reasonable proxy), this results in a further reduction of $3,990,000 from Remington's loss.

[1108] Fifth, Mr. Davidson's quantification must be reduced to reflect the cost of acquiring air rights from CPR. CPR submitted that Remington would have acquired the same air rights as the Province, for the same price, for a cost of $11,369,160. Remington submitted that it would only have acquired the air rights necessary to build its crossings, which would have cost $191,000.

[1109] I do not view either of these scenarios as plausible. CPR would have had no realistic market for the air rights given Remington's ownership of the lands on both sides, but Remington would also have required the air rights to complete Rail Town. That suggests that CPR would have negotiated for more than the minimum amount of air rights Remington required but would have been willing to accept an offer to buy less of the air rights than were purchased by the Province. As such, I find that Remington would have acquired half of the air rights acquired by the Province for the same price per square foot, an amount of $5,684,580. Of that 30% should be deducted from Remington's losses: $1,705,364.

[1110] I do not accept Mr. Dyack's critique of Mr. Davidson's analysis. Mr. Davidson did not overstate the comparable profit margin for Remington; he analyzed sixteen commercial office developments from the relevant time period. The projects added by Mr. Dyack to suggest that Remington would ordinarily have earned a lower profit on this type of development were simply non-comparable.

[1111] I also do not accept Mr. Dyack's suggestion that Quarry Park was an "open field" and less "complex" than Rail Town. To develop Quarry Park Remington had to clean and remove a billion litres of water and bring in 3 million cubic metres of fill – some 175,000 trucks worth. The land was, as its name suggests, a quarry before Remington developed it. In addition, Quarry Park was in the flood plain. The project required Remington to construct roads and pathway infrastructure. Rail Town obviously had planning and other complexities, but it is a flat piece of land, proximate to downtown, serviced to a significant extent and outside of the flood plain. It is not more complex to develop than was Quarry Park.

[1112] While I have explained my reasons for applying some discount for uncertainty to Remington's calculation of its losses, I do not accept Mr. Dyack's position that a discount rate should be based on Remington's return on equity. What Remington could expect to earn as a return on equity may be relevant to assessing the uncertainties associated with a particular investment, but they are not the same thing, particularly given the variety of construction activities in which Remington is engaged, and that Remington finances its projects through debt, not equity. Further, there is no reason to approach the uncertainty of Remington's ability to earn the projected return on Phases 2, 4 and 5 so indirectly; Remington provided significant evidence and analysis of each aspect of its loss calculation. The uncertainties in that evidence and analysis can be directly identified and assessed, and an appropriate discount applied, as I have explained earlier in these reasons.

[1113] I also was not satisfied with Mr. Dyack's calculation of Remington's return on equity. Mr. Dyack selected 7 comparator companies. Some of those companies were clearly not comparable – for example the Maui Land and Pineapple Company and Greenbriar Capital Corp. The method through which they were selected was unclear. The addition of a further small company risk premium was not appropriate given the nature of the comparator companies.

[1114] Like Mr. Davidson, I view Remington's financial capacity and the net equity it generates as confirming that Remington was a profitable and active business during this time period, and also that Rail Town would have been an incremental increase in its activity, rather than a wholesale shift in the work it was able to accomplish. Like Mr. Davidson, I see Remington as active and successful and with the capacity to undertake a project like Rail Town. While not directly relevant to the assessment of damages, this provides reassurance regarding the overall reliability of the amounts quantified by Remington's experts.

[1115] I also note that, with the application of the discounts for uncertainty and the other specific reductions made here, Remington's profit margin on the Rail Town project drops to 31%[2], which is about what would be expected for Remington's construction of commercial buildings, which have a high of 45% a low of 11%, a weighted average of 27% and a simple average of 31%.

[1116] In my view, in the circumstances of this case an *ex post* analysis is preferable to an *ex ante* analysis. I also am not persuaded that doing an *ex post* analysis as was done by Remington's experts involved calculating the loss as at some point other than 2007. Using information about what happened after 2007 ensures that the analysis has some factual and empirical grounding,

[2] Calculated by applying the discounts ($129,982,164) to Remington's selling price of $757,300,000 to generate a selling price of $627,317,836, and then dividing Remington's adjusted profit by its adjusted selling price (192.7/627.3)

rather than being purely speculative. It allows for more precision and accuracy in calculating what, but for CPR's breach of the 10th Ave Agreement, Remington would have earned.

[1117] The analysis remains grounded in 2007 because the determination of what Remington would have done with the lands, and how the City would have approached its proposal, are rooted in the information known and available as of 2007. The inclusion of information about what happened in the real estate market in Calgary after 2007, and in the Calgary economy in general, ensures that crucial facts, and in particular the market downturn of 2008, and the oil crash of 2014 and afterwards, are not pretended away.

[1118] As Mr. Davidson noted, it is not clear that, if those facts were ignored, Remington's loss calculation would go down. In 2007 the subsequent drop in the commercial real estate market, and rise in vacancy rates, would have been hard to anticipate, if not impossible. Ignoring those realities would potentially inflate Remington's loss calculation unreasonably.

[1119] I also do not accept the methodology used by Mr. Dyack to calculate *ex ante* losses. It assumes that Remington would have not developed the lands and ignores the factual evidence – even evidence he relies on to calculate the *ex ante* damages – that Remington was actively pursuing development. Instead, Mr. Dyack suggests that Remington should be compensated based on estimates of their out of pocket costs, a calculation that does not fit with the law's approach to expectation damages.

[1120] Mr. Dyack seems to rely in reaching the conclusion that Remington would not develop the lands in part on the evidence of Mr. Romanesky and Mr. Delf about the challenges for the 2007 Trial Concept Plan. In the end, however, Mr. Romanesky agreed that Remington would have been able to obtain City approval for a proposal closer to what was originally proposed in 2007. And, at trial, the Remington experts were consistent in their testimony that developers work with the City to get a project approved. Even if I agreed that the City would not have accepted the 2007 Trial Concept Plan that does not suggest that Remington would have sat on the lands for over a decade. Yet, Mr. Dyack's *ex ante* calculation posits exactly that.

[1121] I also do not accept Mr. Dyack's *ex post* calculation. I adopt the critiques of the Remington experts of those calculations with respect to the pricing of the land, the use of unadjusted construction costs, and the application of a discount rate.

[1122] I agree with Mr. Davidson that it is improper to assume that the lands were acquired in 2021, but to price them based on their original contract price, even if taking into account the Participation Agreement. I also do not accept the assumption that construction on Phases 2, 4 and 5 would begin in 2029 at the earliest, and perhaps not even until 2034 or 2039; this does not fit with what would have happened in 2007 but for CPR's contract breach. In addition, it was incorrect to make no adjustment, including for inflation, to reflect having moved Mr. Crane's cost numbers from 2011-2014 to a time period about 20 years later. The application of a discount rate compounded these issues. Overall, Mr. Dyack's *ex post* approach does not taken into account that Remington lost something of real tangible value in losing the 10th Ave Lands; it is not reasonable given the evidence heard in this trial.

[1123] I acknowledge that CPR did not emphasize Mr. Dyack's evidence in its post-trial brief, except in relation to mitigation, discussed below. I also observe, however, that the issues with Mr. Dyack's evidence in part reflect a broader deficiency in CPR and the Province's approach to the damages calculation.

[1124] The Defendants made the choice not to attempt to quantify Remington's lost profits even though CPR's position in its final brief with respect to Remington's 'but for' damages was that "Remington would have pursued development of the May 2007 Concept Plan" with an FAR of six, would have acquired the 10th Ave Lands "one or more years" after June 2007, would not have constructed Phase 2, and would have constructed low-rise office and other commercial buildings on the 10th Ave Lands, rather than high-rise office buildings. CPR also suggests the phasing of Rail Town would have begun with the 9th Ave and Interlink Lands.

[1125] For reasons I have earlier explained, I accept Remington's evidence about what it would have done and do not accept CPR's characterization of the 'but for' scenario. Yet, CPR's position essentially acknowledges that by 2008-2009 Remington would have acquired the 10th Ave Lands and, with a FAR of 6, would have constructed low-rise and commercial buildings there, after starting construction on the 9th Ave and Interlink Lands. That assessment of what Remington would have done fundamentally supports the position that Remington would have developed the 10th Ave Lands with a commercial focus, and leads to the question: in that scenario, what profits would Remington have earned?

[1126] The Defendants chose not to quantify the losses associated with CPR's 'but for' scenario. It is possible, of course, that they did not do so because, if they had, it would have substantiated Remington's quantification of its loss. Regardless, as a trial judge, I must decide based only on the evidence before me. Here, Remington provided detailed, substantive and persuasive evidence about what it would have done had it acquired the 10th Ave Lands, and what it lost when CPR breached the 10th Ave Agreement. Subject to the adjustments I have made, I accept that evidence as establishing, as at the date of breach, what Remington would have earned but for CPR's breach of the 10th Ave Agreement.

Does the assessment of damages require an uncertainty adjustment or discount in relation to the quantification of losses?

[1127] Given Mr. Davidson's reliance on the other Remington experts, and my application of uncertainty adjustments to those experts as required, no further uncertainty adjustment is warranted.

What losses has Remington proven, on the balance of probabilities, that it suffered as a result of losing the 10th Ave Lands?

[1128] Based on the foregoing, Remington has proven on the balance of probabilities that it lost $192,707,836 as a result of losing the 10th Ave Lands:

Remington lost profits, unadjusted	$322,700,000
30% adjustment for uncertainty re vision, timing and planning, and for reduction in parcel east of 4th Street SE.	($96,810,000)
5% adjustment for uncertainty re revenues	($16,135,000)
Recoverable operating cost adjustment	($11,351,800)
ENMAX transmission line removal	($3,990,000)
Air Rights Acquisition	($1,705,364)
Proven Losses	**$192,707,836**

Given the analysis on remoteness, what proportion of Remington's proven losses can it claim from CPR and the Province?

[1129] I have found that at the time the 10th Ave Agreement was signed, it was reasonably foreseeable that the 10th Ave Lands would be developed commercially. They would be part of a large multi-use development on the B Yard lands, focused on commercial uses, specifically, "commercial/office uses oriented to downtown service providers including office/medical, technology, business service and educational uses and secondary retail/commercial use".

[1130] The Defendants submit that the 14-15 story high rise commercial buildings on which Remington based its damages calculation were not reasonably foreseeable. Specifically, even if commercial development was contemplated on the 10th Ave Lands, high rise commercial development was not.

[1131] It emphasizes that the 2001 IBI document does not put high rise development on the 10th Ave Lands, that Remington did not develop high rise office buildings at that time, that there was no high-rise development near the 10th Ave Lands in 2002 and such development was not contemplated by the zoning then in place.

[1132] The Defendants also submit that the restriction against residential development on the 10th Ave Lands might have been waived by CPR as a rational economic actor, noting this Court's emphasis on that point in relation to the acquisition of air rights. It suggests that the restriction on residential development ought not to be interpreted as meaning that office towers would be constructed on the 10th Ave Lands.

[1133] Remington responds by pointing out that the 2001 IBI document identified high-rise commercial office buildings as providing the highest land value. It also observed that CPR precluded the type of residential development on the 10th Ave Lands portrayed in the images in the 2001 IBI document. While the 2001 IBI image had townhouses on the 10th Ave Lands, it included "high rise commercial/business/apartment" on the 9th Ave Lands, which puts that possibility within CPR's contemplation, certainly once it chose to exclude residential developments from the 10th Ave Lands. In addition, Remington relies on the 2002 Appraisal's identification of the highest and best use of the 10th Ave and Interlink Lands being "commercial/office uses oriented to downtown service providers"

[1134] I am satisfied that remoteness should not reduce or limit Remington's proven losses in this case.

[1135] I find that high rise commercial buildings were within the reasonable contemplation of the parties. In my view, commercial/office uses oriented to downtown service providers makes high-rise development liable to result from Remington acquiring the 10th Ave Lands. I agree with Remington that it is significant that the 2001 IBI image had "high rise commercial/business/apartment" on the 9th Ave Lands. Once residential development was precluded on the 10th Ave Lands, it would be reasonable to expect those lands would be developed along the lines contemplated for the 9th Ave Lands by IBI.

[1136] I do not accept the Defendants' position that CPR would have waived the residential development provision. A rational economic actor can be expected to seek profit from a thing of value for which it itself has no use, in this case selling air rights to the available purchaser. A rational economic actor cannot be expected to give away for nothing a benefit for which it bargained.

[1137] I do note that, were I to consider only the pre-contract IBI documents, I may have excluded high rise commercial buildings. I acknowledge the low FAR contemplated in those documents, and the relatively limited scope of office development they included (albeit including 50% non-residential, and mixed-use). Ultimately, however, the fact that the 2001 IBI document includes high-rise development on 9th Ave, that the 10th Ave Agreement precludes residential development, and that the 2002 Appraisal identifies the highest and best use as "commercial/office uses oriented to downtown service providers", support the position that high-rise commercial development was within the reasonable contemplation of the parties when they entered into the 10th Ave Agreement.

[1138] Recall that the buildings Remington says it would build are not 30+ story AAA downtown buildings. They are 14-15 story AA buildings, which would rent for a lower amount than downtown buildings. They are near downtown, but different from downtown. That seems like exactly the type of building in which key downtown service providers – engineers, IT specialists, human resources consultants, downtown university campuses, day cares, environmental consultants, realtors, developers, investment advisors, lawyers – may, in an expanding city centre, be located. Those sorts of buildings provide a high quality and lower cost alternative while remaining proximate to downtown.

[1139] I put limited significance on the City planning documents and lack of similar development in the area. In 2002 the entire area was an active rail yard, and in transition. Yet, CPR was provisionally selling the 10th Ave Lands, and also selling the 9th Ave Lands and Interlink Lands, to a developer, and had been reviewing its options for doing so for over five years. It knew that what the lands were used for now, and how they were viewed by the City, was evolving. I do not think it could have looked at contemporaneous planning documents as reliably indicating what Remington would do, particularly in light of the other information available to CPR about the future of the lands.

[1140] While this was just over a year later, and so is not relevant to identifying what CPR knew or ought to have known, I point to the e-mail from Mr. Berry in February 2004, referenced earlier in relation to the surplus issue, saying, the "reality is that as the East Village and Stampede continue to develop, there is going to be more and more pressure from the City to minimize our footprint…Sooner or later, those tracks are going to have to go". This e-mail does not show what CPR knew in 2002, but it does show the general trends in the area during that time, and that CPR was aware of trends in the area.

[1141] The Defendants argued that commercial uses may include a wide variety of things, car washes or schools or low rise buildings, and emphasized Mr. Mason's questioning evidence about the "pie in the sky" nature of Remington's plans. I am not, however, satisfied that because commercial has a range of meanings, that a plaintiff has an obligation to show that only one of those meanings, high-rise buildings, was contemplated here. The case law on remoteness, discussed above, shows that what needs to be established is that the loss was not unlikely, that it was something liable to occur, that it was sufficiently likely that it flowed naturally from the breach. It may be "considerably less than an even chance". It certainly does not need to be, 'the one thing most likely to occur'.

[1142] Further, the 2002 Altus appraisal said, "downtown service providers including office/medical, technology, business service and educational uses and secondary retail/commercial uses". Those examples suggest an office-based environment, not a commercial

development such as a car wash. Enterprises such as owntown university campuses may be developed in office style buildings. Business service, technology and office/medical are likely to be in an office building. All of them are as likely to be in a 14-15 story building, as in one less than 7 stories. A reasonable person reading, the "highest and best use of the subject is concluded to be for commercial/office uses oriented to downtown service providers including office/medical, technology, business service and educational uses and secondary retail/commercial uses" would not brush aside the construction of 14-15 story office towers as far-fetched, but would rather view it as sufficiently likely as to flow naturally from the contract being completed, to be liable to result from Remington acquiring the 10th Ave Lands, particularly once residential development was precluded. And, in turn, the reasonable person entering into the 10th Ave Agreement in 2002 would identify the loss of the ability to construct 14-15 story office towers as a reasonably foreseeable loss in the event of contract breach.

[1143] As such, I am satisfied that the loss of profits from not being able to construct three high-rise buildings was within the reasonable contemplation of the parties in 2002.

[1144] Further, even if I were to accept the Defendants' submission, and find that low-rise office towers were foreseeable, but high-rise office towers were not, I am not persuaded that would show that the quantification of Remington's losses was in error.

[1145] At the risk of stating the obvious, finding that high-rise buildings were not foreseeable would not show that Remington suffered no loss. All it would mean is that Remington's loss would be limited to its foreseeable loss, rather than being based on its 'but for' loss. In this scenario, its loss would be its loss based on low-rise office buildings, rather than high-rise office buildings.

[1146] If quantifying the foreseeable loss, in which the 10th Ave Lands were used for low-rise office buildings, say 6-7 stories, it is not clear that this would reduce Remington's damages over all. Remington only claimed losses associated with three of the seven buildings proposed for those lands. If it was building only low-rise buildings, it is conceivable that it would have been able to complete more buildings more quickly. I do not know whether that is the case, but it is certainly a possibility.

[1147] For example, in 2018 Remington sold the Meredith building, which is near downtown, is 7 stories, and was 177,311 square feet. When Remington sold that building, it made $29,000,000. The Meredith building was not part of a transformative development. It is on the other side of the river from downtown. It was sold in 2018, a weaker market than Phases 2, 4 and 5 would have been sold in. Yet if Remington constructed and sold six buildings on the 10th Ave Lands the size of the Meredith building, and could earn 10% more because of the location, it would have made $191,000,000, 99% of the amount I have calculated here (prior to any deductions for mitigation).

[1148] I am not, of course, suggesting that this math accurately reflects what Remington would have claimed in that scenario. It does not account for the time value of money, phasing, the allocation of FAR to other parts of the development, that six buildings may not have been possible depending on the amount of land finally acquired, or different profit levels in the earlier time frame. I am only using it to illustrate the point that simply saying low-rise buildings were foreseeable and high-rise were not, while not explaining what the difference means for Remington's claim, leaves a major gap in the argument that Remington's damages should be decreased due to remoteness.

[1149] This leads to a more general point about Remington's claim. The Defendants characterize Remington's claim as exaggerated and too large. But, as Remington argued, in many ways its claim is conservative. It does not include the four other buildings on the 10th Ave Lands, and it does not include the impact on the Interlink Lands or 9th Ave Lands from losing the 10th Ave Lands, an impact that was material. That choice was appropriate given the time frame in which those other developments would have occurred, and the legitimate issues of remoteness associated with indirect losses. However, in considering the remoteness of Remington's claim for the three buildings, it is important not to ignore the things that it did not claim.

[1150] Part of the difficulty for the Defendants is the size of the 10th Ave Lands, and of the Rail Town development as a whole. The evidence at trial was that development is a profitable business. Mr. Hofer testified that if you did an internal analysis of a developer's profits, you would be likely to find that they were in the 25-40% range based on costs. Mr. Davidson's analysis of Remington's commercial developments supports that opinion. Once commercial development on the 10th Ave Lands was foreseeable, such that profits from commercial development were foreseeable then, given the size of the property (at its smallest 5.1 acres) Remington's claim for damages was going to be large.

[1151] Remoteness properly limits contractual damages. Requiring a defendant to put the plaintiff in the position they would have been in but for the breach cannot justify the imposition of any loss on the defendant, however improbable that loss might be. A defendant should only be required to take on the losses that were in the reasonable contemplation of the parties at the time they entered into the contract, so that the defendant can be said to have accepted the risk of those losses.

[1152] Here, the evidence satisfies me that CPR knew the nature of the contract into which it was entering, and the risk for Remington if CPR breached. Prior to contracting it learned that the lands were suitable for development, including commercial development. It found a developer to acquire the lands. It addressed the possibility of development in the contract, ensuring that no residential development would happen there, and that all parts of the land were suitable for development. It based the price for the 10th Ave Lands on an appraisal premised on the highest and best use of the lands being for commercial/office uses oriented to downtown service providers. It ensured that if development was approved, it would participate in the upside of the land value.

[1153] As a result, when CPR chose to breach its contract to Remington it was obligated to accept the consequences of the risk it had previously assumed – compensating Remington for the loss of profits it would otherwise have earned developing the 10th Ave Lands.

Did Remington have a duty to mitigate? Should any deduction be made from its claimable losses in relation to mitigation?

[1154] An injured party who suffers an actionable loss nonetheless has a duty to take all reasonable steps to mitigate the loss. The Supreme Court has held that losses that could have been mitigated, but were not, "are, in effect, caused by the plaintiff's inaction, rather than the defendant's wrong": ***British Columbia v Canadian Forest Products Ltd***, 2004 SCC 38 at para 176; ***Southcott Estate Inc v Toronto Catholic School Board***, [2012] 2 SCR 675 at paras 23-24.

[1155] Mitigation in the context of a contract for property usually involves the plaintiff procuring "alternate property in mitigation of his losses": ***Asamera Oil Corp v Seal Oil and***

General Corp, [1979] 1 SCR 633 at 668; ***Southcott Estate Inc v Toronto Catholic School Board***, [2012] 2 SCR 675 at para 30.

[1156] The Defendants have the burden of showing, on the balance of probabilities, not only that Remington "failed to take reasonable efforts to find a substitute, but also that a reasonable profitable substitute could be found": ***Southcott Estate Inc v Toronto Catholic School Board***, [2012] 2 SCR 675 at para 45; ***Tribute (Springwater) Limited v Atif***, 2021 ONCA 463 at para 14; ***Taylor v 1103919 Alberta Ltd***, 2015 ABCA 201 at para 40.

[1157] The Court's assessment of a plaintiff's duty to mitigate may take into account that plaintiff's claim for specific performance. A claim for specific performance does not eliminate the plaintiff's duty to mitigate, but "a claim for specific performance informs what is reasonable behaviour for the plaintiff in mitigation": ***Southcott Estate Inc v Toronto Catholic School Board***, [2012] 2 SCR 675 at para 36.

[1158] The steps that a party must reasonably take in mitigation are dependent on the prevailing circumstances, including market conditions: ***Sansalone v. Qiu***, 2022 ONSC 286, at para 125, citing ***100 Main Street Ltd v WB Sullivan Construction***, (1978), 20 OR (2d) 401 (CA). Subsequent purchases may be evidence that other development properties were reasonably available: ***Southcott Estate Inc v Toronto Catholic School Board***, [2012] 2 SCR 675 at para 48, cited in ***Akelius Canada Inc v 2436196 Ontario Inc***, 2020 ONSC 6182 at para 41.

[1159] The Defendants supported their claim that Remington had mitigated its loss through the evidence of Mr. Dyack. As previously summarized, Mr. Dyack testified that Remington owned other land for development between 2007-2019, had a high level of project activity and strong financial performance, concluding that it refocused its attention "on other projects after the Alleged Breach". Specifically, Mr. Dyack suggested that had Remington invested the $9,000,000 and earned its documented rate of return of 23.9% then over 15 years it would have earned $224,000,000 on a compound basis, and $113,000,000 after tax.

[1160] I have some serious reservations about the Defendants' submissions on mitigation. As earlier determined, Remington communicated to CPR and the Province its election to accept repudiation rather than pursuing specific performance. However, the things that make specific performance the just and fair outcome in this case are relevant to the mitigation analysis. Specifically, they speak to the availability of a "reasonable profitable substitute" for the 10th Ave Lands.

[1161] The 10th Ave Lands were a large tract of land proximate to downtown and offering the opportunity to bridge the 9th Ave Lands and the Interlink Lands. They made Rail Town a possibility. Without them, it is not. They have no substitute. Unlike the trial judge in ***Southcott***, I do not find that this "land was nothing more unique…than a singularly good investment". The 10th Ave Lands were unique in what they were in general, and in what they were to Remington in particular. Here, Remington has shown that money is an imperfect remedy, and that the land has a peculiar and special value not replaceable in the market: ***Southcott Estate Inc v Toronto Catholic School Board***, [2012] 2 SCR 675 at para 41; ***Strategic Acquisition Corp v Multus Investment Corp*** 2017 ABCA 250 at para 64.

[1162] Indeed, the Defendants did not identify a reasonable profitable substitute, other than the general idea that land might have been available, and the only somewhat more specific idea of "land Remington had available". The only tract of land Mr. Dyack names is Quarry Park, which

was acquired by Remington prior to the breach. Otherwise, he simply refers to "distinct step change in the value of lands held [by Remington] for development and sale in both 2007 and 2010", to Remington holding "other lands that could have been developed at around the Alleged Breach date" and to the broad range of development activities engaged in by Remington.

[1163] This is in contrast to the defendant in ***Southcott***, who identified 81 parcels of raw land suitable for development and 49 subdivided properties available for sale in the GTA in the relevant time period. It also identified other parcels of land acquired by the corporate group of which Southcott was a part, two of which the Court found to be comparable to the land not acquired as a result of the contract breach. The Defendants here did not identify any specific parcels of land acquired by Remington after the breach, or that could have been acquired by Remington, that this Court could consider as a "reasonable profitable substitute" for the 10th Ave Lands.

[1164] The Defendants suggest that Remington had a burden to show how it used the $9,000,000 it saved on the 10th Ave Agreement; that position ignores the Defendants' burden of proof in relation to showing the availability of suitable alternate properties, a burden ***Southcott*** makes clear.

[1165] I note in this respect that much of the evidence the Defendants needed to provide was not in Remington's control – it was evidence about properties in Calgary that would have been a suitable replacement for the 10th Ave Lands, such as provided by the defendant in ***Southcott***. For example, the Defendants' land appraiser identified different parcels of land sold between 2005 and 2006 in appraising the value of the 10th Ave Lands in 2007. That suggests that a similar analysis could have been done to identify properties that were available for sale and sold in, say, 2007-2012, including properties acquired by Remington. That analysis would have allowed the Court to assess whether those were or could have been reasonable profitable substitutes for the 10th Ave Lands.

[1166] Also, as I have done below, the Defendants could have relied on the information provided by Mr. Davidson about commercial developments completed and sold by Remington between 2011 and 2018, and rooted its mitigation analysis there.

[1167] The lack of specificity in the Defendants' approach to mitigation is especially problematic because, without a tangible substitute property to take into account, measuring the effects of mitigation become difficult. I do not know the difference in the cost of that substitute property relative to the cost of the 10th Ave Lands, or the difference in the profit that could have been earned on that land relative to what was earned on the 10th Ave Lands. CPR asks that I decide that because, generally speaking, Remington was profitable and acquired lands, it suffered no loss. In the alternative, it suggests that Remington's losses should be "drastically reduced". I do not know what a "drastic" reduction would involve. And, in any event, I am not satisfied that this approach, unmoored from any specific analysis, is consistent with the direction of the Court in ***Southcott***. I return to this point below.

[1168] The Defendants cite the decision of Justice Morgan in ***Akelius Canada Inc v 2436196 Ontario Inc***, 2020 ONSC 6182, where he held that it was sufficient for the defendants to show that the plaintiff had generally made investments in other properties: ***Akelius*** at para 42. In that case, however, the Plaintiff declined to provide any specifics of its other purchases, and the investment units were "entirely fungible": ***Akelius*** at para 42. Justice Morgan drew an adverse

inference "from the fact that the Plaintiff has refused to produce the relevant details of its post-January 2016 property acquisitions" (***Akelius*** at para 46) and concluded:

> The Defendants have established that the Plaintiff has either failed to mitigate its loss or, perhaps more likely, has mitigated its loss in its entirety. Either way one looks at it, the Plaintiff lost the opportunity to buy one set of investment units, thereby freeing up the funds to buy another set of investment units. With multiple real estate markets at its disposal, the Plaintiff could deploy the funds from the aborted deal with the Defendants in keeping with its own strict financial parameters and in the market or markets of its choosing. The Plaintiff therefore suffered no capital loss or loss of opportunity for capital gains: ***Akelius*** at para 48.

[1169] Here, by contrast, the property purchased was not simply a fungible investment unit. It was a unique property that created the opportunity for Rail Town to be constructed in accordance with the concept plans and vision Remington was developing in 2006-2007. Further, while Remington did not disclose every property investment and development it made after CPR's breach, through Mr. Davidson's evidence it disclosed sixteen commercial office buildings constructed and sold by Remington from 2007-2018. CPR has not suggested that it asked Remington for further information but was not provided it.

[1170] In short, the generic approach to mitigation loss used in ***Akelius*** is not appropriate here.

[1171] I also place no significance on Remington's decision not to develop the Interlink and 9th Ave Lands. It has claimed no loss in relation to those lands, or its inability to develop them. It acquired the lands before the contract breach.

[1172] Moreover, while I have rejected Remington's claim for specific performance, I also do not view that claim as frivolous or improperly advanced. It is relevant to assessing the reasonableness of Remington's conduct in relation to mitigation: ***Southcott Estate Inc v Toronto Catholic School Board***, [2012] 2 SCR 675 at para 36. Specifically, it is the context in which I must assess Remington's decision not to develop the Interlink and 9th Ave Lands pending the resolution of this matter. Remington sought to obtain the 10th Ave Lands, and to build Rail Town as it originally intended. Given the uniqueness of the 10th Ave Lands, that goal was not unreasonable legally speaking. This is particularly so given that, while I have found that Remington communicated its election to accept CPR's repudiation and pursue a claim in damages, I am satisfied that was not Remington's subjective intention or desire. The uniqueness of the 10th Ave Lands, the appropriateness of specific performance conceptually as a remedy, and the context of Remington's election to accept repudiation, justify its decision to pursue specific performance, and to hold the Interlink and 9th Ave Lands pending the resolution of this litigation: ***Cellular Baby Cell Phones Accessories Specialist Ltd v Fido Solutions Inc***, 2017 BCCA 50 at paras 80-81.

[1173] Steps that Remington has taken in 2021 with EllisDon, which is considering developing a train station on the 10th Ave Lands in conjunction with the Province, do not change the loss Remington experienced prior to that time. These were not opportunities that existed previously, other than in 2007, when Remington did make efforts to pursue them with the Province, in an attempt to mitigate. They do not affect Remington's claim for damages.

[1174] In that respect, and perhaps most importantly, Remington did attempt to mitigate its loss. Indeed, and ironically, it is Remington's effort to maintain its relationships with CPR and the

Province, and to pursue what it was told was an opportunity to obtain part of the 10th Ave Lands, that led it to take the steps that have disqualified it from claiming specific performance. Remington acted reasonably and responsibly when told of CPR's intention to breach the contract in December 2006. It sought to avoid or reduce its loss, and to maintain its relationships with CPR and the Province. That qualifies as mitigation. Its efforts failed, not because of Remington, but because the Province was unable or unwilling to continue with its efforts so as to release unneeded land to Remington.

[1175] As noted by Lord McMillan in ***Banco de Portugal v Waterlow & Sons Ltd***, [1932] All ER Rep 181 at 204:

> Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

[1176] Having said all of that, I nonetheless find that some mitigation adjustment is merited here. Mitigation is the duty of a plaintiff, even in cases where specific performance is sought. It is an important principle of contract law, ensuring justice between the parties, and that the defendant is not abused: ***Southcott Estate Inc v Toronto Catholic School Board***, [2012] 2 SCR 675 at para 25; ***Strategic Acquisition Corp v Multus Investment Corp***, 2017 ABCA 250 at paras 60-63.

[1177] As noted, the claim for specific performance is relevant to assessing the reasonableness of a plaintiff's conduct, but it is not determinative of the issue of mitigation: ***Southcott*** at para 36. Here, while Remington's specific performance claim was reasonably brought, it was also unsuccessful. In addition, while the 10th Ave Lands were unique, they were acquired for the purpose of profit. In those circumstances, it was reasonable to expect Remington to attempt to mitigate its loss, as it in fact did in 2006-2007 when it participated in the visioning process.

[1178] Further, I accept the general premise advanced by the Defendants that Remington's active and successful land acquisition and development business create the possibility that it was able to mitigate at least some of its losses through purchasing and developing a reasonable profitable substitute. Specifically, is not unreasonable to infer that not constructing Rail Town left some of Remington's finances, business capacity, expertise and personnel available to focus on substitute development ventures, and that doing so mitigated some of the loss it suffered from not acquiring the 10th Ave Lands.

[1179] The challenge is to identify a fair and justifiable way to quantify that mitigation, based in Remington's actual land acquisition and business activities, and one which does not improperly reduce Remington's claim given my findings that the 10th Ave Lands were unique and

irreplaceable, and that Remington made serious efforts to mitigate when CPR repudiated the 10th Ave Agreement in December 2006.

[1180] In considering how to approach this issue I have focussed on the specifics of the Supreme Court's decision in ***Southcott***. In that case, the plaintiff was part of a corporate group in which single entity corporations were created for the purpose of acquiring land; when the transaction for which Southcott was incorporated fell through, no other lands were acquired by Southcott. At the same time, however, other entities within the group did acquire properties. Those properties were collateral, "in the sense that the transactions would have occurred whether or not the defendant breached its contract with Southcott": ***Southcott Estate Inc v Toronto Catholic School Board***, [2012] 2 SCR 675 at para 54. That, along with Southcott's distinct legal personality, meant that they were not technically mitigation. The Court found, however, that those other properties could be considered as "evidence of the existence of mitigation opportunities": ***Southcott*** at para 55. It noted in particular that two of the properties were clearly comparable to the transaction at issue: "Southcott had agreed to purchase 4.78 acres of land for $3.44 million in August 2004. Ballantry corporations purchased 2.7 acres for $3.3 million in August 2005 and 2.3 acres for $6 million in December 2006": ***Southcott*** at para 56.

[1181] The Court found these properties to be evidence of mitigation available to Southcott:

> It was a choice on the part of the principals of the Ballantry Group as to which corporate entity would be used for each purchase and they elected not to use Southcott. In addition, the trial judge found that "[t]he plaintiff['s] proposed development here was not complex, but rather a relatively straightforward plan for the development of 48 semi-detached residential units" (para. 132). In these circumstances, a straightforward development could have been carried out on a different property by Southcott, had it wanted to mitigate its loss. This corresponds to the modern reality recognized in ***Semelhago*** that "[r]esidential, business and industrial properties are all mass produced much in the same way as other consumer products" (para. 20).
>
> As the Court of Appeal concluded (paras. 25-26), the Ballantry Group's purchases of other properties was evidence that other suitable development lands were available and the decision not to purchase them in Southcott's name was based on other considerations. I agree with the Court of Appeal that the trial judge erred in failing to consider these purchases as evidence of other available and comparable development properties: ***Southcott Estate Inc v Toronto Catholic School Board***, [2012] 2 SCR 675 at para 58-59.

[1182] The difference between this case and ***Southcott*** is, as already emphasized, that the 10th Ave Lands were unique. This is not a case of a mass produced development where any other development could be substituted for the 10th Ave Lands. It was not a "relatively straightforward plan for the development of 48 semi-detached residential units". And, again, unlike the defendant in ***Southcott***, the Defendants provided no examples of reasonable substitute properties that Remington could have acquired or did acquire.

[1183] The approach of the Court in ***Southcott*** explains why I cannot accept the approach of the Defendants and Mr. Dyack that mitigation can be inferred from a) the $9,000,000 that Remington did not have to pay because it did not acquire the 10th Ave Lands; b) Remington's ordinary rate of return from investments; and, c) what Remington would have earned applying

that rate of return to the $9,000,000. The Court in ***Southcott*** did not look at the overall profitability of the Ballantry Group and use that to quantify its mitigation. Rather, it looked at specific properties acquired by that group, that were not acquired by Southcott but that could have been. It identified two that were clearly comparable, noting the comparable size and purchase price. It relied on the fact that the Ballantry Group acquired properties and simply chose to have them owned by a company other than Southcott.

[1184] As already explained, the circumstances of this case are different from those at issue in ***Akelius Canada Inc v 2436196 Ontario Inc***, 2020 ONSC 6182 where such an approach was employed.

[1185] What that suggests is that to assess mitigation by Remington I should look at one of two things: properties that it could have acquired but did not, or properties that it did acquire that can be considered comparable to the 10th Ave Lands and in that way reasonably profitable substitutes. Because I was given no evidence on properties that Remington could have acquired but did not, my focus is only on those that Remington did acquire.

[1186] I thus reviewed Schedule 1 of Mr. Davidson's report, and his summary of the commercial office projects completed by Remington between 2006 and 2018. I focussed on Schedule 1, rather than Remington's activities in general, because those commercial office properties are at least in the same general category as the buildings to be constructed on the 10th Ave Lands. Remington constructed sixteen buildings during that period and earned profits of $403,900,000. Those buildings significantly varied in size, and none can be considered to be substitutes for the 10th Ave Lands. Most were suburban developments or in Edmonton; those in Quarry Park (11 of the 16) were built on land acquired before the contract breach.

[1187] The only land acquired, and building constructed, that is meaningfully comparable to the 10th Ave Lands is the Meredith building, which is a commercial office building proximate to downtown Calgary, that was completed in 2016 and sold in 2018. As a single block development, it is not dissimilar to the Phase 2 building on the 10th Ave Lands, albeit smaller and across the river from downtown. According to an appraisal which was provided as an exhibit at trial, Remington purchased the land on which the Meredith building was developed in January 2009, slightly over 2 years after the December 4, 2006 meeting, and one year after the Province told Remington that no land would be available. The pro forma listed the land acquisition costs as $9,750,000 which, based on Remington's practices, would have been the land cost at the start of construction, a few years after 2009. This land acquisition cost is very close to what, prior to the adjustments necessary by virtue of this judgment, the 10th Ave Lands would have cost as of 2007, making this essentially equivalent to Remington having reinvested what it would have paid for the 10th Ave Lands. The land had a FAR of 5.61. When Remington sold the Meredith block in 2018 it made a profit of $29,000,000.

[1188] I find that the Meredith block is a reasonable substitute property purchased with the funds Remington would have spent on the 10th Ave Lands, the development of which partially mitigated Remington's losses on the 10th Ave Lands. On that basis, I further reduce Remington's damages claim by $29,000,000 to $163,707,836.

What deductions should be made from Remington's claimable losses to reflect land acquisition and holding costs?

[1189] Mr. Davidson's calculation of Remington's loss assumes land acquisition costs of $9,181,000. Those costs were provided to him by counsel for Remington.

[1190] Those costs do not accurately reflect the land acquisition costs that Remington would have been required to pay based on the findings in this judgment. In fact, pending the resolution of the issue in relation to the land in the blue/grey shaded area it is not possible to make a final determination of Remington's land acquisition costs. It either would have paid to acquire 5.1 acres, as set out in the first subdivision application, or it would have paid to acquire 5.1 acres plus the land in the Blue/Grey shaded area – that is, lands in the first subdivision application and those that – perhaps – were already subdivided.

[1191] Once the size of the lands has been determined then, pursuant to Article 2.02 and Article 1.03 of the 10th Ave Agreement, Remington must pay $25 per square foot for the lands in Lot 2 (west of 4th Street) and $10.76 per square foot for the lands in Lot 1 (east of 4th Street).

[1192] I reserve my decision on the purchase price that Remington would have paid pursuant to the 10th Ave Agreement pending further submissions on whether the Blue/Grey area would have been part of the lands acquired by Remington.

[1193] In addition, Remington must pay the amounts required by the Participation Agreement. Pursuant to Article 4.2(a) of the Interlink Participation Agreement on which the parties agreed the 10th Ave Participation Agreement would be based, once Remington applies for a development permit, it could advise CPR that it intended to terminate the Participation Agreement. It could do so in relation to the parcel for which the permit was applied, or for the lands as a whole.

[1194] I have accepted Remington's evidence that the City would have approved the land use in relation to the 10th Ave Lands by December 2007 and would have issued a development permit for Phase 2 by March 2009, and for Phases 4 and 5 by March 2011. Mr. Lee's expert report indicates that Remington would have submitted its application for the development permit for Phase 2, the first building on the 10th Ave Lands, in October 2008. I accept that evidence.

[1195] Further, for the purposes of this calculation, I accept that Remington would have triggered the termination of the 10th Ave Participation Agreement in October 2008 when it submitted the development permit for the first building on the 10th Ave Lands. I further accept that it would have done so for the entirety of the 10th Ave Lands, rather than only for the parcel on which Phase 2 was being constructed.

[1196] Based on the terms of the Interlink Participation Agreement, the 10th Ave Participation Agreement would then require Remington to pay to CPR half of the appraised value of the 10th Ave Lands as at October, 2008 ("the then appraised value") less what Remington had originally paid for the lands and carrying costs. In addition, Remington would deduct $1 multiplied by the square footage in the lands.

[1197] CPR disputed whether the $1 per square foot multiplier applied to the 10th Ave Lands; however, given the agreement of the parties to apply the terms of the Interlink Participation Agreement to the 10th Ave Lands, and the evidence of the Remington witnesses on this point, I accept that this reduction should occur.

[1198] The difficulty remains that I am unable to determine the price to have been paid for the 10th Ave Lands given the uncertainty about how much land would have been sold (5.1 acres or 5.1 plus the Blue/Grey area). In addition, because of the complexity of the trial, and the interlocking nature of the evidence, I am not satisfied that I have heard fully from the parties in relation to the value of the 10th Ave Lands as at October 2008. As such, I also reserve my decision on what would have been payable by Remington pursuant to the Participation Agreement.

[1199] In sum, at this time the damages calculation includes a deduction of $9,181,000 for land acquisition costs, but that amount is subject to further variation based on my later determination of whether the land in the Blue/Grey shaded areas would have been acquired by Remington, the purchase price that would have been paid by Remington under the 10th Ave Agreement, and the additional amounts that would have been paid by Remington under the Participation Agreement. That later determination will be made following a process determined after hearing from Remington, CPR and the Province.

[1200] A further issue arises with respect to holding costs associated with Remington owning the 10th Ave Lands through the loss calculation period, after the triggering of the Participation Agreement. Mr. Crane incorporated costs associated with the payment of for property taxes from 2008-2013 in his costs analysis. As previously explained, I have accepted Mr. Crane's opinion and analysis without amendment. As such, and given that Remington has only claimed lost profits in relation to Phases 2, 4 and 5, that incorporation is sufficient to ensure that holding costs have been properly deducted from Remington's damages award.

Summary of Compensatory Damages

[1201] Remington claimed damages of $322,700,000. I accepted the evidence of Remington's witnesses with respect to the vision, timing and planning of the three buildings, and with respect to the costs, revenues and marketability of the buildings. I applied adjustments to those amounts to account for uncertainties I identified in aspects of their projections, to reflect the reduction in the land size, and to account for mitigation and other necessary adjustments. The analysis can be summarized as follows:

Remington lost profits, unadjusted	$322,700,000
30% adjustment for uncertainty re vision, timing and planning, and for reduction in parcel east of 4th Street SE.	(96,810,000)
5% adjustment for uncertainty re revenues	($16,135,000)
Recoverable operating cost adjustment	($11,351,800)
ENMAX transmission line removal	($3,990,000)
Air Rights Acquisition	($1,705,364)
Mitigation	($29,000,000)
Land acquisition cost adjustment	TBD
Compensatory damages	**$163,707,836**

Is Remington Entitled to Punitive Damages?

[1202] In ***Whiten v Pilot Insurance Co***, 2002 SCC 18 at para 36, the Supreme Court explained that punitive damages are awarded in exceptional cases, where the defendant's conduct "represents a marked departure from ordinary standards of decent behaviour". Ordinarily punitive damages will be restricted to intentional torts or breach of fiduciary duty cases, arising for breach of contract only in "the exceptional case": ***Whiten*** at para 67. They ought to be "imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour": ***Whiten*** at para 94 [emphasis in original].

[1203] Punitive damages serve the purposes of punishment, deterrence and denunciation: ***Whiten*** at para 68. They must focus on the defendant's misconduct, not the plaintiff's loss: ***Whiten*** at para 73.

[1204] In breach of contract cases, the punitive damages must be grounded in an actionable wrong independent of the breach of contract, although that wrong "can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation": ***Whiten*** at para 82; ***Hornstein v Kats***, 2021 ONCA 293 at para 6.

[1205] Remington submitted that it was entitled to punitive damages based on CPR's conduct in relation to the 10th Ave Agreement. It submitted that "CPR's conduct showed a blatant disregard for its contractual obligations" and set out the following as examples to support its position:

(a) CPR concealed its negotiations with the Province.
(b) CPR wasted the City's time and resources with a major subdivision approval by putting the subdivision 'on hold' after it had been approved.
(c) At the December 2006 meeting where CPR told Remington that it had sold the lands to the Province, Mr. Walsh told Mr. Remington to "get over it".
(d) CPR's agreement with the Province initially included a clause that would require Remington to agree that it had no further interest in the 10th Avenue Lands. Mr. Walsh acknowledged that he had this clause removed because he knew that Mr. Remington would never agree to it.
(e) Mr. Walsh and Mr. Hyder, when initially reviewing the offer from the Province, noted that Remington's rights under the Agreement would need to be 'considered' but then they simply ignored those rights and proceeded despite them.
(f) In a May 2007 email, Mr. Walsh told Mr. Hyder not to release the sale agreement with the Province to Mr. Menzies.
(g) At trial, Mr. Walsh scoffed at the fact that the 9th Ave and Interlink Lands had not been developed.
(h) CPR has taken the position throughout the litigation that the 10th Avenue Lands were not surplus, despite the fact that its internal documentation indicated the lands were surplus.
(i) CPR relied on the assertion that the 10th Avenue Lands were not surplus, but nonetheless sold those lands to another party.
(j) CPR knew it wasn't just breaching one contract – it was leaving Remington with two orphaned parcels of land it could not develop while still being obligated under the Participation Agreement to pay millions of additional dollars to CPR for the Interlink and 9th Avenue Lands.

[1206] Remington submitted the following in summary of its position:

> CPR's double dealing on the 10th Avenue Lands was planned and deliberate, with the intent to profit. The Province pursued its negotiations and the purchase of the Lands out from under Remington with knowledge of the Agreement between CPR and Remington and in the face of Randy Remington's refusal to sell to the Province. This arrogant behaviour, demonstrating a complete and utter lack of respect for a party's contractual obligations has no place in the Calgary business community. An award of punitive damages is necessary to denounce the Defendants' outrageous conduct.

[1207] I do not accept Remington's claim for punitive damages. Assuming I could ground an independent actionable wrong in a claim of conspiracy, I nonetheless do not find the conduct of CPR and the Province to constitute a marked departure from ordinary standards of decent behaviour. CPR breached its contract. The lands were declared surplus, the subdivision application had been approved and CPR nonetheless sold the lands to the Province. The Province induced CPR's contract breach because, despite the clear and recurrent information that Remington had a legal interest in the lands, the Province looked away, entering into a contract with CPR wilfully blind to the fact that it would result in CPR breaching its obligations to Remington. Neither Defendant nor their representatives were properly thoughtful about their own conduct or situation, either in 2006-2007 or at trial. None of these were good choices. They could fairly be described as careless and self-centered.

[1208] But, fundamentally, they were about the Province and CPR pursuing their own self-interest to an unlawful extent, rather than the Province and CPR seeking to do an injury to Remington. The Province and CPR didn't care about Remington. They did not think about them one way or another, even when they should have. They acted unlawfully towards Remington and, as a result, are required to pay damages to compensate for the injury they caused. But I am not satisfied any punishment for their conduct is warranted here. I cannot describe CPR or the Province's actions as "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour". It was ordinarily bad, not extraordinarily so.

[1209] I also note that the size of the compensatory damages awarded in this case is significant; in my view adding a punitive award here would result in excessive compensation to Remington.

What interest rate should apply to Remington's damages, and should interest be calculated on a compound or simple basis?

[1210] Remington submitted that it ought to be awarded extraordinary interest, calculated based on its usual rate of return on investment, or on its usual borrowing rate. It further argued that the interest should be calculated on a compound basis, rather than on a simple basis.

[1211] Pursuant to s. 2(3) of the *Judgment Interest Act*, SA 1984 c J-0.5, I may order a different interest rate where I consider it just to do so having regard to "changes in market interest rates, the circumstances of the case or the conduct of the action". The Supreme Court of Canada held in ***Bank of America Canada v Mutual Trust Co***, 2002 SCC 43 at para 50, that compound interest can be awarded where the parties have earlier agreed to it or where "there are circumstances warranting it". Setting rates and methods of interest depends to a significant

degree on judicial discretion: ***Alberta (Minister of Infrastructure) v Nilsson***, 2002 ABCA 283 at para 205.

[1212] The basis for Remington's request for interest at higher rate calculated on a compound basis was that Remington did not just lose profit, it also lost the opportunity to reinvest those profits. It relied on the evidence of its President, Mr. Clayton who, on being asked "I understand that Remington's practice as a business is generally to reinvest its profits and equity in a way that generates further profits" responded, "that's correct".

[1213] I am not satisfied that the circumstances of this case warrant awarding interest other than that in the usual way, through application of the provisions of the *Judgment Interest Act* on a simple basis. The evidence about Remington's reinvestment conduct was minimal; it was not traced through financial statements or substantiated in a meaningful way. Remington cited one answer by a witness to what was an obviously leading question. That is a thin basis for an interest claim that would add hundreds of millions of dollars to Remington's compensation.

[1214] Further, even if I had enough evidence to be satisfied that this was Remington's practice, I am not satisfied that it would be sufficient to justify a higher interest rate. Indeed, in my view it is incorrect to suggest that compound interest of 23.9% on lost profits would be within the reasonable contemplation of CPR and Remington when they entered into this contract for the sale of the 10th Ave Lands. The contract did not deal with interest. It was not a contract for debt, in which the unpaid creditor lost both the repayment of principal and compound interest on that principal provided for by the contract. It was a basic contract for the sale of land. The loss of that land resulted in a significant loss for Remington, one recognized by this judgment as reasonably within the contemplation of the parties in 2002, and as properly compensated by CPR and the Province. Some interest on that judgment is just and proper, but there is nothing special about the facts or circumstances of this case warranting a departure from the statutory interest rate.

[1215] I agree that a trial judge has the authority to vary the interest rate awarded; however, to do so there must be some rational connection between varying the interest, and the underlying dispute between the parties. There must be something about the circumstances of *this* case that makes such an award just.

[1216] The facts of ***Bank of America Canada v Mutual Trust Co***, 2002 SCC 43 are instructive in this respect. There, the respondent refused to advance funds pursuant to an agreement where the appellant's debt would be repaid with interest of prime plus one percent, compounded monthly. The appellant successfully sued for the failure to advance the funds, and at trial was awarded damages plus interest at the rate specified in the agreement calculated on a compound basis. The Court of Appeal reversed this decision, but the Supreme Court restored it.

[1217] In that case, the relationship between the selected interest rate and the compound basis, and the underlying dispute between the parties, is obvious; it was literally part of the agreement giving rise to the dispute and the claim. There was a rational connection. As the Court put it, "If the court was unable to award compound interest on the breach of a loan which itself bore compound interest, it would be unable to adequately award the plaintiff the value he or she would have received had the contract been performed": ***Bank of America Canada v Mutual Trust Co***, 2002 SCC 43 at para 45. It added:

> A contrary rule would lead to inequity and provide incentives to breach contracts. If courts were restricted to simple interest in assessing damages for breach of

> contract, an apparent abuse could occur in the following way. Money lent at compound interest would accrue compound interest until there was a breach of contract by the borrower. The lender would then sue and only be entitled to simple interest on the judgment. This would encourage borrowers not to repay loans. Contract law is not the enemy of parties to an agreement but, rather, their servant. It should not frustrate their mutually agreed intentions but, instead, absent overriding policy concerns, should permit those parties to obtain the benefit of their intended agreement: ***Bank of America*** at para 46.

[1218] The Court thus emphasized the rational relationship between applying compound interest at the contract rate to the damages claim, and to the breach of contract the damages are to redress.

[1219] By contrast, that Remington would ordinarily pay a higher interest rate to borrow money, or ordinarily enjoys a rate of return on investment higher than the statutory interest rate, is not sufficient to create a rational connection to the underlying dispute between it, CPR and the Province. Indeed, it is something likely to be true of many plaintiffs, across a wide variety of contracts resulting in a claim for damages. It is neither a fact that makes Remington particularly unique, nor a fact that has anything to do with the underlying contract for the purchase of land between it and CPR. It is not sufficient to support an elevated claim of interest.

[1220] As such, I require CPR and the Province to pay interest in accordance with the rates provided for in the *Judgment Interest Act* and its associated regulations

[1221] Pursuant to s. 2(1) of the *Judgment Interest Act*, interest is payable "from the date the cause of action arose". CPR argues that the Court should start the accrual of interest on March 19, 2008, which is the date Remington filed its Statement of Claim. It says that prior to that time "CPR was under the impression that Remington had accepted the expiration of the 10th Ave Agreement". It suggests that Remington did not give "CPR any reason to believe that it intended to bring a claim or that interest was accruing".

[1222] I do not accept this position factually for reasons I have already explained. Mr. Remington expressed his objections in December 2006 and CPR brushed them off. Remington's subsequent efforts to mitigate do not amount to acquiescence, and the contemporary record does not support the position that CPR understood Remington to accept what had happened. I note that in the case relied on by CPR, "no one knew about the overpayments when they were made, the overpayments resulted from Chevron's [the plaintiff's] negligence, and … no demand was made for the repayment": ***Chevron Canada Resources v Canada***, 2022 ABCA 108 at para 92. Those facts obviously differ from the facts before me, where CPR was aware – or ought to have been aware – that it was repudiating its agreement with Remington.

[1223] The more difficult question is as to when, in this case, the cause of action arose. The possible dates are December 4, 2006 when CPR announced its intention to breach the 10th Ave Agreement; March 19, 2007 when CPR and the Province signed the Memorandum of Understanding; April 9, 2007 when CPR and the Province signed the contract for sale; June 15, 2007 when Mr. Raby sent the expiration letter to Remington; or, December 15, 2007 when the contract for sale of the 10th Ave Lands to the Province closed.

[1224] In my view, the cause of action arose on December 4, 2006. Commencing an action to compel specific performance of the 10th Ave Agreement would have been legally aggressive, and

I am not surprised Remington chose instead to mitigate its losses and to work with the Province and CPR. At that time, it would not have appreciated that it had a cause of action against the Province. However, CPR had announced its intention to repudiate, and Remington could – and, as it turns out, should – have brought an action in this Court to compel CPR to sell the land to Remington as CPR was contracted to do. At that meeting the relevant representatives of CPR told Remington it was entering into a contract with the Province, that it did not view itself as bound by the 10th Ave Agreement, and that Mr. Remington should "get over it". There was, at that point, no intention on the part of CPR to conclude the 10th Ave Agreement. It had decided to enter into a contract with the Province instead and, in fact, entered into that contract in due course. Further, Mr. Brownlee, the negotiator for the Province, was at that meeting. The Province had taken the steps to induce Remington's contract breach and had, by virtue of the caveat and the terms of the draft memoranda, been alerted to the fact of Remington's interests in the land, but had made no inquiries to determine their nature and extent.

[1225] As at December 4, 2006 both CPR and the Province could have turned back. Had the Province at that point taken steps to follow up on the information it had respecting Remington's legal interests, it could have avoided inducing the contract breach. Its commission of the tort had begun but was not yet completed or inevitable. CPR at that point had no legal obligation to the Province and could have sold the land to Remington as it was contracted to do. Neither CPR nor the Province did turn back, however, and in my view the commencement of the cause of action is more appropriately identified as the point where the legal wrong began than at the point where the legal wrong could no longer have been averted.

[1226] In reaching this conclusion I do acknowledge that Remington's calculation of its losses showed that it would have earned profits commencing in 2011. However, in my view the method for calculating damages ought not to change the ordinary view that interest on damages arising from breach of contract accrue commencing at the date the cause of action arises.

Conclusion

[1227] Subject to resolution of the land acquisition costs, Remington is entitled to $163,707,836 in damages, plus interest calculated in accordance with the *Judgment Interest Act* (non-compounded) as of December 4, 2006.

[1228] The parties may contact the Court to determine an appropriate process for the resolution of the land acquisition cost issue and for determining the appropriate order as to costs.

Heard on the 4th day of April – 3rd day of June and the 20th and 21st days of June, 2022.
Dated at the City of Calgary, Alberta this 20th day of October, 2022.

A. Woolley
J.C.K.B.A.

Appearances:

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D.V. Tupper/Brendan MacArthur-Stevens/Sophie Mansfield/Lindsay Rowell/Geoffrey Hudson Adair/Alexandra Mackenzie/Wajeeha Sattar – Blake Cassels & Graydon LLP
for the Defendant, Canadian Pacific Railway

Shelley J. MacDonald/ Melissa N. Burkett – Alberta Justice
for the Defendant, His Majesty the King in Right of Alberta