

Excerpt of Section 14 of the *Municipal Government Act* and Previous Inquiry Officer Decisions

Expropriation powers

14(1) In this section, “organization” means any of the following organizations in which the municipality is a member or has acquired shares:

- (a) a society under the *Societies Act*;
- (b) an association registered under Part 9 of the *Companies Act*;
- (c) a corporation under the *Business Corporations Act* that is a charity or operates for non-profit purposes;
- (d) a controlled corporation as defined in section 75.1.

(2) If a council wants to acquire an estate or interest in land, inside or outside the municipality

- (a) for a purpose authorized by an enactment,
- (b) to carry out an area redevelopment plan under Part 17, whether undertaken by the municipality alone or in conjunction with another person,
- (c) to improve land owned by the municipality,
- (d) for the purpose of selling the land as building sites,
- (e) to enable an organization to carry out a development as defined in Part 17 or a redevelopment, or
- (f) for any other municipal purpose,

it may acquire the estate or interest in the land by expropriation under the *Expropriation Act*.

(3) No council may expropriate an estate or interest in mines or minerals.

(4) The expropriation of an estate or interest in land that is outside the municipality is subject to section 72.

(5) When the council is of the opinion that the municipality can obtain a more reasonable price or other advantage by acquiring the

whole or a larger portion of any parcel of land of which a part may be expropriated by the municipality, the municipality may expropriate the whole or the larger portion of the parcel.

RSA 2000 cM-26 s14;2016 c24 s7

IN THE MATTER OF THE EXPROPRIATION ACT,
BEING CHAPTER E-16 OF THE REVISED STATUTES
OF ALBERTA, 1980, AND AMENDMENTS THERETO

AND IN THE MATTER OF THE INTENDED
EXPROPRIATION BY THE TOWN OF WESTLOCK OF

THE NORTHERLY EIGHTY (80) ACRES, MORE OR LESS, OF
THE NORTH EAST QUARTER OF SECTION THIRTY THREE (33)
TOWNSHIP FIFTY NINE (59)
RANGE TWENTY SIX (26)
WEST OF THE FOURTH MERIDIAN
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT: HECTARES ACRES MORE OR LESS
A. PLAN 7721021 - ROAD 0.979 2.42
EXCEPTING THEREOUT ALL MINES AND MINERALS

AND IN THE MATTER OF THE NOTICE OF OBJECTION
TO THE SAID INTENDED EXPROPRIATION FILED BY
MARVIN D. MARKS, OF WESTLOCK, IN THE PROVINCE
OF ALBERTA.

AND IN THE MATTER OF AN INQUIRY IN RESPECT THEREOF
PURSUANT TO THE PROVISIONS OF THE SAID ACT BY
REX M. NIELSEN, ESQ., AS INQUIRY OFFICER APPOINTED
BY THE DEPUTY MINISTER OF JUSTICE AND DEPUTY
ATTORNEY-GENERAL TO CONDUCT THE SAID INQUIRY.

REPORT OF THE INQUIRY OFFICER

BEFORE: REX M. NIELSEN, ESQ.

HELD AT: TOWN OF WESTLOCK, COUNCIL CHAMBERS
10003 - 106 STREET
WESTLOCK, ALBERTA

DATE: TUESDAY, JUNE 19TH, 2001

APPEARING FOR THE EXPROPRIATING AUTHORITY -
MR. D.W. MOROZ,
MAH & CHIU, BARRISTERS AND SOLICITORS
SOLICITORS FOR THE TOWN OF WESTLOCK

APPEARING FOR MARVIN D. MARKS -
MR. D. P. MALLON
PROWSE & CHOWNE, BARRISTERS AND SOLICITORS
SOLICITORS FOR MARVIN D. MARKS

- 2 -

I. PURPOSE AND INITIATING PROCEDURE

This is an intended expropriation by the Town of Westlock (hereinafter referred to as "the Town") of the Northerly Eighty (80) acres more or less of the following land:

THE NORTH EAST QUARTER OF SECTION THIRTY THREE (33)
TOWNSHIP FIFTY NINE (59)
RANGE TWENTY SIX (26)
WEST OF THE FOURTH MERIDIAN
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT: HECTARES ACRES MORE OR LESS
A. PLAN 7721021 - ROAD 0.979 2.42
EXCEPTING THEREOUT ALL MINES AND MINERALS

(hereinafter referred to as "the Land"), from the registered owner thereof, Marvin D. Marks (hereinafter referred to as "the Owner").

The Town by Resolution No. 100.2001 on March 19, 2001 resolved to expropriate the Land.

The Town's Notice of Intention to Expropriate dated March 29th, 2001 (hereinafter referred to as "the Notice of Intention to Expropriate") was registered against the title to the Land on April 4th, 2001 as registration number 012094231. Also registered against the title to the Land prior to the Notice of Intention to Expropriate are:

1. Caveat No. 5674SQ registered on December 8, 1971;
2. Caveat No. 842210174 registered on September 24, 1984.

The Town's Notice of Intention to Expropriate was served on the Owner on April 5, 2001.

- 3 -

The Town's Notice of Intention to Expropriate was published in the Westlock News on April 9th and 23rd, 2001 issues of the said newspaper.

The Owners through their then solicitors, Tims & Company, served a Notice of Objection dated the 26th day of April, 2001 on the Town.

The Notice of Intention to Expropriate stated that the work or purpose for which the interest, being a fee simple interest, in the Land is required is for the development of an industrial commercial park.

Clark Dalton, Director (Legal Research & Analysis), Alberta Justice appointed Rex M. Nielsen, Barrister and Solicitor, on April 30th, 2001 as the Inquiry Officer (hereinafter referred to as "the Inquiry Officer") to conduct the inquiry with respect to the intended expropriation by the Town pursuant to and in accordance with the provisions of *The Expropriation Act* and the regulations made thereunder.

On May 16, 2001, Jeanette Fedorak, Co-Director (Legal Services), Civil Law, Alberta Justice, pursuant to Section 23(1)(b) of *The Expropriation Act* extended by 30 days, the time within which the Inquiry Officer had to make his report with respect to the intended expropriation by the Town. On the same date, the said Co-Director extended by 30 days the time for registration of the Certificate of Approval by the Town at the Land Titles Office pursuant to *The Expropriation Act*. The latter extension Order was registered at the Land Titles Office at Edmonton, Alberta, against the Land as Registration No. 012149311 on May 24th, 2001.

The Inquiry Officer served a Notice of Inquiry (hereinafter referred to as "the Notice of Inquiry") on the solicitors for the Town and the solicitors for the Owner, giving notice of an Inquiry Hearing with respect to the Notice of Objection by the Owner to the intended

- 4 -

expropriation by the Town that would be held at the Town of Westlock offices, 10003 - 106 Street, Westlock, Alberta, on Tuesday, June 19th, 2001, commencing at 9:00 a.m. (hereinafter referred to as "the Inquiry Hearing"). Each party was requested in the Notice of Inquiry to file with the Inquiry Officer and each of them with the other, a written brief of their case together with all maps, plans, studies and documents intended to be presented in evidence at the inquiry.

Briefs were filed with the Inquiry Officer by the solicitors for the Town and the solicitors for the Owner.

The Inquiry Hearing proceeded on June 19th, 2001 and concluded on that date. Counsel for the Town and counsel for the Owner appeared at the hearing.

Counsel for the Town advised the hearing that he had no preliminary matters to deal with.

Counsel for the Owner advised the hearing that he had no preliminary matters to deal with.

II. SUMMARY OF EVIDENCE ADDUCED AT THE HEARING

A. EXHIBITS

1. Tab 1 in the Town of Westlock's materials, Town of Westlock authorizing resolution.
2. Tab 2 in the Town of Westlock's materials, document entitled Notice of Intention to Expropriate.
3. Tab 3 in the Town of Westlock's materials, document entitled Affidavit of Service.

- 5 -

4. Tab 4 in the Town of Westlock's materials, document entitled Affidavit of Publication.
 5. Tab 6 in the Town of Westlock's materials, map of the Town of Westlock.
 6. Tab 8 in the Town of Westlock's materials, document entitled town of Westlock Potential Developments.
 7. Tab 7 in the Town of Westlock's materials, land use map of the Town of Westlock.
 8. Document entitled town of Westlock Municipal Development Plan 1998, Bylaw No. 06-98.
 9. Letter from Mr. Bancroft to Mr. Marks dated February 17, 2000.
 10. E-mail from Colleen Thome to Jack and Pat Armitage dated February 16, 2000.
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11. Document entitled Alberta Primary traffic Volume History Report, 1990 to 1999.
 12. Aerial photograph and overlay of the Town of Westlock prepared by Mr. MacKenzie.
 13. Letter to Jack Armitage from the Town of Westlock dated July 14, 1998.
 14. Zoning Plan diagram indicating C3 commercial districting.
 15. Letter from Alberta Transportation dated December 21, 1994.

- 6 -

B. SUMMARY OF TOWN'S WITNESS EVIDENCE

Witness - Mr. Garth Bancroft

The Town's first witness was its Town Manager, Mr. Garth Bancroft. He was sworn by the reporter. He has been employed in that position since 1990.

His formal academic training includes a Utilities Officer designation and a four year University of Alberta, Department of Extension, Local Government Administration Certificate.

He explained that the Town's current Industrial Park is located west of 98th Avenue and north of Highway 18 in the Town of Westlock. He also advised that this industrial park is essentially fully developed and that the Town did not own any land in same for development. This Industrial Park was first started approximately 26 years ago. Exhibit Number 5 was presented to show the chronological development of this Industrial Park.

Mr. Bancroft explained that there was demand for industrial - commercial properties in the Town. Exhibit Number 6 was presented as evidence of such demand. He suggested that high traffic counts on adjacent roadways, larger sized parcels of a five acre minimum, and being located adjacent to Highway 18 east of the Highway 44 are criteria for interested business developers. In cross examination by Mr. Mallon, Mr. Bancroft agreed that the Boston Pizza enquiry is currently on property south of the hospital in the Town. In addition, Mr. Bancroft confirmed that the John Deere people asked the Town to see if land across from the Case dealership would be available for development and that this is a motivator for the development of the Lands.

- 7 -

Mr. Bancroft testified that the highest traffic counts on Highway 18 existed in an easterly direction from the intersection of Highway 18 and 44. Exhibit Number 11 was presented to show traffic counts from as recently as 1999 to substantiate the Town's position on traffic counts. He admitted in cross examination by Mr. Mallon that the redesignation of Highway 794 to Secondary Highway 44 and a new truck stop development off Highway 16 slightly east of Highway 44 are factors of change that would effect traffic count numbers. He also was unable to confirm if the Exhibit Number 11 traffic count numbers were local or through traffic or commercial or industrial or passenger traffic. Moreover, Mr. Bancroft testified that such specific traffic information would be meaningful in an assessment of what this traffic means to land that is going to be designated as industrial or utilized as industrial or commercial.

Other reasons presented by Mr. Bancroft for favouring industrial development of the Lands rather than other property included the nuisance to residential owners of wind carried debris from industrial sites in the prevailing north and northwest winds that would not present a problem in developing the Lands and water and sewer utilities being available for connection to the Lands from adjacent lands to the Lands on the south side of Highway 18.

Mr. Bancroft identified Exhibit Number 8 as the Town's 1998 Municipal Development Plan. Mr. Bancroft confirmed this Municipal Development Plan was created through a review process starting in 1996 and public hearings in 1997 to be finally approved by the then Town Council in 1998. A professional planner assisted in its creation. He confirmed that this plan recommended development of the industrial-commercial park at property on the west end of the Town. Mr. Bancroft confirmed that this Municipal Development Plan emphasized commercial development in the central area of Town and that it is always encouraged to develop the central area of Town. He stated that notwithstanding same, a political decision was made to proceed with the Lands notwithstanding this Municipal Development Plan.

- 8 -

Mr. Bancroft confirmed that this Municipal Development Plan suggested a staging of development for the Town of non-residential development lands with lands on the west part of the Town being in stage one and the Lands being in stage 2 and 3. In cross examination by Mr. Mallon, he said the Town Council decided to change the staging priorities without public input.

Mr. Bancroft testified that the Town wrote Mr. Marks one letter and met with him on a couple of occasions in regard to negotiations. Neither price nor impact on Mr. Marks' business were discussed by Mr. Bancroft with Mr. Marks. The form of development as expressed in Exhibit Number 9 was discussed by Mr. Bancroft. Mr. Bancroft in re-examination by Mr. Moroz, stated that Mr. Marks never got back to the Town about their written enquiry.

Mr. Bancroft testified that the Town was negotiating regarding both the Lands and with owners of land on the west end of the Town at approximately the same time in February 2000. In respect of the development of the Lands, Mr. Bancroft stated that the Town would be looking at both getting their costs back and taking a profit. He testified that the most recent cost information for connecting Town sewer and water to the North East Quarter of Section Thirty-One, Township Fifty Nine, Range Twenty Six, West of the Fourth Meridian would be \$125,000.00 from a quote some time earlier which he says is likely to have gone up by today. He has no exact cost of connecting water and sewer to the Lands.

C. SUMMARY OF OWNER'S EVIDENCE

Witness - Mr. Marvin D. Marks

The Owner gave evidence on his own behalf as his first witness. He was sworn by the reporter.

- 9 -

Mr. Marks is sixty-one years of age and is a farmer in the area of Westlock. He farms approximately three thousand acres. Approximately seven hundred acres of that is leased land. The balance is owned including the Lands. He also owns the south half section of Section Thirty Three, Township Fifty Nine, Range Twenty Six, West of the Fourth Meridian.

Mr. Marks' farming operation is a mixed grain and cow/calf beef cattle operation. He proposes that Section Thirty Three, Township Fifty Nine, Range Twenty Six, West of the Fourth Meridian is the heart of his farming and cattle operation containing the farm yard, homes, buildings, cattle pens and grain storage facilities on the north west quarter site ("the home property") of that section. He also testified to the usefulness and need of the water from dugouts on the Lands to supply water to his cattle pens on the said north west quarter of that section. He described his water and electrical line from the home property to those dugouts for such purposes. He discussed his need of the Lands during calving season. He also discussed his use of the Lands for pasture and particular use for both cattle requiring medical attention and artificial breeding purposes during the spring and summer. He confirmed the Lands would not be used between November and March.

Mr. Marks also testified that a private airstrip exists on the Lands and is used primarily by a farm equipment dealership adjacent to the Lands which Mr. Marks has an interest in. This private airstrip is used by farmers flying in to pick up parts required fast during harvest time. Highway lights are used as reference lights for the airstrip along with a tower with a red light on it at night on the home property for use by such farmers at night. He explained the preparation required for creation of this strip and the three years necessary to establish same.

Mr. Marks confirmed the negotiations he had with Mr. Bancroft as constituting a telephone call and two meetings in the summers of 1999 and 2000 respectively. He explained discussions about ways to arrange for development of the Lands including the Town developing same, a joint venture, or an outright sale as proposed by Mr. Bancroft. He testified that in the

- 10 -

first meeting he told Mr. Bancroft he would give those suggestions some thought and that is where it was left. He testified that the second meeting did not address in any significant detail what the Town wanted to do, how much they would pay or what their plans were.

Regarding the dugout on the property, Mr. Marks testified that it would be costly to move same and that the inlet mechanics would be very important. He testified the inlet for the dugout comes from the south and west of the dugout.

Mr. Marks testified that prior to the Notice of Expropriation he had not considered development of the Lands. Subsequent to that Notice he is prepared to look at the development of the Lands but Mr. Marks testified that his property immediately west of the Industrial Park, if expropriated, would be less damaging to him than expropriation of the Lands. Those westerly lands are not within the Town of Westlock municipal limits.

Witness - Mr. Jack Armitage

The Owner's second witness was Jack Armitage. He was sworn by the reporter. Mr. Armitage owns or is part owner of land on the west side of the Town south of Highway 18 marked on Exhibit 12 by a purple star and legally described as the portion west of the railway line through the North East Quarter Section of Section Thirty One, Township Fifty Nine, Range Twenty Six, West of the Fourth Meridian. He testified this land is zoned industrial and partly highway commercial.

He explained that in approximately 1994 the Town introduced a possible client, The Alberta Wheat Pool, to them who was interested in building an elevator system on rail trackage. That project died of its own volition.

- 11 -

He testified that a farm equipment dealer expressed interest in their land but ended up buying on the east end of Town, a piece of inexpensive property that had been for sale for quite a while. As well, a large truck stop and movie theatre enterprise showed interest in those lands being the Leo Virbes referred to in Exhibit Number 6. That failed as a result the financial backers of same backing out.

Mr. Armitage testified that in July of 1998 the Town suggested, in writing, that if the Leo Virbes transaction was signed with Mr. Armitage, the Town would take over management of servicing to the Armitage property and Armitage would pay them back. Exhibit Number 13 was entered in respect of same.

Mr. Armitage presented Exhibit Number 10 as evidence of ongoing development discussions with the Town for Mr. Armitages' property on the west side of the Town and south of Highway 18. Mr. Armitage stated he left his preferred option and access applications in respect of Exhibit Number 10 with the Town and nothing has been heard from the Town by Mr. Armitage on this since February 2000. Mr. Armitage testifies that development in the west end of the Town is in the direction of the Municipal Development Plan, would bring more business into the west end of Town, bring more traffic into the west end of Town and rebalance out the area.

Mr. Armitage suspects that if the Town development of the Lands proceeds that Mr. Armitage would not be able to develop his lands, would not be able to compete with the Town and would be out of business.

In cross examination by Mr. Moroz, Mr. Armitage testified that he is currently working with a large manufacturing system, international capacity regarding the Armitage property.

- 12 -

Mr. Armitage testified that competing against the Town is not a level playing field and an unfair advantage for the Town.

Witness - Mr. James Peter Seward

The Owner's next witness is James Peter Seward. He was sworn by the reporter. Mr. Seward is a realtor with Muller Realty in Westlock. He has held this position for six years. He has not sold any commercial real estate but his office does. Prior to becoming a realtor he was a teacher for thirty years in Westlock.

Mr. Seward identified on Exhibit Number 7, numerous commercial properties which are currently for sale or which recently have been for sale of a commercial and industrial nature. His evidence identified numerous commercial properties available.

On cross examination he stated that some of those properties have structures on them and all are owned privately.

Witness - Mr. Kim MacKenzie

The Owner's next witness is Kim MacKenzie. He was sworn by the reporter. Mr. MacKenzie's qualifications were accepted by the Town's legal counsel and the Inquiry Officer to provide expert opinion evidence as a professional urban planning consultant.

Mr. MacKenzie testified that he was retained to examine the land use planning context for the Lands that are proposed for expropriation and to determine whether the purpose of the taking was consistent with the land use planning environment of the Town of Westlock or the land use planning regime.

- 13 -

Mr. MacKenzie has viewed the Lands and Mr. Marks' agricultural operation as a use of the Lands. He has also viewed the industrial area of the Town and has toured the Town. He has also reviewed the Municipal Development Plan entered as Exhibit Number 8 and the Town's land use bylaw.

Mr. MacKenzie's view is that there is a substantial amount of available area of undeveloped land in the west part of the Town which is indicated as future industrial land use by the Municipal Development Plan entered as Exhibit Number 8.

Those westerly lands are identified in that Municipal Development Plan as Stage 1 development areas.

He also identifies some confusion between Map 3.1 in the Municipal Development Plan and Exhibit Number 7 regarding residential development.

He refers to specific policies at pages 4, 6 and 10 of the Municipal Development Plan. He also reviewed the Westlock County Municipal Development Plan and comments that this plan recognizes that the Town of Westlock may have to expand its boundaries. He notes that both the Town Land Use Bylaw and Westlock County Land Use Bylaw attempt to control urban development around the town from a policy perspective.

Mr. MacKenzie confirmed that his engagement did not undertake an empirical analysis of the quantity of lands available for either commercial or industrial use. Based on his experience with other communities and driving this community, he states that a significant amount of land is available for future industrial use. This includes large areas within the Town boundaries designated for future industrial use and a significant number of commercial buildings in the central area and some along the major arterial roadways or highways that transect the Town.

- 14 -

His basic impression is that there is a very significant supply of land available in the Town now for both commercial use and industrial use.

Mr. MacKenzie testified that the proposed taking violates the stated objective of the Municipal Development Plan of expanding the existing industrial area in the western part of the Town. In addition he states that the proposed taking does not conform with the staging priority in the Municipal Development Plan which articulates that the west area should develop first.

It is Mr. MacKenzie's opinion that a private developer might well have to apply to amend a Municipal Development Plan such as Exhibit Number 8 if it wishes to propose a development like that proposed for the Lands by virtue of the Notice of Intention to Expropriate.

Mr. MacKenzie indicated that certain reasons make sense for the Town to focus on industrial growth on the west side of Town including, major trunk utility services are already located in the west part of Town, focus industrial traffic and minimize impacts on the rest of Town, minimize traffic between disjointed commercial and industrial sites (traffic, noise, pollution, visual impacts, waste) and minimize exposure to same to residential areas.

Mr. MacKenzie's opinion is that the proposed taking is not sound because it violates or departs from several stated policies enacted by bylaw in the Town's Municipal Development Plan including:

1. expansion of industrial development in the west end of Town;
2. Town's requirement for service roads along arterial roads may not be complied with in the proposed taking's proposed commercial use;

- 15 -

3. the proposed taking's proposed industrial use area appears to conflict with the Municipal Development Plan designation of a significant residential use area in part of the Lands;
4. the proposed taking and development of commercial and/or industrial uses of the Lands contradicts the stated staging priority for development in the Municipal Development Plan.

It is Mr. MacKenzie's opinion that the proposed taking is not reasonably necessary to achieve the town's objectives because the Town possesses several alternatives which are available to meet commercial and industrial growth needs.

In cross examination by Mr. Moroz, Mr. MacKenzie was referred to section 637 of the *Municipal Government Act of Alberta* and stated that this section does not mean that "the municipality does not have to follow its own Municipal Development Plan".

Mr. MacKenzie suggests that if a municipality wants anybody else to respect their Municipal Development Plan and give it meaning and purpose, it should be the first party to follow their Municipal Development Plan.

III. ARGUMENTS ADVANCED ON BEHALF OF THE PARTIES

Mr. Moroz, in his summation, argued that:

1. The objective of the Town is to develop a commercial industrial park on the northerly 80 acres of North East Quarter of Section Thirty-Three, Township Fifty Nine, Range Twenty Six, West of the Fourth Meridian.

- 16 -

2. The Town's evidence is that large parcels are required on Highway 18 east of Highway 44 where the highest traffic counts are.
3. The intended use does not have to be an immediate use but can be a future use.
4. The Town has made a political decision to develop the subject Lands rather than proceed along the western portion of Town.
5. The only issues raised by Mr. Marks are compensation issues.
6. The objective of the Town is not a subject for debate by the Inquiry Officer.
7. The proposed taking is fair, sound and reasonably necessary to achieve the Town's objective.

Mr. Mallon, in his summation, argued that:

1. The proposed taking is not fair sound and reasonably necessary. The test is set out in section 15(8) of the *Expropriation Act*. Rules of legislative drafting presume that legislation avoids superfluous and meaningless words. Every word is presumed to make sense and have a specific role to play. The test the Town must satisfy is whether the taking is fair, the taking is sound and the taking is reasonably necessary for the Town to achieve its objectives. The Inquiry Officer should not be weakening the test or trying to paraphrase it, but should be looking at the test for what it is.

- 17 -

2. Expropriation legislation should be interpreted broadly in favour of the land owner and strictly with respect to the powers of expropriation and the procedures for expropriation.
3. The Town argues that its objective is to develop an industrial and commercial park in this particular quarter section. The Notice of Intention to Expropriate in paragraph 3 says the work or purpose for which the interest in the lands is required is for the development of an industrial - commercial park. The question for the Inquiry Officer is whether it is fair, sound and reasonably necessary for such objective to occur on this property or to the extent the Town has planned for this property.
4. The St. Mary River Irrigation Case states at page 138 *"the hearing is therefore essentially concerned with the factual information surrounding the proposed taking, the purpose for which the land is required and the suitability of a selected land for such purpose."* This should be considered by the Inquiry Officer.
5. The Municipal Development Plan states the westerly industrial properties are slated for development first. That Plan was incorporated by Town By-law after a two year evaluation and public input in 1998 and within six months of its creation the Town was pursuing the Lands in contravention of same.
6. The negotiations between Mr. Bancroft and Mr. Marks did not go past the barest details. They did not talk about pricing, plans or impact on Mr. Marks' operation.

- 18 -

7. Mr. Bancroft's evidence is that the decision to change was politics. The *Municipal Government Act* does not provide that a municipal purpose for which an expropriation can take place is politics.
8. The John Deere dealership in the Town of Westlock approached Mr. Bancroft and said they would like a portion of the Lands. The Town under the guise of municipal purpose has attempted to satisfy this request and in so doing is looking to advantage the John Deere dealership for its choice of land while disadvantaging Mr. Marks. Mr. Mallon states that exhibits 9 and 13 bolster this conclusion as examples of speeding up development of the Lands contrary to the Municipal Development Plan and slowing the pace of development of lands considered as a higher priority in the Municipal Development Plan.
9. Mr. Marks' airstrip and dugout would be impacted by the taking. The taking in Mr. Marks' view is from the heart of his operation and the impacts are significant on him.
10. Exhibit Number 8 is misleading and the evidence shows that there is not such demand for such property. We must note there are no 2001 inquiries, one in 2000 and one in 1999 only. The Owner's evidence through Mr. Seward, Mr. Armitage and Mr. MacKenzie shows there is a lot of commercial property available for sale and available for development. In respect of Industrial property, the Armitage lands represent a large tract of land as well as land north of the current Industrial Park available for development.
11. Mr. MacKenzie's evidence is the taking is not sound for the reasons stated.

- 19 -

12. When you examine whether the taking is fair, sound and reasonably necessary, the issue of fairness must balance the needs of the community against the impact on the Owner. Fairness to other members of the community as well as Mr. Marks must be taken into account. The needs of the community do not require the Lands to be expropriated. It is not fair to use a different standard for development by the Town than for another owner in Town.
13. The taking is not sound because it violates the Municipal Development Plan, the proposed commercial use may not conform to the service road requirements of the Municipal Development Plan, it creates a conflict between residential uses in the future and the proposed industrial park and contravenes the proposed staging set forth in the Municipal Development Plan.
14. It is not reasonably necessary to develop an industrial and commercial park or industrial and commercial lands on the Marks' Lands. There is considerable land available in this town for those purposes.

IV. ARGUMENTS ADVANCED ON COSTS

On the question of costs,

Mr. Mallon and Mr. Moroz each state that *The Expropriation Act* is clear that the Owner is entitled to their reasonable costs.

- 20 -

V. INQUIRY OFFICER'S FINDINGS OF FACT

I FIND THAT:

1. The Town has satisfied all of the requirements of *The Expropriation Act* and taken all the necessary steps to initiate this Inquiry Hearing as required by *The Expropriation Act* and the Regulations under it.
2. The Town has passed the necessary resolution authorizing the filing of a Notice of Intention to Expropriate.
3. The Town proposes to develop a commercial industrial park on the Lands. The Notice of Intention to Expropriate either expressly or impliedly proposes the use of the Lands for the intended expropriation by the Town.
4. There have been minimal negotiations between the Town and Owner to acquire the Land from the Owner for the proposed purpose.
5. The current Town Industrial park is full.
6. There is some demand for new commercial industrial lands in the Town.
7. There is commercial resale property and industrial developable property in the Town of Westlock without developing the Lands. Those other lands are all privately owned and the Town does not control any such lands.

- 21 -

8. The highway and road traffic count information supports that there is more traffic east of Highway 44 on Highway 18 than west of Highway 44 on Highway 18 but the details of the type of traffic and its orientation is not determinable.
9. The Municipal Development Plan includes the Lands in its considerations for future development of non residential commercial property.
10. The Town negotiated with respect to the Lands at the same time as it negotiated with another owner on the west side of the Town of Westlock in February, 2000.
11. The proposed development of the Lands is generally included in the Town's Municipal Development Plan albeit not as a stage one activity.
12. The time required to fill a sizeable commercial industrial park in the Town is significant, taking several years.
13. The Town has not bound itself to any particular proposal for development of the Jack Armitage et al lands as their most recent proposal was conditional on at least one development having been finalized and under construction. That has not occurred. Numerous periodic and current enquiries for development of that Armitage et al property exist. Any failures of such enquiries have been as a result of circumstances beyond those owners or the Town's control.
14. The Town's Municipal Development Plan is an extensive document containing guidelines and a roadmap for organized municipal development.
15. The proposed taking will have an impact on the Owners' farming and cattle raising operations and other business interests. In particular, the use of the

airstrip and water dugout will be significantly negatively impacted and will have a rippling effect on the aspects of the Owner's business on lands adjacent to the Lands.

16. The Town has made a political decision to proceed with development of the Lands in a fashion outside of the specific terms of reference of the Municipal Development Plan.

VI OPINION AND REASONS

The question before me for determination is whether the intended expropriation by the Town is fair, sound and reasonably necessary in the achievement of the objective of the Expropriating Authority, the Town. This is the only finding or determination that I can make under *The Expropriation Act*. I am obliged to conduct this Inquiry Hearing and prepare my report in accordance with *The Expropriation Act*.

In this case, the objective of the Town is not as clear and unequivocal as one might find in another factual circumstance. The Owner argues that the objective is to develop a commercial industrial park but not necessarily on the Lands and impliedly in accordance with the strict reading of the Municipal Development Plan. The Town argues that this objective is specific to the Lands.

I concur with Inquiry Officer McLennan in his unreported May 16, 2001 Inquiry Officer Report in *the Municipal District of Spirit River No. 133 v. Ben and June Kurys and Larry and Marguerite Bradley* that:

"It is not within the Inquiry Officer's scope of Inquiry to challenge the objectives of the expropriating authority. That is, once the expropriating authority has decided that they wish to make certain improvements, that matter is not a subject for debate before, and decision by, the Inquiry Officer".

- 23 -

I have paid careful attention to the Owner's argument that the Town's objective is limited to the general proposition of developing an industrial commercial park and not specifically connected to the Lands. I have made a finding of fact that the Notice of Intention to Expropriate either expressly or impliedly proposes the use of the Lands for the intended expropriation by the Town. The Town's Municipal Development Plan includes the Lands in its consideration of lands for future expansion. It also authorizes the Town to bank industrial land and service it for resale. This necessarily implies that the Town may take such steps for current and future purposes.

In consideration of the evidence and the interplay between the actions of the Town and the Municipal Development Plan, I am compelled to accept that the objective of the Town is not limited to the Owner's position as stated above, but does include the specific use of the Lands. Accordingly, I do accept that the Town's objective in respect of this matter is the development of these Lands for an industrial commercial park. Having concluded this being the objective I must turn to the test I must apply to these proceedings as proposed in argument by counsel for the parties.

I accept that the test set forth in section 15(8) of the *Expropriation Act of Alberta* is not one capable of being reduced to a paraphrased statement. In my view, it does require an application of the specific components of the test to the evidence and findings of fact. In certain factual circumstances it is conceivable that each of those statutory components may have a greater or lesser importance dependent upon the evidence and facts before the Inquiry Officer.

It is not my job to enquire into whether the Owner or other interested land owners think the expropriation is fair. I am obliged to sit objectively, providing my objective opinion whether the Town is acting fairly and soundly in meeting their objectives. It is not an acceptable reason in and of itself that a real estate owner or business owner or other party with an interest in real estate as defined in the *Expropriation Act* is injuriously affected by an expropriation to conclude that such an expropriation is not fair, sound and reasonably necessary to achieve the

- 24 -

objectives of the expropriating authority. Whereas some expropriations may have no real negative impact on an owner, it is very often the case that an owner such as the Owner in these proceedings is at least inconvenienced if not seriously affected by such expropriation. Expropriating authorities are faced with this consideration on a regular basis and must make decisions to go forward notwithstanding some negative impacts such decisions might have or change their minds and not proceed.

The *Municipal Government Act of Alberta* provides the Town with legislative authority to expropriate an estate or interest in land pursuant to the provisions of the *Expropriation Act of Alberta*. The intent of the Town's Municipal Development Plan and their Notice of Intention to Expropriate are in accord with the *Municipal Government Act of Alberta* provisions. The Town's Municipal Development Plan does not eliminate the Lands from future development considerations. It rather expressly includes those Lands for future development. The opposition to such proposed development of the Lands is really one of timing. The Municipal Development Plan of the Town provides that the development of the Lands should be later than other lands referenced in that Plan. Opposition by other land owners in the Town of Westlock includes that of timing and that of unfair advantage. I am not convinced that such unfair advantage will materialize from the development of the Lands proposed by the Town.

I am unimpressed and disappointed in the lack of communication and limited negotiation by the Town for the acquisition or other development models with respect to the Lands. This is a serious undertaking by the Town with potentially serious effects on the Owner. What has occurred is barely negotiations. Notwithstanding same, I cannot conclude that such actions were with dishonesty or malice in mind. I do not find anything sinister in the fact that the Town was negotiating with two owners in February, 2000 as referred to in my findings of fact. I accept that the Town is attempting to generate better and more business for the Town and its members. It is logical that all avenues of development would be considered.

- 25 -

While it is clear that an impact will occur on the Owner as to his business operations and to the Town in respect of traffic and other aspects raised in these proceedings as a result of the intended Expropriation, I keep coming back to this being a matter of a timing issue and the fact that development of the Lands is part of the long range plan for the Town. The south half of Section thirty three, Township fifty nine, Range twenty six, west of the fourth meridian is shadowed in the Municipal Development Plan of the Town for long term expansion and annexation as well. This clearly shows an intention to utilize three quarters of the Owner's land in that section in the future.

As the Owner has provided evidence of the inlet to the dugouts on the land being from the south and west, it is my view that such water facilities are mechanically moveable at a cost that can be considered in a compensation consideration. The same is true of the underground water line and power line. Other possibilities for handling the water and electrical lines such as easements may be available in respect of same. I believe the usefulness of the airstrip may be significantly lost should the proposed expropriation proceed. I am not satisfied that this will have a negative impact on the business that airstrip supports.

While evidence from the Town expresses the decision to move on the expropriation of the Lands as being a political decision, the entire body of evidence in these proceedings implies to me a more complicated rationale for that decision being made which satisfies me that the authorizing legislation in the Province of Alberta has been complied with in proceeding with this intended expropriation by the Town.

The evidence of the objectors point out specific variances from the Town's Municipal Development Plan in respect of the intended development of the Lands. That Plan is expressed as a long term ideal. As was expressed in the Inquiry Hearing, such Plans go through an evolutionary phase. One Plan evolves into another over time. It is my opinion that the Town's proposed development of the Lands is not contrary to the Town's Municipal

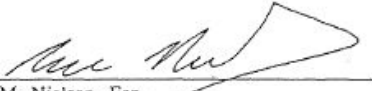
- 26 -

Development Plan, but rather is in general accordance with the Plan, but for the timing of same, and a further step in the evolution of same. The Town is not restricted to that Plan by chapter and verse.

Having regard to all the evidence presented, the intentions of the Town, the impact on the Owner and other owners of real estate in the Town of Westlock, I find that the intended expropriation of the Marks Lands is fair, sound and reasonably necessary in the achievement of the objective of the expropriating authority, the Town of Westlock, to develop an industrial-commercial park on the Lands. I reiterate that I am not impressed with the lack of communication and meagre negotiations but this does not compel me to reverse or restate my opinion stated above.

Pursuant to section 15(10) of the *Expropriation Act*, the reasonable costs of the Owner in respect of these proceedings shall be paid by the Town.

DATED at the City of Edmonton, in the Province of Alberta, this 28th day of June, 2001.



Rex M. Nielsen, Esq.
Inquiry Officer
1700 Oxford Tower
10235 - 101 Street
Edmonton, Alberta
T5J 3G1

IN THE MATTER OF the *Expropriation Act*, being Chapter E-13 of the *Revised Statutes of Alberta*, 2000, and amendments thereto ("**Act**");

AND IN THE MATTER OF the intended expropriation by the Minister of Infrastructure of a fee simple interest in those lands described as:

All that portion of the South West (SW 1/4) Quarter of Section Ten (10), Township Seventy (70), Range Seventeen (17), West of the Fourth (4th) Meridian, standing under Certificate of Title 032150909+3 and shown hatched on the sketch plan attached to and forming part of this document containing 1.68 Hectares (4.2 Acres), more or less
Excepting thereout all mines and minerals (the "**Lands**");

AND IN THE MATTER OF the Notice of Objection to the said intended expropriation filed by Leslie Howard Johnson by his solicitor, Chelsea Tkachuk;

AND IN THE MATTER OF an Inquiry in respect thereof pursuant to the provisions of the said *Act* by Graham McLennan as Inquiry Officer appointed by Clara Cerminara, Barrister and Solicitors, to conduct the said Inquiry;

**REPORT OF THE INQUIRY OFFICER
GRAHAM McLENNAN, Q.C.**

November 4, 2011

COUNSEL

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Exhibits1

EVIDENCE OF THE EXPROPRIATING AUTHORITY1

Mr. Landon Reppert.....1

Cross-Examination of Mr. Reppert.....5

Re-examination of Mr. Reppert.....9

Mr. Alan Griffith9

Cross-Examination of Mr. Griffith11

EVIDENCE OF THE OBJECTORS11

Leslie Howard Johnson.....11

Cross-Examination of Mr. Johnson11

SUMMARY OF ARGUMENT11

Expropriating Authority.....11

Objectors.....12

FINDINGS OF FACT.....13

OPINION ON THE MERITS OF THE INTENDED EXPROPRIATION AND REASONS THEREFOR15

APPENDIX 1 – LIST OF EXHIBITS18

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INTRODUCTION

The Expropriation Inquiry was held on Monday, October 31, 2011, at the Lac La Biche Provincial Building, 1st Floor, 9503 Beaverhill Road, Lac La Biche, Alberta. The expropriating authority, the Minister of Infrastructure (“**Expropriating Authority**”), was represented by Mr. John-Marc Dube of Alberta Justice, Civil Law. The Objector, Leslie Howard Johnson (the “**Objector**”), was represented by Ms. Chelsea Tkachuk of Edmonton, Alberta.

This Inquiry concerns the intended expropriation of a portion of the Objector’s lands for the construction, development, and maintenance of highway (public road). Counsel for the Expropriating Authority and counsel for the Objector agreed that all appointments, notices, filings and registrations with respect to the intended expropriation, the objection and this Inquiry have been properly performed.

Evidence was given under oath.

SUMMARY OF EVIDENCE

Exhibits

All exhibits entered in evidence were entered without objection from counsel. A list of the exhibits is attached to this report as Appendix 1.

All of the exhibits are attached to the Inquiry Officer’s Report provided to the Expropriating Authority. With the consent of all parties, the exhibits are not attached to copies of this Report provided to the Objectors.

EVIDENCE OF THE EXPROPRIATING AUTHORITY

Mr. Landon Reppert

Mr. Reppert advised that he was a professional engineer having received his degree in 1996. He has been working with Alberta Transportation since 2005. His prior experience was seven years with an engineering consultant firm. Mr. Reppert’s title is presently Acting Regional Director, Fort McMurray Region, with Alberta Transportation.

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- 2 -

Mr. Reppert advised that the Crown is seeking to expropriate a section of Mr. Johnson's land as part of a project for upgrading Highway 63, initially to expressway status and ultimately to freeway status, from the junction of Highway 55 to Fort McMurray (the "Project").

Mr. Reppert testified that some of the work has been done for the Project as the section of Highway 63 down to Highway 881 is open to traffic and construction is proceeding on other sections. He advised that phase 1 of the Project, the upgrade to expressway status, involves twinning the highway and the use of existing township roads, approximately every two miles, for access to Highway 63. When phase 2, freeway status is obtained, access will be further restricted to interchanges only, approximately every ten miles or sixteen kilometers. This requires service roads to be constructed to parallel Highway 63 to allow access to the planned interchanges.

Mr. Reppert advised that the twinning of Highway 63 to achieve expressway and, ultimately, freeway status is required because:

- (a) Traffic volumes on Highway 63 to Fort McMurray are increasing.
- (b) Large, heavy industrial loads travel this road.
- (c) The upgrading of Highway 63 will increase safety especially in light of the larger loads and increased traffic volume.

Mr. Reppert identified the Functional Planning Study Final Report completed by Castle Glen Consultants for Alberta Transportation, at Exhibit 1, Tab 1 ("Functional Plan"). Further, the Functional Plan identifies the alignments required for twinning sections of Highway 63 as well as identifying service roads required for the interim stage and service roads required for the final upgrading of Highway 63 to freeway status (when connection is only via interchange).

Mr. Reppert advised that, in preparation of the Functional Plan, the consultant conducted open houses, technical review committee meetings, and discussions with the local

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- 3 -

municipality. He advised that at the open houses, all of the members of the public are invited to come and review plans and options that are being prepared and considered.

Mr. Reppert advised that the Functional Plan would be the basic guide for Alberta Transportation in the development of the Project.

The Functional Plan covers about 70 kilometers of Highway 63. However, detailed work done by the engineering consultants for the design of specific sections typically cover 15 to 30 kilometers at a time.

Mr. Reppert testified that the Expropriating Authority intends to expropriate a section of Mr. Johnson's land for the purpose of construction of a service road for the Project. The service road is required, at the expressway status stage, to provide legal access for landowners. The proposed service road that parallels Highway 63 is designed to provide access for both Mr. Johnson and his neighbour, Mr. Cochrane. Mr. Reppert identified Exhibit 1, Tab 2, a plan which shows ownership of land and has superimposed a design of the Project and the proposed areas of expropriation marked in red.

Mr. Reppert advised that the Crown is responsible for the construction of the service road. Once it is constructed, the service road is surveyed and transferred to the local municipality, in this case the County of Athabasca.

Mr. Reppert advised that, typically, service roads parallel the highway. By paralleling the highway, service roads generally are the shortest distance possible. This keeps construction costs and maintenance costs to a minimum. In addition, it is beneficial to avoid having service roads crossing pipelines or utility corridors. Typically, the cost of construction over utility corridors or pipelines is higher than not having to cross pipelines or utility corridors with roadways.

Mr. Reppert addressed a concern raised by the Objector that a service road adjacent to Highway 63 could create a hazard to motorists who may think it is a third lane of Highway 63. Mr. Reppert opined that he would not think that motorists would conclude that this was a third lane of Highway 63. Highway 63 would be paved and the service road would be

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- 4 -

gravel. Further, there will be a depressed median or a ditch seeded with grass between the highway and the service road.

Mr. Reppert advised that Alberta Transportation's plans are to proceed with the twinning of Highway 63 in the near future. Once all of the land has been acquired, approvals are in place for roads, utilities, permits and any other regulatory approvals, Alberta Transportation would proceed with construction.

Mr. Reppert referred to a letter he authored dated March 10, 2010, found at Exhibit 2, Tab 12. He advised that this letter addressed concerns that he understood were raised by the Objector. One of the concerns addressed the suggestion that the service road could be moved to the west side of Mr. Johnson's property and then run parallel to Highway 63 coming to either a dead end or turn back in an eastward direction to connect with Highway 63. Mr. Reppert addressed this suggestion in his March 10, 2010, letter and noted:

- (a) Alberta Transportation generally constructs service roads adjacent and parallel to the highway. Further, location of service roads is designed to limit the number of direct access points to the highway.
- (b) Building the service road farther west would increase the length of the road and thereby increase the cost of construction. He advised the typical cost to build a service road would be in the neighbourhood of \$200,000 to \$250,000 for each half a mile.
- (c) There are additional costs associated with crossing utility corridors/pipelines. One would need to obtain agreements from all of the utility companies and address issues that are involved when roadways cross utilities/pipelines.
- (d) The adjacent and parallel service road proposed by Alberta Transportation would provide a shorter travel distance for farm equipment.
- (e) The shorter service road, as proposed by Alberta Transportation, would reduce the costs of snow removal and maintenance of the gravel service road by the local municipality.

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- 5 -

- (f) If Mr. Johnson's proposed service road location was adopted, and it came to a dead end, then additional expenses would be incurred in creating an access to the south of Mr. Johnson's property. This would also add another access point to Highway 63, which generally is to be avoided.

Mr. Reppert addressed another option that had been suggested: namely, the construction of a right in, right out access from Mr. Johnson's property. Mr. Reppert advised that such an access is generally not desirable. It does not provide all directional access. If you wanted to travel in a northerly direction, you would have to turn on to Highway 63 travelling south, do a u-turn at some point and head in the other direction. Such traffic flow and u-turns are not desirable in the design of highways.

In reference to Exhibit 1, Tab 2, at page 1, Mr. Reppert identified that there was a gap in the two areas coloured red which the Crown seeks to have expropriated. Mr. Reppert advised that that this portion of land has already been subdivided. Further, that as part of the subdivision approval, land was dedicated to the Crown for the future construction of a service road. Therefore, this area between the two red-shaded areas is already owned by the Crown and can be used without any further compensation, for the construction of a service road.

Cross-Examination of Mr. Reppert

Ms. Tkachuk asked Mr. Reppert to review his letter found at Exhibit 2, Tab 12, dated March 10, 2010. The first concern noted in the letter appeared to be safety. Ms. Tkachuk asked how moving the service road one mile to the west would impact safety, as there would be the same number of access points to Highway 63. Mr. Reppert responded that constructing the service road to the west would not result in any additional access points, but the service road would be longer. Further, Mr. Reppert noted that the length of the service road would make it less efficient for motorists because it would take longer to travel down a service road to the west, as proposed by Mr. Johnson. As well, Mr. Reppert noted there would be cost implications for construction and maintenance of a service road located to the west.

Ms. Tkachuk asked how much longer it would take to travel on a service road constructed to the west, and Mr. Reppert responded that it would be approximately 30 seconds to

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- 6 -

a minute longer. Mr. Reppert noted that there would be an additional half mile of construction, and the service road would then turn back to the east, which would include crossing of a utility corridor. Thus, there would be additional costs of construction crossing the utility corridor and approximately double the maintenance costs.

Ms. Tkachuk asked Mr. Reppert to identify what safety concerns he had. Mr. Reppert noted that the service road would have 90-degree turns, rather than flowing in a straight line. There would also be additional intersection points which may decrease the safety of the service road. Mr. Reppert agreed that appropriate signage and other steps could be taken to construct a safe and efficient service road in the location proposed by Mr. Johnson, although it would not be as efficient or economical as the service road proposed by the Expropriating Authority.

Ms. Tkachuk asked Mr. Reppert about the costs of construction to build a service road in the location proposed by Mr. Johnson. Mr. Reppert replied that he does not have specific costing, just his general understanding that it would be approximately \$250,000 in additional construction costs, plus costs for construction of the roadway over the utility corridor. Costs related to constructing the roadway over top of a utility corridor could range from \$200,000-\$700,000 per utility, for a total in this case of approximately \$1.5 million. Mr. Reppert was asked why a specific cost estimate had not been done for Mr. Johnson's proposed route. Mr. Reppert replied that Alberta Transportation was comfortable that they knew from experience what the range of costs of construction were for a service road, and for the crossing of utilities with roadways, and this information was sufficient to address Mr. Johnson's proposed route.

Mr. Reppert advised that Alberta Transportation had not contacted the utility companies to specifically determine what their position would be with respect to any crossings required, if Mr. Johnson's proposed location for the service road was adopted.

Ms. Tkachuk then asked Mr. Reppert about the position of Alberta Transportation that Mr. Johnson's proposal would adversely impact farming operations. Mr. Reppert advised that the impact would be the additional distance that farming equipment would need to travel based on a longer service road. Mr. Reppert agreed that there were trees on the northern portion of the proposed expropriation, which is coloured in red on Exhibit 1, Tab 2, at page 1. He agreed

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- 7 -

the majority of these lands were treed. Ms. Tkachuk asked if those trees were removed and a service road constructed, would not the land be exposed to wind and traffic which could negatively impact farming operations. Mr. Reppert advised that he was not an expert in the field of farming and was unable to state whether the removal of trees would impact Mr. Johnson's farming operations.

Ms. Tkachuk asked whether there had been any specific investigations done with respect to how much more money it would cost for snow removal or maintenance of an extra mile of service road. Mr. Reppert did not have specific dollar estimates. He simply noted that whatever the costs were, they would be 50% higher if the service road route proposed by Mr. Johnson was constructed. Mr. Reppert was unable to comment on what percentage of the local municipality's budget for road maintenance and snow removal this extra 50% may represent.

Mr. Reppert was asked to describe what type of repair would be involved with the gravel service roads. He replied that the local authority would perform blading of the service road, periodically perform "shoulder pull" and periodically apply additional gravel. He also suggested there would be mowing of grass on the service road right-of-way. Mr. Reppert was unable to provide a per unit cost of maintenance services such as these performed by the local authority.

Mr. Reppert agreed that over the 70-km. section of the Project, there are presently 200 direct accesses to Highway 63. He advised that it was the intention of Alberta Transportation, in bringing Highway 63 to expressway status, to remove all existing direct accesses except for connections made to the adjoining local County road network. Further, with respect to negotiations with other landowners involving access, Mr. Reppert is not aware of any negotiations that have permitted the landowners to continue to have direct highway access.

Mr. Reppert agreed that it was possible to develop and maintain Highway 63 as contemplated without building a service road as proposed on the Johnson lands. However, this would require a connection to Highway 63 being built from the south, which would require the purchase of the Haley residence.

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- 8 -

Mr. Reppert stated that the purchase of the Haley residence will be required, if the residence exists when Alberta Transportation constructs Highway 63 to a freeway status and the service road needs to connect through those lands. Further, he indicated that the freeway status will be achieved for Highway 63 some time in the future, which may be 20 or 30 years from now.

Mr. Reppert agreed with Ms. Tkachuk that it is fair to state that a continuous service road running through Haley's lands, the Cochrane lands and Mr. Johnson's lands will not happen for 20 to 30 years.

Mr. Reppert indicated that he was not aware of any concessions made to other landowners near Mr. Johnson with respect to access or proposed service roads. However, Mr. Reppert did clarify that the owner of the northeast 34-60-17, west of the fourth meridian, did negotiate a change in location of a proposed service road. However, this landowner (the property being identified on the first 2 pages at Tab 3 of Exhibit 1) had the proposed service road going through the middle of a gravel stockpile and adjacent to a Telus right-of-way that included a Telus tower site. Accordingly, there were adjustments to the service road to take these conditions into account.

Ms. Tkachuk noted in the Functional Plan, paragraph 9.114 (at Tab 1 of Exhibit 1), there was a discussion about maintaining natural habitat. She asked Mr. Reppert whether there is consideration to maintaining natural habitat where possible. Mr. Reppert replied that the process is to inventory fish and fish habitat as part of an ongoing federal environmental impact assessment. Further, a detailed environmental impact assessment considers water courses and general impact on the environment with an eye to considering what can be done to minimize impacts on the environment. Ms. Tkachuk asked whether Mr. Reppert would agree that removal of the trees on Mr. Johnson's lands would impact the environment. He replied that he does not believe that removal of a strip of trees is an impact to the environment. Generally, with respect to tree removals, he advised that requirements of the *Migratory Bird Act* must be complied with to ensure there is no disturbance to nesting birds. He agreed that there could be species, other than nesting birds, living in the trees on Mr. Johnson's property. Further, the removal of those trees might impact the habitat of species that might be living there. Mr. Reppert noted that

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- 9 -

Mr. Johnson's proposed route appears as though it would result in the removal of a significantly larger treed area and may have significantly more impact on wildlife and the environment than the route proposed by Alberta Transportation and their consultants. He further noted that Mr. Johnson's proposed route would have the service road constructed through bush, creating the potential for additional animal-vehicle collisions.

Re-examination of Mr. Reppert

Mr. Reppert was asked to clarify that the Haley residence is south of Mr. Johnson's property. Further, the first quarter to the south of the Johnson lands is the Cochrane property, then the next quarter to the south is the Haley property. Mr. Reppert further clarified that the Haley residence is located right where the proposed right-of-way for the service road would be constructed. To construct the service road to the north along the parallel alignment would require the acquisition and removal of the Haley residence.

Mr. Reppert confirmed to Mr. Dube that he was not a biologist or an environmental engineer or anything like that. Further, there was an environmental assessment done, or at least considered by those who prepared the Functional Plan, and there were no concerns raised about the trees on the proposed right-of-way for the service road on Mr. Johnson's property in that environmental assessment, as far as he is aware.

Mr. Alan Griffith

Mr. Griffith advised that he is a professional engineer working with Genivar. He graduated from the University of Alberta with an engineering degree in 1976. He worked for Alberta Transportation between 1977 and 2009, primarily engaged in supervising highway construction projects and administering highway districts or construction in highway regions. Mr. Griffith has been working with Genivar since 2010. His present title is Senior Engineer.

Mr. Griffith advised that Genivar was retained to provide design and construction consulting services on the first 34 kilometres of Highway 63 north of the junction with Highway 55. Mr. Griffith advised that there was a Functional Plan completed several years ago and that Genivar was employed to complete detailed design for this portion of the Project. The

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- 10 -

detailed design was prepared for tender and eventual construction of this stage of the Project. Genivar looks at the individual properties as part of their assignment to take the Project from the Functional Plan stage to an actual detailed plan to the as-built roadway.

Mr. Griffith identified the aerial photographs and superimposed detailed road plan which is found at Tab 2 of Exhibit 1. Genivar, in fact, prepared this plan, which amongst other things identifies the right-of-ways that need to be acquired for the construction of the Highway 63 Project, which includes the accompanying service roads. These detailed plans are referred to as the individual ownership plan, or IOP.

With respect to Mr. Johnson's IOP found at Tab 2 of Exhibit 1, Mr. Griffith noted that it identifies an existing service road dedication, and the designed service road takes this roadway dedication into account. Mr. Griffith advised that design standards for service roads include a 30-m. right-of-way with typically an 8- or 9-metre graded top. Further, they are built to a local road standard in conjunction with standards required within the County of Athabasca. Mr. Griffith identified at page 35 of Tab 1, Exhibit 1, the design grid for the proposed service roads.

Mr. Griffith was asked to comment on the route for the service road proposed by Mr. Johnson. He advised that such a road could, physically, be built. However, this would involve the road crossing pipeline right-of-ways. This would involve investigation of things such as protective cover over any such pipelines or depth of cover underneath public roadways. This would need to be identified and determined whether it would be sufficient for development of a service road. Further, depth of cover is considered the minimum amount of earth that would be required above a pipeline. He advised that it was typically 1.4 metres. Further, he advised there might be requirements for venting or casing or adjusting the depth of cover if the service road was to cross pipelines. Mr. Griffith noted that the location of the service road proposed by the Crown avoids crossing any pipelines or utility corridors.

Mr. Griffith advised that Genivar has checked previous legal surveys and plans in preparing the detailed construction drawings. It appears that a right-of-way for a service road was taken as a condition of subdivision when an area of Mr. Johnson's land was subdivided. That area is identified as the area between the two red markings found on Tab 2 of Exhibit 1.

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- 11 -

Cross-Examination of Mr. Griffith

Ms. Tkachuk asked Mr. Griffith that, of the 75 kilometres of new service road proposed, how many crossings would there be of pipelines. Mr. Griffith replied that there would be quite a few and agreed that to have a crossing of a pipeline, if Mr. Johnson's proposed route were adopted, would not be unusual.

EVIDENCE OF THE OBJECTORS*Leslie Howard Johnson*

Other than identifying himself as a resident of Wandering River and the owner of the Lands, Mr. Johnson gave no further evidence in chief.

Cross-Examination of Mr. Johnson

Mr. Johnson agreed that his main concern is with the loss of trees that would result from the proposed expropriation and how that would affect his residence as well as his farming operations. Mr. Johnson advised that the impact on farming, the wind, the noise and the loss of privacy are his concerns with the removal of the trees on his property.

SUMMARY OF ARGUMENT*Expropriating Authority*

Mr. Dube submitted that the intended expropriation of Mr. Johnson's Land is fair, sound and reasonably necessary. The expropriation is required to accomplish the twinning of Highway 63 initially to an expressway status or standard, and ultimately to a freeway status. The twinning is to increase safety and to accommodate the increased traffic volumes as well as large loads which are travelling to Fort McMurray from other parts of the province. As a result of being upgraded to expressway status, Highway 63 has direct access points which will be removed. As the Crown is legally required to provide access to affected landowners, a service road is required.

Mr. Dube summarized the evidence of Mr. Reppert. Mr. Reppert described the proposed location of the service road and the alternate route suggested by Mr. Johnson.

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- 12 -

Mr. Reppert advised of the benefits of having the service road both parallel and adjacent to Highway 63. This would be the most efficient design for the service road location in terms of construction and maintenance which would benefit the Crown as well as the County. Mr. Dube also summarized Mr. Reppert's evidence concerning the impacts of Mr. Johnson's alternate route. He testified that this route increased the length of the service road, increasing the cost of construction and the cost of maintenance. In addition, the road would be less safe than a service road paralleling and adjacent to Highway 63. Costs of construction would increase because of the pipelines or other utility rights-of-way that would need to be dealt with, if Mr. Johnson's alternate route was adopted. Finally, there was already land dedicated that could be used for the service road that was owned by the Crown and would not need to be expropriated.

Mr. Dube also summarized the evidence of Mr. Griffith. He summarized that Mr. Griffith described the design guidelines for construction of a service road and the detailed engineering work and drawings done by Genivar.

Mr. Dube submitted that the proposed expropriation is fair, sound and reasonably necessary in the attainment of the goals of the Expropriating Authority. Further, regarding Mr. Johnson's objections, Mr. Dube submitted that: Mr. Johnson's residence is set back a long way from the line of trees that would be removed and therefore the privacy concern is minimal; any such impact could be compensated with the process at the Land Compensation Board; the alleged impact on the farming operations would also be a matter that could be dealt with through the compensation process at the Land Compensation Board. Mr. Dube also noted that new trees could be planted by Mr. Johnson to recreate the shelter belt.

Objector

Ms. Tkachuk noted that the stated objective of the Expropriating Authority was the construction, development, and maintenance of Highway 63. She submitted that the proposed service road is incidental to this objective and that it was possible to construct Highway 63 without the construction of the service road as it is currently proposed by the Expropriating Authority.

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- 13 -

Ms. Tkachuk submitted that the alternate route proposed by Mr. Johnson would have the service road constructed to the west of his property. She submitted this would be built on land already owned by the Crown, would not require any expropriation of Mr. Johnson's lands and would allow him to keep the shelter belt of trees.

Ms. Tkachuk submitted that the trees which are at risk provide a visual, sound and wind barrier for Mr. Johnson. She submitted that these were essential to his farming operations as well as his use and enjoyment of his lands, as he does reside on the property in question.

Ms. Tkachuk suggested that the reasons for rejecting Mr. Johnson's suggested route for the service road were not sound, reasonable or fair, the first reason being safety. Ms. Tkachuk submitted that Mr. Reppert gave evidence that it was possible to have safety measures such as signage constructed to make the service road safe. With respect to efficiency of travel, the increased travel time of 30 seconds is not such as to reasonably be construed as rendering the route "inefficient". With respect to the costs, Ms. Tkachuk noted that the Crown did not provide any actual numbers for the increase in costs for construction or costs to maintain by the local authority. Therefore, these costs could be negligible in comparison to total costs for the Crown or the local authority.

Ms. Tkachuk suggested that there was another option, which was not really the subject matter of evidence: namely, direct access entering Highway 63, until Highway 63 is upgraded to the freeway status. It was submitted that that was an option and that, given the estimate of 20 to 30 years before freeway status may be reached for Highway 63, it would be a reasonable option.

Ms. Tkachuk submitted that because there were reasonable alternatives which would not require the expropriation of Mr. Johnson's land, the proposed expropriation is not reasonably necessary, fair or sound in achieving the objective of the Expropriating Authority.

FINDINGS OF FACT

I find as a fact that the Expropriating Authority has the objective of improving Highway 63, first to an expressway status, and subsequently to a freeway status. To accomplish

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- 14 -

this objective in accordance with the Functional Plan, design and safety standards in use by Alberta Transportation and the local authority, this requires limiting direct access to Highway 63 and ultimately the construction of a service road to provide access to landowners adjacent to Highway 63 only by way of interchange. I find as a fact that the service road route proposed by the Expropriating Authority is a reasonable route for such a service road.

The Objector, Mr. Johnson, has established as a fact that construction of the service road and the removal of trees would likely negatively impact his use and enjoyment of his property.

The alternate route for a service road proposed by Mr. Johnson has some advantages and some disadvantages over the route proposed by the Expropriating Authority. I do not find as a fact that Mr. Johnson's proposed route is obviously more advantageous than the route proposed by the Expropriating Authority.

The primary concerns expressed by Mr. Johnson in his oral evidence relate primarily to issues of compensation relating to loss of use of enjoyment or productivity of his lands.

I find that the construction of a service road is a requirement for the Project. That is, if the Expropriating Authority is to upgrade Highway 63 to an expressway and thereafter a freeway status, following normal design, safety, and construction standards, it would require the construction of a service road and the elimination of direct access to Highway 63.

The Expropriating Authority, or the Crown, already has ownership of lands which lie between the red markings on the Johnson IOP drawing which is found in Exhibit 1, Tab 2, page 1. It is an advantage to the service road route recommended by the Expropriating Authority, or its consultants, that part of the right-of-way for such a service road includes land already owned by the Crown.

Although the Expropriating Authority did not perform exact costing calculations, I find that the costs of construction and maintenance of a service road on the route proposed by Mr. Johnson would be significantly higher than the route for the service road proposed by the

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- 15 -

Expropriating Authority. Costs of construction would be approximately 50% more and the costs of maintenance would again be approximately 50% more, in perpetuity. This would not be insignificant, given the general estimate in evidence, which I find to be a fact, that the additional construction costs, including addressing pipeline and other utility right-of-way crossings, would be several hundreds of thousands of dollars, perhaps as high as \$1.5 million dollars in extra costs.

I find as a fact that construction of a gravel service road adjacent and parallel to Highway 63 would not create any significant safety concerns. It appears unlikely that motorists would become confused that Highway 63 is a three-lane highway given that the service road is gravel, there is a separation ditch which will be grassed, and that this type of service road construction and location is common throughout Alberta.

I find that the traffic volume and the large loads which travel on Highway 63 are increasing and are the reasons for which the Project is proceeding.

**OPINION ON THE MERITS
OF THE INTENDED EXPROPRIATION
AND REASONS THEREFOR**

The scope of this Inquiry is set out in section 15(8) of the Act, which states:

The Inquiry Officer shall inquire into whether the intended expropriation is fair, sound and reasonably necessary in the achievement of the objectives of the Expropriating Authority.

In my opinion, the intended expropriation is fair, sound and reasonably necessary in the achievement of the objective of the Expropriating Authority. As noted above, the objective of the Authority is to upgrade Highway 63. Part of any such upgrade is reducing and ultimately eliminating direct accesses to Highway 63 from adjacent landowners property. Further, part of such an upgrade is to create service roads which provide access to Highway 63 for adjoining landowners, ultimately only at interchanges.

The reasons for the Expropriating Authority, and its consultants, proposing the location of the service road parallel and adjacent to Highway 63 are sound. Although there are

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- 16 -

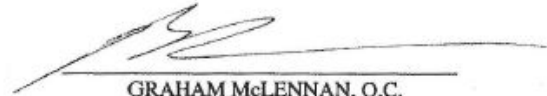
advantages and disadvantages to both the route proposed by the Expropriating Authority and the route proposed by Mr. Johnson, the route proposed by the Expropriating Authority is not capricious or unreasonable. It cannot be said that the route proposed by Mr. Johnson is obviously superior to that proposed by the Expropriating Authority.

I note that it may be some time before the service road is constructed. The evidence was unclear as to when construction will actually occur. If construction will not occur for some time, presumably the Expropriating Authority would not remove the trees which provide a shelter belt to Mr. Johnson's property, even after expropriation of the property. Hopefully, the parties are able to reach an understanding in this regard should construction not take place for a considerable period of time after expropriation.

The mere fact that actual construction may not take place for quite some time does not establish that the proposed expropriation is not fair, sound and reasonably necessary. Long term assembly of land and right-of-ways is required for long term detailed planning and construction for roadway improvement. In my opinion, the evidence does not support that the timelines being followed by the Expropriating Authority, in these circumstances, are such that I could conclude that the intended expropriation is not fair, sound and reasonably necessary.

Pursuant to section 15(10) of the Act, the reasonable costs of the Objector incurred in connection with this Inquiry shall be paid by the Expropriating Authority.

DATED at the City of Edmonton, in the Province of Alberta, this 4th day of November, 2011.



GRAHAM McLENNAN, Q.C.
Inquiry Officer
#600, 12220 Stony Plain Road
Edmonton AB T5N 3Y4
Phone: (780) 482-9221
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- 17 -

TO: Mr. John-Marc Dube
Counsel for the Minister of Infrastructure
Alberta Justice
Civil Law Litigation
9th Floor, Peace Hills Trust Tower
10011 – 109 Street
Edmonton AB T5K 3S8

AND TO: Ms. Chelsea Tkachuk
Counsel for Leslie Howard Johnson
Nicholl & Akers
200, 10187 – 104 Street
Edmonton AB T5J 0Z9

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APPENDIX 1 – LIST OF EXHIBITS

Exhibit

1. Submissions of the Expropriating Authority, including Tabs 1 through 5
2. Submissions on behalf of the Objector, including Tabs 1 through 12

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IN THE MATTER of the *Expropriation Act*, being Chapter E-13 of the *Revised Statutes of Alberta*, 2000, and amendments thereto ("**Act**");

AND IN THE MATTER OF the intended expropriation by the Minister of Infrastructure and Transportation of a fee simple interest in those lands described as:

All that portion of the North East Quarter (NE ¼) of Section Twenty-One (21), Township Two (2), Range Sixteen (16), West of the Fourth (4th) Meridian, standing under Certificate of Title 041 202 640+1 and shown cross-hatched on the sketch plan attached to and forming part of this document containing 1.83 Hectares (4.51 Acres), more or less
Excepting thereout all mines and minerals ("**Madge Lands**");

AND IN THE MATTER OF the Notice of Objection to the said intended expropriation filed by Paul Madge by his solicitors, Stringam Denecky;

AND IN THE MATTER OF an Inquiry in respect thereof pursuant to the provisions of the said Act by Graham McLennan as Inquiry Officer appointed by R. Neil Dunne, Q.C., Executive Director, Civil Law, to conduct the said Inquiry;

REPORT OF THE INQUIRY OFFICER
July 20, 2006

COUNSEL

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Steve Denecky, Q.C.
Counsel for the Objector
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Lethbridge AB T1J 3Y3

Alberta Justice
Christopher D. Holmes
Counsel for Expropriating Authority
Minister of Infrastructure and
Transportation ("**AIT**")
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TABLE OF CONTENTS

PART 1 – INTRODUCTION 1

PART 2 – SUMMARY OF THE EVIDENCE..... 3

 (a) EXHIBITS 3

 (b) EVIDENCE OF AIT..... 3

 (i) Mr. Hempsey..... 3

 (ii) Mr. Brownbridge..... 6

 (iii) Mr. Martin..... 10

 (iv) Mr. Younger..... 12

 (c) EVIDENCE OF THE OBJECTOR 15

 (i) Mr. O'Brien..... 15

 (ii) Mr. Hodge..... 18

 (iii) Mr. Madge..... 23

 (iv) Ms. O'Donnell 25

 (v) Mr. Swanson 27

 (vi) Mr. Hinman..... 28

 (d) FURTHER EVIDENCE OF AIT AND THE OBJECTOR RE ICE JAMS AND SPURS 30

 (i) AIT..... 30

 (ii) Objector..... 31

PART 3 – SUMMARY OF ARGUMENT..... 32

 (a) AIT..... 32

 (b) Argument of Behalf of the Objectors..... 34

 (c) Reply Argument of AIT..... 37

PART 4 – FINDINGS OF FACT 38

PART 5 – OPINION ON THE MERITS OF THE EXPROPRIATION AND REASONS THEREFOR..... 40

APPENDIX 1 – EXHIBITS..... 43

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PART 1 – INTRODUCTION

This Inquiry concerns the intended expropriation by AIT of the Madge Lands for the purposes of the construction, development and maintenance of a highway, specifically Highway 4.

The Objector, Paul Madge, has filed a Notice of Objection (Exhibit 11).

AIT was represented by Christopher Holmes and the Objector was represented by Steve Denecky, Q.C.

The hearing was held on Thursday and Friday, June 29 and 30, 2006, at Council Chambers, Town Hall Building, in Milk River, Alberta.

Counsel for AIT and counsel for the Objector agreed that all appointments, notices, filings, and registrations with respect to the intended expropriation, the objection, and this Inquiry have been properly performed in accordance with the Act. Most of the relevant documents in this regard were entered by agreement as Exhibit 11.

Counsel for AIT and counsel for the Objector advised there were no preliminary objections to the Hearing proceeding. However, Mr. Denecky made application to add Joseph O'Donnell and Betty O'Donnell as parties to the proceedings.

After hearing submissions from Mr. Denecky and Mr. Holmes, I ruled that Joseph O'Donnell and Betty O'Donnell would not be added as parties because it appeared that the only reason that the Objector wanted to add these individuals as parties was so that they may testify at the Hearing. Further, I ruled that whether these individuals could testify or not would be dealt with as any other proposed witness at a hearing.

The Objector did request that I inspect the Madge Lands. However, this request was later not pursued as a result of weather conditions that made an inspection impractical.

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Evidence was given under oath and a court reporter was present to transcribe the evidence.

- 3 -

PART 2 – SUMMARY OF THE EVIDENCE**(a) EXHIBITS**

Exhibits 1-23 were entered in the course of the Hearing. By agreement between the parties, Exhibit 24 was provided by counsel for AIT on July 6, 2006, as rebuttal evidence, and Exhibit 25 was provided by counsel for the Objector. In all cases, no objection was taken by opposing counsel to entry of the documents as exhibits, which totaled 25 exhibits.

The exhibits are listed in Appendix 1 and copies of the exhibits (by agreement with counsel for the Objector and AIT) are provided only with the original of this report.

(b) EVIDENCE OF AIT**(i) Mr. Hempsey**

Mr. Hempsey was employed with AIT, or its predecessor departments, for approximately thirty-five years. He is now a consultant with EarthTech, formerly known as Reid Crowther. A copy of Mr. Hempsey's CV was entered as Exhibit 12.

Mr. Hempsey outlined his experience with respect to the proposed realignment of Highway 4 near the Town of Milk River. He gave evidence that, during the process of consultation with the Milk River community, the "town fathers" raised concerns of: maintaining the visibility of the Town from the highway, not separating the Town from the cemetery or creating an undue traffic hazard between the Town and the cemetery, and not interfering in future expansion of the sewage lagoon for the Town of Milk River.

Mr. Hempsey outlined the history of the Highway 4 design proposals. He noted the Highway 4 Functional Planning Study done by ISL (Exhibit 1). Mr. Hempsey then outlined the Functional Planning Study for Highway 4 prepared by Reid Crowther (Exhibit 2).

Mr. Hempsey explained that Highway 4 is part of the Canamex project, which is an international agreement between Canada, the United States of America, and Mexico to provide a roadway corridor linking all three countries. Highway 4 through Milk River is part of this Canamex roadway. Canada and Alberta are committed to upgrading the roadway to a four-

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- 4 -

lane divided highway with a posted speed limit of 110 kilometers per hour, and with an ultimate objective of reducing or eliminating direct access to the highway, except at interchanges.

Mr. Hempsey discussed the three highway alignment options which are set forth in Appendix A of the Reid Crowther Report, Exhibit 2. Two of the proposed alignments were to the east of Milk River and one proposed alignment to the west of Milk River.

Mr. Hempsey reviewed traffic flows on the proposed western alignment route. He discussed the proposed intersections in connections with Highway 501. He further discussed the advantages of the western alignment versus the proposed eastern alignments.

Mr. Hempsey indicated that the final design decision to go with the western alignment route was made in approximately October of 1999.

Cross-Examination of Mr. Hempsey

Mr. Hempsey was cross-examined by Mr. Denecky, counsel for the Objector. Mr. Hempsey clarified that he is referring to the same facility when he makes reference to "Plains Canada" or "Murphy Oil" facilities. It is simply a name change.

Mr. Hempsey did not recall seeing eleven initial road alignment proposals at any time during the conceptual development of this proposed project.

Mr. Hempsey acknowledged that initial discussions with respect to highway design were focused on a route that was to the east of Milk River.

Mr. Hempsey acknowledged that the far eastern route would do the job of simply a roadway function as well as the western highway proposed route. However, Mr. Hempsey understood that the "town fathers" were not happy with the eastern route and that the western route that was proposed better accommodated the desires of Town visibility and lack of interference regarding the cemetery traffic or future expansion of the sewage lagoon.

Mr. Hempsey acknowledged in questioning by Mr. Denecky that there were other areas of Highway 4 and Highway 2 that were not up to a standard of a four-lane divided highway and that complied with the ultimate objectives of AIT. For example, in Nanton and Claresholm,

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- 5 -

the highway narrowed and went through towns. At these locations, these highways did not meet the "Canamex" standards.

Mr. Hempsey was asked about the "cross-hatched" area which outlines the Madge Lands found on Exhibit 9 (the Alignment Plan aerial photograph with superimposed proposed design). Mr. Hempsey advised that the Madge Lands were required to allow construction of a highway and to allow access to the river to allow the construction of bank protection to prevent continual erosion of the bank, which in turn would threaten the new proposed highway.

Mr. Denecky asked Mr. Hempsey whether the construction of the bank protection could not be done by way of some type of easement, rather than expropriation of the Madge Lands. Mr. Hempsey speculated that that may be possible. However, there would be a requirement for periodic inspection, maintenance or upgrading of the bank protection that would also be required. A permanent easement of some type may allow for this type of work as well.

Mr. Hempsey was cross-examined about the need for a roadway to be built across the Madge Lands to allow for construction and maintenance of the bank protection. Mr. Hempsey gave evidence of the approximate minimum width required to construct the roadway, ditches and associated work at the location of the Madge Lands, and he estimated this to be a minimum of seventy-two meters.

Mr. Hempsey acknowledged that there was a possibility that Highway 4 would be further expanded to six or more lanes at some time in the future.

Mr. Denecky then questioned Mr. Hempsey with respect to the proposed rail spur line. He noted that this would require the building of a new railway bridge, which would not be required (because there would be no movement of the railway track) if the Highway 4 alignment to the east of Milk River was chosen. Mr. Hempsey agreed with this observation.

Re-Examination of Mr. Hempsey

In re-examination of Mr. Hempsey by Mr. Holmes, he was asked to look at Exhibit 10, a sketch which shows the details of a proposed access road to be built across the Madge Lands to the Milk River to enable construction and maintenance of the bank protection

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- 6 -

armorings (also referred to as "Spurs"). Mr. Hempsey elaborated on the proposed sketch of the access road to Milk River.

(ii) **Mr. Brownbridge**

Mr. Brownbridge advised that he was the project director at Stantec Engineering with respect to the realignment of Highway 4 and the associated movement of the CPR rail line. He advised that Stantec had been retained by AIT for design and construction engineering for this project. Mr. Brownbridge's CV was marked as Exhibit 13.

Mr. Brownbridge advised that Exhibit 9 was prepared by Stantec and was representative of the route for the realignment of Highway 4 that will be set forth in further detailed construction design drawings.

Mr. Brownbridge was project director of a team at Stantec of fifty to sixty individuals who had various expertise which was brought to bear on this project for Stantec.

Mr. Brownbridge was qualified as an expert in road design, and his qualifications were not seriously challenged except for Mr. Denecky's submission that Mr. Brownbridge lacked experience in railway design.

Mr. Brownbridge reviewed Exhibit 9 in detail and discussed the "cross-hatched" area which designated the Madge Lands that were the subject of the proposed expropriation. He advised these lands were required to construct the Highway 4 roadway and to provide an area to allow access to the Milk River to construct and maintain Spurs to prevent or at least reduce the continued erosion of the bank, which in turn would threaten the proposed relocation of Highway 4.

Mr. Brownbridge advised that the total width of the roadway area proposed to be constructed would be from 70 to 90 meters, depending on the topography at any given location. For example, if the roadway needs to cut through hillside, then the size of the roadway easement required would be larger than if the roadway simply needed to cross flat land. This is because the slopes need to be cut at a certain ratio and this obviously takes more land than if the roadway is crossing flat land. Mr. Brownbridge thought that Mr. Hempsey's rough calculations of

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- 7 -

seventy-two meters were probably somewhat low, on average, for a highway such as that proposed for the upgraded and realigned Highway 4.

With references to Exhibit 9 and Exhibit 10, Mr. Brownbridge described the highway area adjacent to the Madge Lands. This area of land had topography that shows a knoll or a hill which indicates that a wider roadway easement is required.

Mr. Brownbridge then reviewed photographs that are contained in Exhibit 14.

Mr. Brownbridge indicated that access to the bank protection Spurs would be required for construction, for inspections and assessment as to whether the Spurs were performing properly and whether they may need repair if damaged by ice or flooding.

Mr. Brownbridge discussed the proposed bridge design for a new crossing over the Milk River. He indicated that Stantec analyzed whether one, two or three piers should be used in the design for the bridge. They looked at the question of ice jamming and concluded that the existing bridge, and bridge piers, were not causing ice jamming. Rather, the ice jamming occurred at a bend in the Milk River and the ice jam backed up towards the existing bridge. Mr. Brownbridge indicated that the one-pier design had been selected and that the one pier was to be built on a sandbar in the Milk River to minimize any potential to contribute to ice jamming.

Mr. Brownbridge, in referring to Exhibit 7, outlined the proposed lighting design for the proposed construction of Highway 4. He indicated that the three new intersections were to be illuminated in the manner set forth in the lighting design sketch, Exhibit 7.

Cross-Examination of Mr. Brownbridge

Mr. Denecky cross-examined Mr. Brownbridge on the subject of the width requirement for the proposed construction of the Highway between Milk River at the Madge Lands and the Plains Gas marketing facility. Mr. Brownbridge believed that the right-of-way or easement required for the railway was approximately 30 meters. Further, he discussed the distances between the separation from the highway to a rail line adjacent to the highway. There was discussion of the approximate distance from the rail line to the bank of the Milk River at the Madge Lands being approximately 170 meters.

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- 8 -

Mr. Brownbridge advised that he was unsure of a specified minimum distance between the riverbank and the proposed highway construction.

An additional cross-section drawing was referred to by Mr. Brownbridge and marked as Exhibit 15.

Mr. Denecky cross-examined Mr. Brownbridge concerning the proposed riverbank protection construction, which were described as Spurs. Mr. Brownbridge thought these Spurs were approximately 4 meters high. He believed that construction would be by way of gravel fill in a hole followed by heavy large rock on top of the gravel to a height of approximately 4 meters.

Mr. Brownbridge understood that access to the Spurs would be by way of the proposed road built through the Madge Lands. Once construction was complete, he anticipated the road would remain and would probably be gated and locked to prevent public access to the river through this road.

Mr. Brownbridge advised that the access road would be required to descend approximately 9 meters from the Highway to the Milk River.

Mr. Denecky cross-examined Mr. Brownbridge with respect to whether the river could be accessed through lands immediately south of the property owned by Mr. Madge where the land was relatively flat and the river could be accessed without having to build a road down through the knoll found on the Madge Lands. Mr. Brownbridge was not sure if such access could be utilized for the purpose of construction and maintenance of the Spurs.

Mr. Denecky then cross-examined Mr. Brownbridge with respect to the Canamex highway standards. Mr. Denecky questioned whether level railroad crossings complied with the Canamex standards and Mr. Brownbridge noted that there were other level railway crossings: for example, one at Couits and one at Sterling, Alberta. Further, Mr. Brownbridge acknowledged that the Reid Crowther Report notes that if this Highway 4 was upgraded to freeway standards, then the rail line must be at a different elevation than the highway.

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- 9 -

Mr. Brownbridge acknowledged that there is a risk of rail/vehicle accidents where there are level crossings intersecting highways, and further, that if the proposed route east of Milk River was chosen, then there would be no level crossing between the railway and the proposed Highway 4 realignment.

Mr. Denecky explored with Mr. Brownbridge the cost of the alternate routes east of Town or west of Town. Mr. Brownbridge acknowledged that Stantec did not examine the question of the cost of alternate routes, which Reid Crowther did in their report.

Mr. Denecky cross-examined Mr. Brownbridge on the subject of whether bridge piers increased the risk of ice jams. He referred Mr. Brownbridge to the Reid Crowther Report (Exhibit 2), Appendix C, Figure 3, and suggested that bridge piers cause ice jams.

Mr. Denecky cross-examined Mr. Brownbridge on the likelihood of there being an expansion of the proposed Highway 4 to six lanes or eight lanes and whether the proposed design could accommodate such expansion. Mr. Brownbridge gave evidence that such a highway lane expansion is unlikely to occur because the traffic volume is low in the Milk River area, and Mr. Brownbridge is unaware of any reason to think that there will be a substantial increase in the volume of traffic so as to make a six- or eight-lane expansion likely in the foreseeable future.

Mr. Denecky cross-examined Mr. Brownbridge on whether Stantec considered taking steps to redirect the flow of the Milk River at the location where the Milk River bend is found adjacent to the Madge Lands. Mr. Denecky suggested this procedure could be employed so that the erosion of the bank would no longer be a concern. Mr. Brownbridge gave evidence that such a redirection of the flow of the river would probably be more costly and perhaps environmentally damaging than the proposal of constructing Spurs. When cross-examined regarding the cost of construction of the Spurs by Mr. Denecky, Mr. Brownbridge was unable to provide an estimated cost.

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- 10 -

Re-Examination of Mr. Brownbridge

In re-examination by Mr. Holmes, Mr. Brownbridge clarified that Stantec's assignment from AIT was not to look at alternatives but to proceed with design and construction engineering with respect to the western alignment option of Highway 4.

Further Cross-Examination of Mr. Brownbridge

In response to further questions from Mr. Denecky, Mr. Brownbridge advised that Stantec had partly completed some cost estimates, and would prepare a new cost estimate before advertising for tenders. However, that work had not been completed as of the date Mr. Brownbridge testified. There was no cost information presented other than that done by Reid Crowther in 1999. Mr. Brownbridge opined that that cost information was out of date.

(iii) Mr. Martin

Mr. Martin advised he was a contract employee with Stantec. He worked in the environmental group section of Stantec.

With respect to this project for the realignment of Highway 4 to the west of Milk River, Mr. Martin advised that there was no provincial environmental assessment that was required. He further advised that there was a federal requirement under the Canadian *Environmental Assessment Act* which was triggered because there was a river crossing and there was a proposed movement of a railway line.

Accordingly, Stantec assisted in providing the requisite environmental report, and dealing with the designated federal department, Transport Canada, in addressing environmental issues raised and replying to those issues.

Mr. Martin noted that Transport Canada requirements regarding road/railway crossings were found in Exhibit 5.

Mr. Martin reviewed some of the conclusions that he reached in addressing environmental concerns. These included noise in the course of construction. This was to be mitigated by the recommended use of equipment which was less noisy in driving any piles that may be required for the project. Mr. Martin also concluded there may be a non-environmental

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- 11 -

impact of the Highway 4 proposed westerly alignment: namely, a potential negative impact on Milk River businesses. However, this potential impact was not explored by him.

Mr. Martin addressed the question of the archaeological sites that may be impacted by the proposed westerly realignment and construction of Highway 4. Mr. Martin advised that the identified impact of two archaeological sites were reviewed by the Province of Alberta in a historical resources overview process. That process ultimately culminated in work being performed by consultants and thereafter the provincial authorities in charge of historical archaeological matters issued a "Clearance Letter" advising that these concerns have been addressed in accordance with the legislation and that the proposed construction can proceed. The Clearance Letter was marked as Exhibit 6 in the proceedings.

Cross-Examination of Mr. Martin

Mr. Denecky cross-examined Mr. Martin with respect to whether burrowing owls would be impacted by this project. Mr. Martin advised that his information was that burrowing owls have not been seen in the Milk River vicinity since 1992.

Mr. Martin was cross-examined with respect to the leopard frog and he advised that the leopard frog was not impacted by this construction as they were not found to be near the construction areas.

Mr. Denecky then cross-examined Mr. Martin with respect to the archaeological sites which may be impacted by the proposed construction realigning Highway 4 to the west of Milk River. Mr. Martin reiterated the fact that the provincial authorities charged with oversight of historical resources, such as archaeological sites, had reviewed the matter and had signed off on the proposed construction.

Mr. Martin acknowledged that the highway noise of the western alignment would be greater than the eastern alignment because it was closer to Town and prevailing winds were from the west.

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- 12 -

(iv) **Mr. Younger**

Mr. Younger advised he was the Manager of Public Works with Canadian Pacific Railway. His duties included working with federal and provincial regulators with respect to the relocation of railway tracks and other construction involving Canadian Pacific Railways. Further, Mr. Younger has a Bachelor of Engineering, Civil. He has worked with Canadian Pacific since 1979 in various capacities and is a registered professional engineer in the Province of Alberta.

He has been personally involved with respect to the proposed relocation of the Canadian Pacific rail line adjacent to Milk River for the last couple of years.

Mr. Younger advised that the railway access to Milk River for use of the grain elevator and other commercial operations in Milk River averages one train per week. This will be the case before and after the proposed construction realigning Highway 4 and making certain changes to the Canadian Pacific rail line.

Mr. Younger advised that there would be a new railway bridge and that the old bridge would be removed and the land remediated by the Province of Alberta.

Mr. Younger advised that it was proposed there be a new level crossing of a Spur line toward the north end of Town and indicated where the proposed Spur line was to be located with reference to Exhibit 9. The proposal in this regard prepared by Stantec was received by Canadian Pacific, and Canadian Pacific provided input to Stantec to deal with the issues raised by Transport Canada. Mr. Younger understands that final approval by Transport Canada is yet to be provided, but is anticipated.

Mr. Younger advised that Transport Canada has set forth what standards are required for road/rail crossings, and this is set forth in Exhibit 5.

Mr. Younger noted that the vehicle highway speed proposed is 110 km./hour. He noted that the trains will be travelling at 10 mph. at the proposed Spur line crossing.

Mr. Younger reviewed the Transport Canada requirements that included a formula for establishing the number of vehicles and number of trains per day, on average, at a

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- 13 -

road/railway crossing. The numbers so generated (in this case, 1 train per day x 2,800 vehicles per day) indicate that a level-grade crossing warning system is required in the form of signage and flashing lights. Further, Mr. Younger indicated that there would have to be at least 50,000 vehicles per day required at such a crossing for Transport Canada guidelines to require a gate warning system to be installed.

In the level crossing which was proposed at the Spur line crossing of the proposed realignment of Highway 4, Canadian Pacific is proposing flashing lights and bells at the crossing, as well as an active advance warning sign/light in advance of the intersection. This latter safety feature is not required by Transport Canada, but is proposed to be implemented by Canadian Pacific at this site.

Mr. Younger reviewed Exhibit 7, the lighting plan, and noted that there appears to be street lighting which will illuminate the intersection where the rail Spur line is to be crossing the highway.

Mr. Younger spoke about the frequency of rail/vehicle collisions. He opined that the frequency of such collisions was relatively low. Further, he noted that there were other level crossings on divided highways found in the Province of Alberta, such as at Bassano on the Trans-Canada Highway.

Mr. Younger described the proposed lighting at the rail Spur/highway crossing. He noted they would be LED lights, and that there would be lights both on the outside lanes reaching across the highway and lights on a stand in the meridian providing warning to vehicles on the inside lanes.

Cross-Examination of Mr. Younger

Mr. Younger was asked why Exhibit 5, the Transport Canada requirements, are noted to be "draft". He indicated that, although not yet proclaimed into law, these requirements are posted on the Transport Canada website and are accepted by the railway industry as Transport Canada requirements. They have apparently been under discussion in the industry for many years and, even though the draft was finalized in October 2002, there have been no other

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- 14 -

proposed changes since 2002. Further, Mr. Younger anticipates promulgation within the next few months.

Mr. Younger was not sure how the Canamex requirements for road/rail affected this project, as he was not familiar with any Canamex requirements that may be applicable to railways.

Mr. Younger was cross-examined with respect to the proposed Spur line. Mr. Younger noted that there was to be one train per week on average. There would be two crossings per visit and the time required to move an average length train over the highway section would be 3 to 5 minutes.

Mr. Younger was not sure whether the statistic of a train once a week was once a week per customer, or once a week for all customers, located in Milk River.

Mr. Younger acknowledged in cross-examination that customer demand could increase, or decrease, the number of weekly train visits. However, Mr. Younger noted that, even if train traffic doubled into Milk River over the Spur line, there would still be a very low frequency of vehicle/rail traffic and, therefore, applying the Transport Canada formula, there would be no impact on the present design of the crossing and the safety features that are presently proposed.

Mr. Denecky asked Mr. Younger whether there were bulk fuel rail trips into Milk River or trips into Milk River to move fertilizer, and Mr. Younger advised he was unaware of the frequency of any such rail trips into Milk River using the Spur line.

Mr. Younger conceded that collisions do occur at level crossings between trains and vehicles. He was unaware of an incident Mr. Denecky related concerning a Milk River resident losing her life in a rail/train collision in Lethbridge some time in the recent past.

Mr. Younger advised Mr. Denecky in cross-examination that a grade separation between the rail line and the roadway is generally only considered where there would be 200,000 vehicles per day, assuming there was one train per day (applying the Transport Canada formula of a "cross-product" of 200,000 being required to consider a grade separation).

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- 15 -

Mr. Denecky asked Mr. Younger about the Alderside grade separation. Mr. Younger advised that in that location Transport Canada determined a grade separation was not required as the "cross-product" was not high enough. Therefore, the Province of Alberta simply paid for the construction of the grade separation crossing without any contribution by Canadian Pacific.

Mr. Younger advised that Canadian Pacific was required to provide notice to Transport Canada if it was proposing to relocate a rail line.

Although final approval had not been received by Transport Canada, if the rail line movement is approved, then the discontinued Canadian Pacific tracks will be removed and the land provided to the Province for remediation.

It was Mr. Younger's understanding that construction of the new railway beds and tracks will be paid for by the Province, although it is not yet clear who will actually direct construction in this regard. Further, the bridge required for construction will also be paid for by the Province of Alberta.

(c) EVIDENCE OF THE OBJECTOR

(i) Mr. O'Brien

Mr. O'Brien described himself as a "layman" with construction and engineering survey experience. He was a senior surveyor with Alberta Transportation for many years and worked on the survey of highways for Alberta Transportation in conjunction with engineers.

Mr. O'Brien had taken materials testing and survey courses and project management courses over the years. Mr. O'Brien had some construction management experience with respect to highway projects in residential subdivisions.

Mr. O'Brien started the company, O'Brien Engineering & Surveys Ltd., after his employment with Alberta Transportation. That company was sold to EBA Engineering.

Mr. O'Brien was qualified as an expert in the field of construction surveying.

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- 16 -

Mr. O'Brien was retained by landowners in the Milk River area to look at the proposed location of the proposed westerly alignment of Highway 4 and to consider an eastern alignment. Mr. O'Brien prepared a report on the preliminary design and cost estimate for realignment of Highway 4 at Milk River, which was marked as Exhibit 19.

Mr. O'Brien advised that Plate 1 in Exhibit 19 showed the route that he considered to be the most reasonable alignment of Highway 4, which was to the east of Milk River. In fact, his alignment was the most easterly alignment of any proposed alignments, of which Mr. O'Brien was aware. His proposed far eastern alignment was approximately 8.5 km. long from when it left old Highway 4 south of Milk River until it rejoined old Highway 4 north of Milk River.

Mr. O'Brien advised that his proposed far eastern route has advantages, including: it cut across farm land that was not very productive looking; it was more economical to construct; and it did not require the relocation of the Canadian Pacific rail lines.

Mr. O'Brien opined that bridge construction was approximately ten times more expensive than road construction per meter.

Mr. O'Brien recalls seeing eleven proposals, during the history of this project, all of which, perhaps except for one, were to the east of the Town of Milk River. Mr. O'Brien prepared his report, Exhibit 19, in the year 2000.

Mr. O'Brien opined that moving railways is a costly exercise. He had two experiences, working as a surveyor, where he believes he knew the cost of projects that involved moving railways. The cost of roadways Mr. O'Brien opined to be approximately \$1 million per kilometer. Although he could not give an estimate for relocating the CPR railway access to Milk River, he opined that the cost of moving a track and installing a bridge were very expensive relative to roadway construction.

Cross-Examination of Mr. O'Brien

Mr. Holmes cross-examined Mr. O'Brien on the issue of whether surveyors generally take directions from engineers in connection with projects such as the construction of a

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- 17 -

highway. Mr. O'Brien conceded that was sometimes the case. However, when he was with Alberta Transportation, it was Mr. O'Brien's recollection that the surveyors did preliminary surveys for location options and provided that information to engineers, who in turn provided engineering design options for various routes. Once a final alignment was decided upon by the engineers, the surveyors would then go survey that particular route.

Mr. O'Brien acknowledged that public input or public opinions are not something that are considered in the surveyor's work generally. Further, environmental issues are not matters considered by a surveyor in performing his duties.

Mr. O'Brien acknowledged that the movement of railway lines in Red Deer was significantly different than the rail line movement proposed for the Milk River project, and that he had no idea of the cost of the Milk River railway work that was proposed.

Mr. Holmes referred Mr. O'Brien to Exhibit 2, Figure 1, of the Reid Crowther Report. He also referred Mr. O'Brien to Appendix A, Table 2. Mr. O'Brien was not aware of much of the information set forth, such as that the western alignment includes use of 3.5 km. of existing highway whereas the eastern routes do not. Mr. O'Brien felt something was wrong with the estimated cost comparison of the eastern routes and the western route by Reid Crowther, as the eastern options were approximately \$1 million per km. whereas the western option was approximately \$0.5 million per km. for only the roadwork. Mr. O'Brien was not prepared to concede that the cost of moving dirt was higher with the proposed eastern routes versus the western routes. Mr. O'Brien did question why Stantec was not able to provide detailed cost estimates for the proposed construction of the westerly alignment of Highway 4 and the associated work on service roads, rail lines, and river bank protection work.

Mr. O'Brien opined that the use of the existing highway was not very much of a cost saving over new construction, as there is typically upgrading and other work required to the existing highway in any event.

Mr. O'Brien agreed with Mr. Holmes that he saw no problems or had no concerns with respect to the proposed width of the easement required between the Milk River to the east

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- 18 -

and the Plains Gas marketing facilities to the west to incorporate the proposed construction for the project.

Re-Examination of Mr. O'Brien

Mr. Denecky clarified that Mr. O'Brien's far easterly route was 0.5 km. longer, not 500 km. longer, than the proposed westerly route.

Mr. O'Brien also referred to a section of his report, Exhibit 19, that provided a rough estimate of the cost of earth moving for the proposed far eastern route.

(ii) Mr. Hodge

Mr. Hodge advised that he had a Bachelor of Engineering and a Master of Engineering, as well as certification as a Land Surveyor. He is a member of the Alberta Professional Engineers Association of Alberta. He has had 30 years of engineering experience that includes rural roads, highway upgrades, highway overpass on Highway 2, and has done a number of bridge design and construction engineering work "overseas" as well as in Canada. Further, he did work on one railway bridge and a railway Spur line. He has had experience working with a team of engineers on a slope failure in the North Saskatchewan River close to pipeline facilities.

Mr. Hodge provided some assistance to Mr. O'Brien in connection with the report issued by Mr. O'Brien in 2000, Exhibit 19. He further advised that the previous evening he had reviewed the property and looked at certain sections of the Stantec Report, Exhibit 3.

Mr. Hodge also indicated that he did engineering work in connection with an irrigation project in India.

Mr. Denecky tendered Mr. Hodge as an expert with experience in providing engineering services in connection with roadways, with some experience with respect to railways and some experience with respect to engineering work in connection with waterways and bank failure.

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- 19 -

Mr. Holmes cross-examined Mr. Hodge on his qualifications. It was clear that Mr. Hodge's experience with respect to rail engineering projects and slope failure related to rivers was very limited. He had some experience related to irrigation projects in Egypt and India.

Mr. Hodge was accepted as an expert engineer who was qualified to provide comments on the proposed westerly alignment of Highway 4, with the weight of his opinions to be assessed in light of his experience.

Mr. Hodge commented on the proposed design of the Spurs which were to be constructed on the Milk River to reduce erosion of the bank adjacent to the Madge Lands. Mr. Hodge opined that the River was narrow, that he thought the Spurs would extend 15 meters into the River; further, that this would cause problems on the inside bank of the Milk River at that location. He described his opinions as "just top of the head sort of thoughts".

Mr. Hodge questioned whether these Spurs will last and whether there might not be problems higher up the bank above the Spurs. The nature of these problems were not specified.

Mr. Hodge opined that the Spurs may reduce the velocity of the Milk River current in that location, which could increase ice jamming and erosion on the opposite riverbank. He opined that ice jams and flooding may present possible problems. Mr. Hodge opined on what he thought may cause ice jams, essentially any type of obstruction in the course of the waterway.

At this point, Mr. Holmes objected to this opinion evidence of Mr. Hodge. Mr. Holmes noted that the Objectors had not provided any written materials, such as expert reports, in advance of the Hearing and that AIT had no notice that Mr. Hodge was going to opine on matters such as proposed construction of the Spurs and the subject of ice jams. Further, AIT had no opportunity, therefore, to prepare and deal with this evidence in the course of presenting their evidence at the Hearing.

After listening to argument from counsel, and further discussion with counsel, it was agreed by both parties and the Inquiry Officer directed that:

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- 20 -

- (a) AIT would have until July 6, 2006, to prepare brief written response evidence to the Objector's evidence on ice jams and the construction of Spurs.
- (b) The Objector would have until July 17 to provide a response, if any, on these two evidentiary points.
- (c) Both parties would have until the close of business one day after such exchange of evidence to provide any further written argument they may wish to provide, only in connection with these two evidentiary points.

Mr. Hodge continued his evidence with reference to Exhibit 19, the O'Brien Report. He confirmed that he did do some work with Mr. O'Brien in connection with this Report. He advised that he agreed with the conclusion stated in the O'Brien Report and, in particular, that the far eastern option was to be preferred because he thought the costs for construction would be less and that the highway would be less disruptive to the residents of, and visitors to, the Town of Milk River.

Mr. Denecky referred Mr. Hodge to the Stantec Report, Exhibit 3. Mr. Hodge advised that he had concerns with the Stantec Report, in that Stantec did not consider all feasible options and do a proper comparison of the easterly routes and the westerly route. They deal almost exclusively with the westerly proposed alignment of Highway 4.

Mr. Hodge advised that it had been six years since he last looked at the O'Brien Report. Nonetheless, he still agrees with the conclusions. Mr. Hodge opined that the costs of construction do not appear to include railway demobilization costs and restoration costs. Mr. Hodge estimated a "ball park" number for such costs may be \$250,000 per km.

Cross-Examination of Mr. Hodge

Mr. Holmes directed Mr. Hodge's attention to portions of Exhibit 19, the O'Brien Report. Mr. Hodge indicated that he walked the proposed far easterly route as well as the westerly route. Mr. Hodge conceded he did not write any of the O'Brien Report, nor did he produce any of the tables therein. Mr. Hodge acknowledged that he does not take official

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- 21 -

responsibility, as a professional engineer, for the O'Brien Report (Exhibit 19). Otherwise, he would have stamped the document with his professional engineering stamp. Nonetheless, Mr. Hodge reiterated that he shared some of the work that went into the O'Brien Report and he shared in the views expressed in the O'Brien Report.

Mr. Hodge acknowledged in cross-examination that he did not know who the O'Brien Report was being prepared for back in 2000.

Mr. Hodge reiterated he saw advantages to the far eastern route versus the proposed western alignment of Highway 4. These were primarily advantages with respect to access in and out of Milk River and the crossing of the Milk River where it was not "meandering".

Mr. Hodge acknowledged that he was not aware of specific concerns raised by the residents of Milk River.

Mr. Hodge was cross-examined with respect to his experience on the North Saskatchewan River regarding ice jams. He advised this was near Fort Saskatchewan, approximately five km. northeast of Fort Saskatchewan. He recalled that the River was approximately 90 meters wide at this point and, in the spring, the ice froze across the River, ice jams were formed and water channels moved location as a result. Apparently, this involved both "banks" with respect to water channels in the River, as well as the riverbank itself being unstable, although Mr. Hodge recalled that this was on an area of the North Saskatchewan River where it flowed straight. It was not at a bend in the North Saskatchewan River.

Mr. Hodge acknowledged he had no other experience with professional engineers with respect to a project that involved ice jam problems. Further, he had working with him on the Fort Saskatchewan project engineers who had the expertise to deal with such issues, such as geotechnical engineers and hydrologists, amongst others.

Mr. Hodge was questioned about the fact that Stantec would have taken a multidiscipline approach to addressing the Milk River adjacent to the Madge Lands, which would have included geotechnical engineers and hydrologists. These specialists would have

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- 22 -

considered the River flow and the soils encountered at the riverbank and taken that into account in designing the proposed Spurs. Mr. Hodge agrees that this would probably have been the case.

Mr. Holmes referred Mr. Hodge to Exhibit 3, River Protection Report and Figure 2.1.1. Mr. Hodge advised that he would have taken approximately two hours to review the Stantec document.

Mr. Hodge advised that, with respect to ice jams, he reviewed Exhibit 2, Figure 3. Mr. Holmes had Mr. Hodge acknowledge that the top photographs at this location in Exhibit 2 did not provide any information as to where the photographs were taken, and Mr. Hodge was unaware of where along the Milk River the photographs were taken.

Mr. Hodge acknowledged that the Stantec Report, Exhibit 3, would have looked at many issues and considerations that Mr. Hodge and Mr. O'Brien did not address in their preparation of the O'Brien Report, Exhibit 19. Further, he conceded that some of these issues are important engineering considerations.

Mr. Hodge confirmed that he had no involvement with respect to the costing that is performed in the O'Brien Report (Exhibit 19).

Mr. Hodge indicated that he had had no involvement in this project or any aspect of the dispute since his involvement in the O'Brien Report approximately six years ago. The evening before his testimony, he reviewed certain areas of Milk River that were impacted by the proposed construction and spent a couple of hours reviewing the Stantec Report. He did not review any of the Reid Crowther Report other than some of the photographs. Therefore, he estimated that he spent approximately four hours total in reviewing matters to prepare to give evidence.

Mr. Holmes asked Mr. Hodge about the time he spent with respect to the North Saskatchewan River project near Fort Saskatchewan, and Mr. Hodge indicated that he spent approximately three weeks on that project.

In connection with "flyovers", Mr. Holmes asked Mr. Hodge if he was familiar with the term "warrants". Mr. Hodge advised that he was not familiar with the term. Mr. Hodge

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- 23 -

was not able to advise as to the approximate number of vehicles using Highway 4 at Milk River. Mr. Hodge was unaware of the significance, if any, of 2,000 cars per day traffic volume with respect to the question of flyovers (i.e., rail/highway crossings).

Mr. Holmes cross-examined Mr. Hodge with respect to construction costs where some of the existing rail or roadway bed was to be used for the proposed Highway 4 realignment. It appears that this was only relevant for approximately 100 meters of roadway.

Mr. Hodge advised that he did not look at, in his review of the area on the previous evening, the depth of the land required for the right-of-ways for the project between the Plains Gas marketing facility and the eastern edge of the Madge Lands which borders the Milk River.

(iii) Mr. Madge

Mr. Madge advised that he lives in Milk River. Further, he is the present owner of the property that includes the Madge Lands, and a copy of title was entered as Exhibit 20.

Mr. Madge reviewed the history of his family's ownership of the property that includes the Madge Lands over the last approximately 40 years. He indicated that the lands were used at one time for the displaying of machinery and a sales lot for machinery. Thereafter, he was instructed by the Department of Highways to remove the machinery from the lands. The lands thereafter were used for hay. He considered at one time perhaps building a home and has considered whether the lands could be used for expansion of the golf course that is presently in Milk River so that the course could expand from nine to eighteen holes. Mr. Madge advised that his understanding was that the lands have been zoned for commercial use, with some further designation of an approved use for a golf course.

Mr. Madge advised that, at some point, he considered perhaps a subdivision of the land, although around this time the idea of the upgrading of Highway 4 came about. Further, Mr. Madge advised that his late wife did not want to sell the property on which the Madge Lands were situated. Mr. Madge advised that, if a dam was built on the Milk River west of Town, this may impact the value of the Madge Lands. He did not elaborate on this assertion.

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- 24 -

Mr. Madge offered that many people over the years wanted to buy the land on which the Madge Lands are found. Mr. Madge stated that it took him a considerable number of years to get a definitive response from AIT as to specific proposals to access the land he owned, if the Madge Lands were expropriated and if the westerly route or realignment of Highway 4 was selected.

Mr. Madge indicated that he had sold part of his lands to allow construction of the Information/Interpretive Centre, and at this time he was also provided with an additional access road to his lands. Mr. Madge advises that he needs access to his lands because he has a Quonset hut on the property where he stores antiques, and he may build a museum in that location at some point in the future.

Mr. Madge reviewed several photographs of his property and the Madge Lands and these were marked as Exhibit 21. These photographs were taken by his son and depict the Milk River bank location where, among other things, the construction of the Spurs was proposed. Mr. Madge noted that there was significant and continuous erosion of the banks of the Milk River at this location over the years.

Mr. Madge noted that photograph 6S, in Exhibit 21, showed Mr. Walker's land immediately south of Mr. Madge's property, where the banks of the Milk River were substantially lower than at the Madge Lands. Mr. Madge offered that AIT could access the Milk River bank to perform the Spur construction from Mr. Walker's lands and would not need to take his land to construct an access road to the Milk River to allow for construction of the Spurs.

Mr. Madge advised that the Province of Alberta had increased the amount of land they required from when the matter was first under discussion with him. Mr. Madge believes that the forces of nature and, in particular, the water flow force of the Milk River has been underestimated by AIT. Further, he predicted that the proposed Spurs will be washed away or otherwise rendered ineffective as the Milk River continues to erode the bank adjacent to the Madge Lands.

Mr. Madge recalled that the existing bridge over the Milk River had piers changed on it due to ice jams being caused in the past. Mr. Madge has seen ice jams and large blocks of

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- 25 -

ice on the Milk River, and he believes that they will continue to cause erosion to the riverbanks and that the construction of the Spurs will not stop this process. Accordingly, Mr. Madge believes that it will be necessary to change the location of Highway 4 in the future if it is built in the westerly alignment, due to the continual erosion of the banks of the Milk River, notwithstanding construction of the Spurs.

Mr. Madge indicated that the proposed alignment would adversely affect his airport, as the related construction would render the airport no longer functioning.

With respect to ice jams, Mr. Madge advised that the more bridges and the more pillars, the more obstructions there are for increasing ice jams and problems associated with ice jams.

Mr. Madge expressed the opinion that the expropriation of the Madge Lands was unnecessary and that the upgraded Highway 4 should take another route.

Mr. Madge expressed the view that one reason they want to expropriate approximately four acres of his property is to gain access to the dirt that is located on the Madge Lands, which he thinks AIT requires for construction. If the westerly route is to be selected, then Mr. Madge believes that they only need approximately 1/3 of an acre of his property for the roadway and approximately 1/2 an acre for access to the River to build the Spurs, although access he believes can be gained from Walker's property immediately to the south, which Mr. Madge believes AIT already owns.

Cross-Examination of Mr. Madge

There was no cross-examination of Mr. Madge by Mr. Holmes.

(iv) Ms. O'Donnell

Ms. O'Donnell advised that she was the daughter of Joseph O'Donnell. She was born and raised in the Milk River vicinity. Mr. Joseph O'Donnell, her father, is approximately 90 years of age and is in the hospital with a broken hip. Were it not for this unfortunate incident, Mr. O'Donnell would be present and would have liked to testify at this Hearing.

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- 26 -

Ms. O'Donnell indicated that she owns land on the eastern side of Highway 4 and that she had entered into a Section 30 agreement to allow some of her property to be taken for the purposes of the Highway 4 Expansion Project. Ms. O'Donnell indicated she reluctantly agreed to the expropriation after taking every step she could think of to oppose the western alignment of Highway 4. Steps that she took included participating in the hiring of O'Brien Engineering & Surveys Ltd., writing letters to politicians, and following up every other method of registering her concern that she was able to determine.

Her objections to the westerly alignment were that: in her opinion, it was not safe with the Spur line crossing the highway; the Milk River bank would be unstable; and there would be traffic congestion and traffic hazards created at the proposed intersections at the north and south ends of the Town of Milk River.

Ms. O'Donnell indicated that her observations were that the traffic volume on Highway 4 at Milk River was increasing over the years. She reaches this conclusion in part as a result of working at the customs building at the Coutts border crossing for many years.

Ms. O'Donnell indicated that her parents' farm is located at the #11 designation on Exhibit 9. At this location, deer travel from a shelter belt of trees to grain elevators on the other side of the highway and then back to the Milk River. Ms. O'Donnell believes that a westerly alignment of Highway 4 will present a hazard as a result of the deer travelling route.

Ms. O'Donnell also has concerns that, with a westerly wind, tanker spills, train derailments or other hazardous events may occur and the westerly wind would increase the harm to the residents of Milk River.

Ms. O'Donnell advised that her parents also have entered into a Section 30 agreement with the Province permitting certain of their lands to be expropriated to allow for the upgrading and expansion of Highway 4 for the proposed westerly route. Ms. O'Donnell noted that the Section 30 agreements entered into by herself and her parents include a provision that, if the highway development does not proceed, then they will be entitled to repurchase their lands from the Province.

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- 27 -

Cross-Examination of Ms. O'Donnell

Mr. Holmes took Ms. O'Donnell through Exhibit 8, where the various concerns she expressed at the Hearing were previously expressed to at least the federal government agency, Transport Canada. Further, each of these concerns was acknowledged and a resolution or response to the concerns was set forth by the authorities. This includes the concerns with respect to the safety of the intersections, traffic congestion, the risk of hazardous material spills, deer traffic, and concerns over ice jams/flooding. Ms. O'Donnell acknowledged that responses to her concerns were provided as set forth in Exhibit 8.

Ms. O'Donnell made clear that the land designated as #11 on Exhibit 9, her parents' property, was not accurately described as "marginal land". Mr. Holmes noted that this description was acknowledged by Transport Canada on Exhibit 8, page 2, and Transport Canada agreed that the land was not properly described as "marginal land".

Ms. O'Donnell acknowledged in cross-examination she was not familiar with the actual traffic volume numbers on the highway at the Milk River location.

Ms. O'Donnell acknowledged that she understood the rights she had in connection with the proposed expropriation of her land and that she had legal counsel in connection with entering into the Section 30 agreement.

(v) Mr. Swanson

Mr. Swanson advised that he had been a resident of Milk River, or surrounding area, for his entire life and that he was 70 years of age. He acknowledged that he does not own any property that is directly affected by the proposed westerly realignment of Highway 4.

Mr. Swanson provided his recollection of a meeting approximately seven years ago with representatives of Alberta Infrastructure. He had understood that representatives of the Province of Alberta would be returning to Milk River to have another public session on whether an easterly or westerly route for Highway 4 should be selected. The Province did not hold another public meeting, and the Province simply announced the westerly option would be pursued approximately six weeks later.

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- 28 -

Mr. Swanson gave evidence that a petition was prepared that included signatures from residents of Coutts, Lethbridge, Milk River, and other areas expressing disagreement with the western alignment option.

Mr. Swanson advised that he developed an idea of conducting a survey of residents to collect opinions on an eastern route versus a western route to realign Highway 4. This survey was done in conjunction with a political science professor. The survey was marked as Exhibit 22.

Mr. Swanson advised that he also prepared a document which he described as the "Big Picture" in connection with this project, which was marked as Exhibit 14. Mr. Swanson reviewed the various photographs that were included in Exhibit 14.

Mr. Swanson provided his opinion that the proposed westerly alignment of Highway 4 was an attempt to fight the forces of nature, and in particular the erosion forces of the Milk River, which would ultimately be futile as the forces of nature would prevail.

Mr. Swanson also reviewed a collection of aerial photographs of the Milk River area which were marked as Exhibit 23. Mr. Swanson provided his recollection of the changes in the course taken by the Milk River over the last approximately 50 years and provided examples of how the flow of the River, with the forces of flooding and ice jamming, had changed and how the erosion occurred over the years.

Cross-Examination of Mr. Swanson

Mr. Holmes cross-examined Mr. Swanson briefly. However, Mr. Swanson could not recall the evidence in chief he provided on the subject of the forces of nature versus man-made structures and Mr. Holmes did not pursue any further cross-examination.

(vi) Mr. Hinman

Mr. Hinman advised that he was the MLA for the Cardston Taber Warner area, which included the Town of Milk River. He indicated that he was from Welling, Alberta.

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- 29 -

Mr. Hinman advised that he has had experience as a farmer, rancher, business entrepreneur and various other ventures. He also indicated he was leader of the Alberta Alliance.

Mr. Hinman gave evidence that he was consulted by many constituents, and others, regarding the proposed westerly alignment of Highway 4. Mr. Hinman provided his opinion that the people of Milk River wanted the Highway 4 alignment to be in the west, although he later corrected himself to say that he actually meant to the east.

Mr. Hinman gave his own personal opinion that he thought an easterly route was better.

Mr. Hinman began to give his opinion on some of the engineering evidence that had been given in the course of this Hearing. At this point, the Inquiry Officer questioned whether it was appropriate or relevant to the Inquiry what Mr. Hinman's views were on evidence provided in the course of this Hearing. Mr. Denecky then had Mr. Hinman simply confirm his impression that most people who contacted him felt the easterly route was better.

Cross-Examination of Mr. Hinman

Mr. Holmes attempted to cross-examine Mr. Hinman on the methodology he employed to make the statement that a majority of people with whom he spoke preferred the easterly route. Mr. Hinman avoided answering the question and took issue with statistics in general. Mr. Hinman further opined that Mr. Holmes' question was "a ridiculous question".

Mr. Hinman was asked if he thought the entire Inquiry was ridiculous, and Mr. Hinman responded that he thought it was a last chance for democracy and common sense to prevail. Further, he testified that he would be able to sleep with himself, because he had shared the concerns of the people of Alberta, especially the people of Milk River, as he perceived them, with the Inquiry Officer.

Mr. Holmes attempted to return to his original line of questioning, to which Mr. Hinman finally responded that he estimated that he spoke with approximately 70 or 80 people about the proposed easterly versus westerly alignment of Highway 4.

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- 30 -

Mr. Hinman then indicated, in his view, reasons why Ottawa says it's okay to use the westerly alignment. Mr. Hinman indicated that deer don't read and they do not respect right of ways.

(d) FURTHER EVIDENCE OF AIT AND THE OBJECTOR RE ICE JAMS AND SPURS

(i) AIT

The Expropriating Authority submitted by way of correspondence a letter from Ralph Walters on the subject of ice jams and the construction of the Spurs. By agreement, this submission was marked Exhibit 24.

This Exhibit includes a review of Mr. Walters' qualifications. He has a Bachelor's degree in engineering and a Master's degree in engineering, and has over 40 years' experience in transportation and bridge engineering work, including many years of hydrotechnical and river engineering designs for river crossings, highway planning and construction supervision of bridges and roadways.

By way of the letter marked Exhibit 24, Mr. Walters provided general comments and specific comments. In his general comments, Mr. Walters outlined the conditions of the Milk River that were carefully considered in designing a method to protect the bank adjacent to the Madge Lands from erosion, and thus prevent damage to the proposed realignment of Highway 4. He explained in detail why Spurs were selected, the location of the Spurs, and the designed impact on the flow of the Milk River at this location to prevent or reduce further erosion.

Mr. Walters provided specific comments on certain evidence given by Mr. Hodge, on behalf of the Objector. Mr. Walters noted that the design and placement of the Spurs would not eliminate scour. However, they are designed so that the scour is moved away from the toe of the bank to protect the bank from excessive erosion; further, that ice jams and flooding at this location cannot be eliminated. However, the Spur design, and the presence of the flood plain on the opposite side of the River, mitigate the effect of ice jamming, giving the water a larger rather than restricted area within which to flow.

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- 31 -

Mr. Walters concludes that the Spurs were designed with flooding, ice flow and ice jams taken into consideration in the overall design.

(ii) Objector

After reviewing Exhibit 24, the Objector submitted a letter from Mr. Hodge, which, by consent, was marked as Exhibit 25.

In this letter, Mr. Hodge comments on Mr. Walters' letter of July 6, Exhibit 24.

Mr. Hodge reiterated some general background information with respect to his involvement in the O'Brien Engineering Report (Exhibit 19) and his comments on the Stantec Report (Exhibits 3 and 4).

Mr. Hodge also stated that ice jams and flooding at the proposed location of the Spurs could be extensive. Should there be extensive flooding, and if it exceeds the designed river bank protection and the 100-year flood level elevation, then damages could be excessive. Such flood waters could enter behind the Spurs, resulting in significant erosion and damages. Further, Mr. Hodge states that the construction of the Spurs will likely cause ice jams or flooding to occur on the eastern bank and cause damage to this flood plain on the east bank side of the Milk River. Finally, Mr. Hodge submits that a significant ice jam or flooding at the location of the Spurs could cause floodwaters to extend back to the Town of Milk River and to the interpretative centre/recreation areas.

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- 32 -

PART 3 – SUMMARY OF ARGUMENT

(a) AIT

Mr. Holmes made reference in his argument to the importance of considering Exhibit 9 and Exhibit 10. Although there was one expropriation, one could consider it an area of land that was required for two purposes:

- (a) A sliver of land that was required for the actual construction of Highway 4; and
- (b) A larger triangular piece of property that was required to construct and maintain the Milk River bank stability, so that Highway 4 in the westerly alignment would not be subjected to risk from erosion in the future.

Mr. Holmes reviewed the overall reasons for the twinning of Highway 4 and the requirements for this under the Canamex Agreement between Canada, the United States, and Mexico.

Mr. Holmes reviewed the fact that there are presently at-grade road intersections and that these would be improved with the proposed project.

Mr. Holmes reviewed the evidence with respect to moving the CPR line and providing the new spur line access to the grain elevator and commercial establishments in Milk River. The number of trains per week was low and the traffic volume was low. The minimum warning and safety standards for a roadway/railway level crossing were in fact exceeded with respect to the proposed signage and flashing warning signs.

Mr. Holmes noted that all the evidence establishes that the width of the proposed right-of-way easement to allow the proposed construction was appropriate. He submitted that the width of the right-of-way, and therefore the expropriation of the Madge Lands, were required to meet all of the design proposals that are set forth on Exhibit 9 between the Plains Gas marketing plant and the Milk River. This includes a service road, a tie into the CPR rail line, the proposed four-lane divided highway, and the proposed road access to the Milk River to permit

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- 33 -

construction of the Spurs. Mr. Holmes noted that Mr. O'Brien had no concerns over the quantity of land that AIT states is required and that Mr. Hodge never addressed the issue.

Mr. Holmes noted that even Mr. Madge gave evidence that the riverbank is unstable and is eroding continuously at the bend in the River where the Madge Lands are located. Mr. Holmes noted that this situation has been addressed by the Stantec engineers which has resulted in the proposed construction of Spurs.

Mr. Holmes noted that there was somewhat of a "checkered past" with respect to the process of decision making on the alignment of Highway 4. First, easterly routes were proposed. Then some people in Milk River were opposed and further consideration led to the development of the westerly alignment route. Mr. Holmes noted that even the survey provided by Mr. Swanson shows that there is a significant number of Milk River residents who are proponents of the westerly alignment.

Mr. Holmes noted that there are good reasons for the westerly alignment of Highway 4 which were reviewed by Mr. Hempsey. These include the fact that the railway and roadway remain together in a corridor. This would allow the Town to expand in a northward or eastward direction without encountering either a major roadway or railway. Further, the westerly alignment achieves one of the Town's objectives of remaining visible from Highway 4 which the easterly alignment would not achieve. Finally, access to the Town of Milk River is equally as good from the western alignment as the eastern alignments that had been proposed.

Mr. Holmes noted that the whole question of erosion has been dealt with by qualified engineers, both in the course of the Reid Crowther Report and thereafter in the Stantec Report (Exhibit 2, Section 5.4.2, and Exhibit 3, Section 2.1.1).

Mr. Holmes postulated that even the existing Highway 4 may be threatened at some time in the future without some measures being taken to prevent erosion to the bank of the Milk River at or around the Madge Lands.

With respect to legal points, Mr. Holmes noted that Section 8 of the Act outlines the duties of the Inquiry Officer.

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- 34 -

Mr. Holmes submitted that the objectives of the Expropriating Authority could properly include protection of the proposed highway construction, which in this case includes the reinforcement of the Milk River bank and constructing facilities to allow maintenance and repair of the same.

Mr. Holmes submitted that the meaning of "fair, sound and reasonably necessary" can be found in the review of an article written by J.W. Morden and cases referred to therein. Mr. Holmes quoted passages from this article. In particular, "fair" he submits is a balancing between the loss of the Madge Lands to Mr. Madge versus the public interest and benefit in constructing a roadway and allowing it to be maintained and repaired. He submits that the public interest clearly exceeds and is outweighed by the loss to Mr. Madge. Further, "sound" is met here because the Expropriating Authority is only taking as much land as is required to meet the Expropriating Authority's objectives. "Reasonably necessary" to meet the objectives of the Expropriating Authority is satisfied here because the objectives include the twinning of Highway 4 and the objective of safely constructing the highway including the adjacent Milk River bank stability.

Mr. Holmes submitted that the option of constructing the Spurs by using access to the lands to the south of the Madge property was not squarely put to the Expropriating Authority's witnesses, in particular, Mr. Brownbridge.

(b) Argument of Behalf of the Objectors

Mr. Denecky submitted that his recollection was that he did cross-examine Mr. Brownbridge on access to the River from the lands immediately south of the Madge property, where the riverbank was much lower.

There was then a discussion between the Inquiry Officer, Mr. Denecky, and Mr. Holmes on the question of what evidence there was that there could be access to the Milk River bank for construction of the Spurs by gaining access from property to the south of Madge's property. Mr. Denecky offered that the River could be diverted and access to the riverbed for construction. Thereafter, for maintenance, there could be perhaps access by boat or barge. However, Mr. Denecky did not refer to any evidence to support these submissions.

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- 35 -

Mr. Denecky submitted, by way of correspondence, submissions with respect to the evidence by correspondence submitted by Mr. Walters and Mr. Hodge (Exhibits 24 and 25, respectively). Mr. Denecky submits that the evidence of Mr. Hodge should be preferred over the evidence of Mr. Walters regarding the placement of the Spurs and impact on flooding, ice jams, and erosion of the Milk River banks.

Mr. Denecky submitted there was a heavy onus on the Expropriating Authority to show that the expropriation of the Madge Lands was fair, sound, and reasonably necessary for its objectives. He referred to the textbook, *The Law of Expropriation and Compensation in Canada*, second edition, Eric Todd, and a 1949 decision of *Diggon-Hibben Ltd. v. R.* quoted therein.

Mr. Denecky also made reference to the decision of *Baker v. Canada* [1999] 2 SCR 817, to support the proposition that there is a heavy onus to show fairness in proceedings such as this expropriation inquiry because of a privative clause in section 17 of the Act. Mr. Denecky supplemented his oral remarks by providing the Inquiry Officer with excerpts of this decision that support the proposition that a duty of fairness is owed to the objector in administrative proceedings, such as the within.

Mr. Denecky also provided quotes from *The Law of Expropriation and Compensation in Canada, supra*, at p.25 and 26, for the proposition that expropriation statutes should be strictly construed in favour of the individual whose property rights are affected. Further, he referred to p.49 of this text in support of the proposition that the Alberta legislation purports to remove the within proceeding from the scope of judicial review.

Mr. Denecky submitted that this heavy onus on the Expropriating Authority has not been met. The intended expropriation was not "fair" because there was no follow-up public consultation by the Province of Alberta as promised to Milk River residents. Further, the Premier had stated publicly that all reasonable alternatives would be considered, yet thereafter the westerly route was selected. Mr. Denecky indicated that the Stantec Engineering Group only looked at the westerly route and did not look at all reasonable alternatives.

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- 36 -

Mr. Denecky submitted that no functional study on the easterly routes had been done, only the Reid Crowther Report, which was simply accepted by Stantec because they were never instructed to look at alternative routes.

Mr. Denecky submitted that the intended expropriation cannot be "sound" for a number of reasons. Firstly, an alternate easterly route was more economic. Mr. Denecky submits this is supported by the O'Brien Report which had not apparently been considered by representatives of the Province. Mr. Denecky indicated that the evidence of AIT was that the detailed financial analysis of the cost is presently underway but had not yet been completed and that the Expropriating Authority had not discharged its heavy onus to demonstrate that the proposed project was therefore "sound" from an economic perspective, and therefore the proposed expropriation of the Madge Lands could not be considered sound. Mr. Denecky indicated that the Expropriating Authority must provide this detailed costing information of various options to meet its heavy onus. Further, it was premature to issue a Notice of Expropriation until such cost matters are finalized.

Mr. Denecky noted that the Stantec Report, Exhibit 3, was preliminary on a number of points, including details of the proposed demobilization of railway beds, future cost of flyovers, total cost for the westerly alignment, and costs associated with relocation of rail lines.

Mr. Denecky indicated that the question of costs and safety, according to the evidence on behalf of the Objector, is at least equal as between the far eastern route advocated by Mr. O'Brien and others, and the westerly route.

Mr. Denecky submits that the Expropriating Authority is obliged to provide final detailed designs to the expropriation officer, not the preliminary designs found in the Stantec Report.

Mr. Denecky indicated that Spurs should probably be constructed on the bank, quite independent of any realignment of Highway 4 issues. He submitted that this could be accomplished by entering through the property immediately south of the Madge property.

In considering whether the intended expropriation is "reasonably necessary", Mr. Denecky submitted that we had essentially two possible locations for the alignment of

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- 37 -

Highway 4: the far easterly location and the westerly location. He submitted that the evidence was that each location was at least as good as the other, and therefore it could not be said that the westerly alignment was "reasonably necessary". Mr. Denecky suggested that there were politically motivated decisions to take the westerly option for relocation of Highway 4.

Mr. Denecky submitted that the law in Ontario is different than the law of Alberta. He submitted that the Ontario law allows an appeal from a decision of an inquiry officer and did not contain the strong privative provisions that are found in the Alberta *Expropriation Act*.

Mr. Denecky submitted that that Inquiry Officer should conclude that the intent of expropriation is not fair, sound and reasonably necessary, and award costs to the Objector.

(c) Reply Argument of AIT

Mr. Holmes noted that Mr. Brownbridge's evidence was that Stantec's instructions were to proceed with the design and construction engineering assuming a westerly route for Highway 4. Stantec was not asked to further evaluate or compare westerly routes and routes to the east of the Town of Milk River. Therefore, the submissions of Mr. Denecky concerning the failure of Stantec to take certain steps is not appropriate because this was never part of Stantec's instructions from AIT.

Mr. Holmes further submitted that the ISL study and the Reid Crowther Report were both functional studies, and both reviewed and compared options for the routing of Highway 4 in the Milk River area. Community concerns raised after the ISL study led to the Reid Crowther study and report on easterly versus western options for Highway 4. It was obvious that there was a difference of opinion within residents of Milk River to the point that the Province made a decision.

Mr. Holmes noted that the lack of detailed planning and costing were simply a function of the status of the state of the project, and the lack of such details are not relevant to consideration of the proposed expropriation by the Inquiry Officer. In any event, Mr. Holmes submitted that the Stantec Report, Exhibit 3, is more than a sufficient level of detail to justify the need for the intended expropriation and therefore Hearing of this nature by the Inquiry Officer.

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- 38 -

PART 4 – FINDINGS OF FACT

The objective of the Expropriating Authority is to acquire the Madge Lands for the construction, development and maintenance of a highway (public road), namely, the proposed realignment of Highway 4 (Exhibit 11).

The proposed realignment and upgrading of Highway 4 is required as part of the Province of Alberta's objective in upgrading Highway 4 so that it complies with the requirements of the Canamex accord, which establishes the requirement for a twinned divided highway between Canada, the United States, and Mexico.

There does not appear to be any disagreement by the Objector that a realignment of Highway 4 is required to improve traffic flow adjacent to the Town of Milk River. Rather, the position of the Objector is that the improvement to Highway 4 should be achieved by way of an alignment east of the Town of Milk River, rather than the proposed alignment to the west of Milk River. If an easterly alignment was chosen, then the Madge Lands would not need to be expropriated.

If the westerly alignment of Highway 4 is to be constructed, then there must be an expropriation of the Madge Lands. These lands are required to upgrade Highway 4 to a divided four-lane roadway. The Expropriating Authority also has established that the lands are required to allow for the construction of Spurs at the bank of the Milk River to try to eliminate or reduce ice jams, flooding, and erosion of the bank in a westerly direction toward Highway 4.

There has been consultation by representatives of the Province of Alberta with the community of Milk River. There has been a functional study performed, comparing various proposed alignments. There has been consultation with Town representatives. Thereafter, the Province made a decision selecting the westerly route.

There was no evidence that the selection of the westerly route was capricious, done for political or other improper motives. Quite the contrary, there are a number of sound reasons for locating the Highway 4 realignment to the west of Milk River, including: keeping the railway and roadway in one corridor; allowing Town visibility for travelers on Highway 4;

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- 39 -

not hampering Town access to the cemetery; and not interfering with expansion of the Town in an eastward or northward direction.

The Objector certainly established through his witnesses that there are arguably certain advantages to an easterly route which may include reduced cost of construction and no requirement to remove existing rail lines.

In argument, counsel for the Objector suggested that the lands required for access to the Milk River and construction, inspection, and maintenance of the Spurs could be done by accessing land immediately south of the property owned by Mr. Madge. However, there was no evidence to support how this could be achieved from an engineering and construction perspective. Accordingly, there was no evidentiary basis to suggest what credible alternative there is for bank protection, which all parties agree would be prudent to prevent continued erosion of the Madge Lands.

It appears that all landowners in the affected area, including witnesses for the Objector, have reluctantly agreed to allow their land to be taken for the purpose of the realignment of and improvement to Highway 4 in the Milk River area.

The expertise of the witnesses called by the Expropriating Authority is far greater than the expertise of the purported expert witnesses called by the Objector. Mr. Walters is far more qualified than Mr. Hodge to speak on the subject of bank protection and construction of the Spurs. Mr. Hempsey, Mr. Brownbridge, Mr. Martin and Mr. Younger have considerable experience in dealing with the issues upon which they testified, unlike Mr. O'Brien on behalf of the Objector, who is essentially a life-long surveyor.

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- 40 -

**PART 5 – OPINION ON THE MERITS OF THE
EXPROPRIATION AND REASONS THEREFOR**

The scope of this Inquiry is set out in section 15(8) of the Act which states:

The inquiry officer shall inquire into whether the intended expropriation is fair, sound and reasonably necessary in the achievement of the objectives of the Expropriating Authority.

To achieve the objectives of the Expropriating Authority in improving and realigning Highway 4, the Expropriating Authority has demonstrated that it is fair, sound, and reasonably necessary that the Madge Lands be expropriated.

There is clearly a difference of opinion within the Milk River community as to whether an easterly route or westerly route for the realignment and improvement to Highway 4 is most desirable. The survey taken by Mr. Swanson demonstrates this is the case. There are pros and cons to each proposed alignment. Representatives of the Province of Alberta decided, for *bona fide* reasons, to select the westerly route.

In most situations where the roadway is to be built or to be realigned, it is likely that one could construct a few equally acceptable routes. Accordingly, it cannot be, generally speaking, a basis for demonstrating that the intended expropriation is not fair, sound, and reasonably necessary, simply because there are competing alternative routes, all of which have pros and cons in comparison to the route chosen by the Expropriating Authority.

The Expropriating Authority's representatives have engaged in public consultation, and have engaged professionals to look at design, construction, safety, environmental impact, and all other relevant considerations in selecting and preparing the preliminary design for the westerly alignment and improvement to Highway 4 near Milk River.

The evidence presented on behalf of the Objector was generally from individuals who are either not qualified or far less qualified than Stantec, Mr. Younger from CPR, and EarthTech witnesses who gave evidence on behalf of the Expropriating Authority. Mere speculation from far less qualified witnesses about excessive ice jams or one in 100-year flooding causing unforeseen damages to the Spurs certainly does not constitute evidence upon

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- 41 -

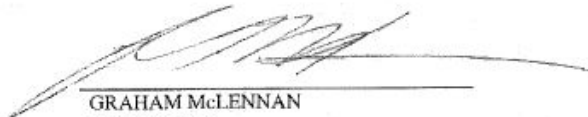
which the Inquiry Officer could conclude that the objectives of the Expropriating Authority would not be met by the intended expropriation.

Certainly, the personal observations of Ms. O'Donnell, Mr. Swanson, and Mr. Madge over many decades must be given some weight. I have no doubt that their observations of periodic ice jam and flooding problems are accurate. However, when it comes to construction of bank erosion protection, the evidence of experts must prevail. The experts called on behalf of the Objector were not in a position to credibly criticize the proposed design of the Spurs and construction of the proposed upgraded Highway 4.

Accordingly, I find the intended expropriation of the Madge Lands is fair, sound, and reasonably necessary in achievement of the objectives of the Expropriating Authority to construct, develop, and maintain the upgraded Highway 4 adjacent to Milk River. Specifically, the construction of the Spurs is required to maintain the upgraded Highway 4 as proposed.

Pursuant to section 15(10) of the Act, the reasonable costs of the Objector in connection with this Inquiry shall be paid by the Expropriating Authority.

DATED at the City of Edmonton, in the Province of Alberta, this 20th day of July, 2006.



GRAHAM McLENNAN
Inquiry Officer
600, 12220 Stony Plain Road
Edmonton AB T5N 3Y4
Phone: (780) 482-9221
Fax: (780) 482-9100

THIS NOTICE OF INQUIRY IS FOR SERVICE ON:

Stringam Denecky
Steve Denecky, Q.C.
Counsel for the Objector
314 - 3rd Street South
Lethbridge AB T1J 3Y3

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- 42 -

Alberta Justice
Christopher D. Holmes
Counsel for the Expropriating Authority
Minister of Infrastructure and Transportation
2nd Floor, Peace Hills Trust
10011 – 109 Street
Edmonton AB T5J 3S8

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- 43 -

APPENDIX 1 – EXHIBITS

1. Highway 4 Functional Planning Study, Couets to Lethbridge, Final Report July 1996, Volumes 1 and 2.
2. Functional Planning Study Highway 4 at Milk River Final Report prepared by Reid Crowther May 2000.
3. Alberta Infrastructure & Transportation Environmental Assessment of Proposed Highway 4 and CPR Railway Relocation, Milk River, Alberta, Volume 1, Main Report, prepared by Stantec.
4. Alberta Infrastructure & Transportation Environmental Assessment of Proposed Highway 4 and CPR Railway Relocation, Milk River, Alberta, Volume 2, Appendices, prepared by Stantec.
5. Transport Canada Road/Railway Grade Crossings Document dated October 24, 2002.
6. Alberta Community Development Memorandum dated February 8, 2005.
7. Street Lighting Site Plan prepared for Alberta Infrastructure by Stantec.
8. Transmittal Document for Environmental Assessment of Proposed Highway 4 and CPR Railway Relocation at Milk River, Alberta; Proponent Responses to ISC Review and Public Input, prepared by Stantec May 2006.
9. Alignment Plan prepared for Alberta Infrastructure and Transportation June 2006.
10. Proposed Expropriated Property prepared for Alberta Infrastructure and Transportation by Stantec.
11. Notice of Intention to Expropriate, Notice of Objection, Notice of Appointment of Inquiry Officer, Notice of Extension.
12. CV of Leslie John Hempsey, P.Eng., Senior Transportation Engineer, EarthTech.
13. CV of William L. Brownbridge, P.Eng., Senior Project Manager, Stantec.
14. Seeing the Big Picture, Proposed Canamex Highway Bypass of the Town of Milk River, prepared by Wray Oscar Swanson, photographs (a) through (i).
15. Documents prepared by Stantec Consulting Limited as part of the design for the project.
16. CV of John Martin, M.Sc., Environmental Consultant (Transportation), Stantec.
17. Public Notice wherein CPR applied on June 26, 2006, to the Canadian Transportation Agency for permission to relocate the railway.

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- 44 -

18. Company Profile of O'Brien Engineering & Surveys Ltd.
19. Preliminary Design and Cost Estimate for Highway 4 at Milk River prepared by O'Brien Engineering & Surveys Ltd. August 2000.
20. Land Title Certificate in the name of Paul Madge.
21. Bundle of photographs taken by Bruce Madge.
22. Milk River Highway 4 Alternate Routes Survey prepared by Peter McCormick March 10, 2001.
23. Taped layout of Alberta Agriculture aerial photographs.
24. Letter and CV from Ralph Walters, M.Eng., P.Eng., Senior Consultant, Bridges, Stantec Consulting, dated July 6, 2006.
25. Letter from E.J. Hodge, P.Eng., Msc., A.L.S., Senior Consultant – Civil Projects, E.J. Hodge and Associates Ltd., dated July 14, 2006.

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