Edmonton Composite Assessment Review Board

Citation: Eco-Industrial Business Park Inc. v The City of Edmonton, 2012 ECARB 01490

Assessment Roll Numbers: 1150986, 1340637, 10150275, 10150276, 10150280
Municipal Address:
Assessment Year: 2012
Assessment Type: Annual New

Between:

Eco-Industrial Business Park Inc

Complainant

and

The City of Edmonton, Assessment and Taxation Branch

Respondent

DECISION OF
Robert Mowbrey, Presiding Officer
Howard Worrell, Board Member
Mary Sheldon, Board Member

Preliminary, Procedural and Jurisdictional Matters

[1] Upon questioning by the Presiding Officer, the parties indicated that they had no objection to the composition of the Board. The members of the Board stated they did not have any bias in respect of this matter.

[2] During the discussions surrounding the admittance of the Respondent's surrebuttal material, the Presiding Officer advised the parties that the author of the appraisal report contained in that surrebuttal material was a member of the Edmonton Assessment Review Board.

[3] Both parties agreed that witnesses would be sworn or affirmed prior to the witness giving testimony for the first time. The choice to swear or to affirm would be up to the individual witness and the witnesses would remain under oath or affirmation until the completion of the hearing.

[4] The parties agreed to carry forward all evidence, submissions, cross-examination and argument during the merit hearing on roll number 1150986 to rolls 1340637, 10150275, 10150276 and 10150280 (now split into 10274072 and 10274073). It was agreed that, while decisions would be rendered by the Board on the value for each roll number, these decisions would be contained in one Board Order.

[5] At the outset of the hearing, the Complainant raised two preliminary issues for determination by the Board. A third preliminary issue was raised by the Respondent at the outset of its presentation.

First Preliminary Issue: Relevancy of Respondent's Evidence

[6] The first preliminary issue concerned the relevance of the material in the Respondent's evidence, specifically, Exhibit R-1, Tab 28 and Tab 30. The Complainant requested that all the materials in these Tabs be removed and not considered by the Board.

[7] The Complainant argued that the documents contained in Tab 28 contained news articles, including an article from a blog. In the opinion of the Complainant, this material was highly prejudicial to the Complainant and did not relate to the complaints before the Board. The Complainant argued that this material was not relevant to the issues before the Board and should be excluded from the Board's consideration.

[8] The Complainant also objected to the material in Tab 30, which included a Statement of Claim relating to unpaid taxes on the roll numbers which are the subject of these complaints. The Complainant argued that the question of unpaid taxes was not relevant to the issues before the Board and should be excluded from the Board's consideration.

[9] The Respondent submitted that the evidence contained in Tab 28 and Tab 30 was arguably relevant and that it was not for the Complainant to determine relevancy. In the Respondent's opinion, the reputation of the owner of the property, as well as issues respecting the management of the property, might be a factor in the difficulties that the owner is having with the property. The Respondent indicated that they would be presenting this as an argument during the hearing. The Respondent said that evidence which is arguably relevant ought not to be disallowed at the commencement of the hearing. In the opinion of the Respondent, the Board ought to consider and weigh that evidence as it is presented during the hearing.

[10] After a recess, the Board concluded that the evidence outlined in Tab 28 and Tab 30 was not relevant to the Board's consideration of the 2012 assessment of the property. The Board found that the Complainant was not the subject of the news reports in Tab 28. Any connection between the Complainant and the subject of the articles was too tenuous to be of any real probative value in the matter before the Board. The Board was not persuaded that the reputation or character of the owner would have an influence on the marketability of the subject lands. In the opinion of the Board, a buyer would be more interested in other factors, such as price per acre, than with the reputation of the owner.

[11] With respect to the material contained in Tab 30, the Board determined that the allegations outlined in the Statement of Claim were unproven and were therefore irrelevant. As well, the Board was not persuaded that the non-payment of taxes represented a negative influence on the marketability of the property. If sold, the purchase price of the property would be adjusted to account for unpaid taxes.

[12] The Board was mindful of the Respondent's argument that a decision maker should not be too hasty in deciding that evidence is irrelevant before that evidence has been fully considered in the context of the hearing. However, the Board was satisfied that the materials in Exhibit R-1, Tab 28 and Tab 30 do not assist in determining the fairness and equity of the 2012 assessment.

[13] Therefore, the material contained in Tab 28 and Tab 30 was struck from the Respondent's disclosure, removed from Exhibit R-1 and returned to the Respondent. As requested by the Complainant, the materials in Exhibit C-3, Tab 22 were removed as well and returned to the Complainant. These materials formed part of the Complainant's rebuttal and were not necessary since Tab 28 and Tab 30 were not going to be considered as evidence.

[14] The Board finds that while the members have seen and considered the materials in Exhibit R-1, Tab 28 and Tab 30, the ability of the Board to make a fair, unbiased decision with respect to the complaints has not been affected.

Second Preliminary Issue: Admissibility of Respondent's Surrebuttal

[15] The Complainant also requested that the Board disallow the surrebuttal presented by the Respondent on the basis that it contained new evidence. This surrebuttal document was only received by the Complainant a few days before the commencement of the hearing. The Complainant submitted that should the surrebuttal be allowed, they would seek a postponement of the hearing to allow the Complainant time to make a proper response.

[16] The Respondent stated that the material in the surrebuttal could not have formed part of its initial disclosure and that it referred to material in the Complainant's rebuttal package. In the opinion of the Respondent, the surrebuttal met all the requirements of a response to a rebuttal set out in s. 8(2)(c) of the *Matters Relating to Assessment Complaints Regulation*, Alta Reg 310/2009 (MRAC). The Respondent also referred to MRAC s. 10(3), which deals with the abridgment or expansion of time for disclosure.

[17] The Board concluded that it would reserve its decision on this matter until after the Complainant's presentation of its rebuttal evidence. At that time, the Board would be in a position to decide whether the surrebuttal was rebutting the evidence in the Complainant's rebuttal package or whether it constituted new evidence.

[18] After the completion of the presentation of its rebuttal evidence, the Complainant reaffirmed its objection to the inclusion of the Respondent's surrebuttal, which related to a subdivision application on the subject. The Complainant submitted that the material in the surrebuttal package referred to the circumstances of a subdivision which had not occurred, and might never occur. In any event, this subdivision would occur subsequent to the valuation date of July 1, 2012.

[19] The Complainant also submitted that they had been prevented from pursuing a line of questioning concerning subdivision and that the line of questioning should not now be permitted. The Complainant also pointed out the technical difficulties of allowing a surrebuttal. The Complainant confirmed that should a surrebuttal from the Respondent be allowed, the Complainant would wish to respond. As such, it was difficult to see where the procedure would end. The Complainant also argued that the Respondent did not have a witness present who could speak to subdivision issues. In conclusion, the Complainant suggested that the Respondent's surrebuttal was not relevant and would not add anything concrete to the matters before the Board.

[20] The Respondent advised the Board that s. 8(2)(c) of MRAC clearly contemplated the possibility of a surrebuttal. The Respondent indicated that pages 1-3 of the surrebuttal document related to unpaid taxes, and included excerpts from regulations and standards which dealt with the effect of delinquent taxes on the marketability of property. The Respondent submitted that the Board could take into account the fact that a decision to pay or not pay taxes would be a management decision. With respect to the portions of the surrebuttal dealing with subdivision, the Respondent pointed out that two news articles about a potential sale of land to Gilead had been included in the Complainant's rebuttal.

[21] The Respondent argued that the surrebuttal showed that in certain circumstances subdivision of the subject would be possible. The Respondent also stated that it was not necessary for a witness at the hearing to present evidence on subdivision.

[22] In response to the Complainant's argument that its preclusion from asking questions about subdivision should also preclude the Respondent from addressing subdivision, the Respondent stated that these earlier questions had been posed to a witness who had not addressed subdivision. As such, the circumstances were different.

[23] The Board decided to admit pages 5, 6 and 7 of the Respondent's surrebuttal as evidence. In the opinion of the Board, pages 1, 2 and 3 of the surrebuttal dealt with the issue of delinquent taxes on the marketability of property and a decision on that matter had already been made (First Preliminary Issue). The Board reiterated that it was not persuaded that unpaid taxes had an effect on the marketability of property. The Board also decided that page 4 and pages 8 to 44 (including an appraisal prepared for Gilead in connection with a subdivision application) were superfluous and would not be considered.

[24] The Board decided that pages 5, 6 and 7 of the surrebuttal document, consisting of a conditional subdivision approval on one of the subject parcels, would be admitted. In the opinion of the Board, this information directly related to material in the Complainant's rebuttal document. The Board also noted that the issue of subdivision had been raised by the Complainant on the complaint form.

Third Preliminary Issue: Recommendations for Reductions on Parcels 3A, 4 and 11

[25] At the outset of its presentation, the Respondent advised the Board that the City had recommended amendments to the assessments for Parcels 3A, 4 and 11. For Parcel 4, the recommended assessment was $2,540,500, based on an accounting for a "do not disturb" (DND) area. For Parcel 3A, the recommended assessment was $2,032,000, based on a market value adjustment. With respect to Parcel 11, the Respondent advised the Board that the Parcel had been split into Parcels 11A and 11B. As such, the Respondent had split the values for Parcel 11 into values for Parcels 11A and 11B.

[26] The Complainant did not accept the recommendations on Parcels 3A and 4.

Procedural Issues Arising During the Course of the Hearing

A. Procedure of the Board

[27] During the course of the Complainant's presentation, the Respondent objected to the Complainant and its witnesses referring to information in the Complainant's rebuttal disclosure. The Respondent argued that the information referred to was not found in the Complainant's initial disclosure. Since the information was contained only in the rebuttal, the Respondent submitted it should be referred to during the Complainant's rebuttal, and not before then.

[28] The Complainant argued that it could more efficiently present its case by having witnesses refer to evidence both in its disclosure and rebuttal packages. In the opinion of the Complainant, it should not be limited in the manner of the presentation of its case. The Complainant further indicated the time required for the hearing would be extended should the Board not allow the Complainant to present its case in the manner in which it had been prepared.

[29] The Board decided that the hearing would be conducted according to the published policies and procedures of the Edmonton Composite Assessment Review Board. The Board noted that its practice was not to hear a party's evidence and rebuttal at the same time. A copy of the published procedures of the Edmonton Composite Assessment Review Board was provided to both parties.

[30] Subsequent to this ruling, the Complainant submitted that it could not present its case in this matter cohesively if the procedures outlined were followed. The Complainant asked whether the Board had a legal opinion supporting its policy on hearing procedure, and if so, whether it could be provided. The Complainant noted that the purpose of disclosure is to ensure all parties are aware of the evidence that will be relied upon at the hearing. From a fairness perspective, both parties should be permitted to refer to any document that has been properly disclosed since each party has knowledge of these documents. The Complainant submitted that it would be a breach of fundamental justice to deny it the ability to present its case in the order it wished. The Complainant stated that it might require a postponement of the hearing in order to bring an application for judicial review of the Board's procedures respecting the conduct of hearings.

[31] The Respondent objected to this request and argued that it was improper for proceedings to be postponed for judicial review on an interim matter. In the Respondent's opinion, the proper time for such review would be after the conclusion of the merit hearing. The Respondent also stated that it would be improper for the Board to deviate from its typical hearing procedure.

[32] After a recess the Board rendered its decision. As an initial statement, the Presiding Officer offered an explanation of a "miscue" from the previous day. The Presiding Officer had stated that he might have been remiss in accepting disclosure documents as evidence at the outset of the hearing. However, after consideration, he advised that these disclosure documents had to be entered in order to deal with the preliminary issues raised at the outset of the hearing by the Complainant.

[33] The Board then advised the parties that an administrative tribunal is the master of its own procedure. Unless the relevant legislation stated otherwise, or unless to insist on a certain procedure would result in procedural unfairness to either party, the Board would continue to follow its usual procedures. In the case of this Board, there is no legislated requirement that restricts the Board from determining its hearing procedure.

[34] With respect to procedural unfairness the Board decided that the Complainant had not provided sufficient reason to have the Board alter its normal procedure in this case with respect to the presentation of evidence. In the opinion of the Board, the perceived inefficiency that the Complainant alleged would not impede the Complainant from entering its case. That the Complainant would need to reconsider the presentation of its case to be in line with Board procedure did not create a fairness issue that would require a postponement and direction from the Court of Queen's Bench. The Board was satisfied that both parties would have the opportunity to fully present their cases. The Board decided that all parties would follow the procedure of the Board as set out in its published policies.

[35] This decision of the Board to follow its published procedures was also applied when the Respondent wished to refer to the Appraisal Institute Standards contained in the Respondent's disclosure during the Respondent's cross-examination of Ed Jackson. The Board did not allow the Respondent to refer to materials in its disclosure which had not yet been entered into evidence. That material could only be referenced once the disclosure had been entered as evidence.

B. Qualification of Expert Witnesses

[36] During the presentation of its case, the Complainant included an appraisal of the market value of the subject properties effective July 1, 2011 (the "Jackson Appraisal"). The author, Ed Jackson, B.Sc, AACI, FRI, CRP ("Jackson") was presented to the Board as an expert witness to explain and comment on his appraisal.

[37] Jackson outlined his credentials including his education and business experience and his membership in relevant professional organizations. Jackson indicated that he had provided opinions of land values to corporations, individuals and municipalities. During cross-examination by the Respondent, Jackson indicated that while he had been involved in the appraisals of many properties, this was the first appraisal he had conducted that involved contaminated land or that required adjustments for contaminated land. Jackson also confirmed that he did not have any education specific to the valuation of contaminated land.

[38] The Complainant requested that Jackson be qualified as an expert witness and be allowed to testify in that capacity. The Respondent objected on the basis that Jackson had no prior experience in dealing with the appraisal of contaminated industrial land.

[39] The Board ruled that Jackson would not be qualified as an expert witness in the appraisal of contaminated industrial property but that he would testify only as a witness.

[40] At the outset of its presentation, the Respondent presented Mr. Rolf Halvorsen ("Halvorsen") to be qualified as an expert witness in his review of the Jackson Appraisal and presentation of his findings (the "Halvorsen Report"). Halvorsen presented his education and relevant business and professional experience. The Complainant objected to the qualification of Halvorsen as an expert witness on the grounds that his experience did not show that he had dealt with contaminated properties on the scale being considered in this hearing.

[41] The Board ruled that Halvorsen would not be formally qualified as an expert witness but that he would give his testimony only as a witness.

C. Objection to Witness Referring to Notes

[42] During the course of the testimony of a witness for the Respondent, the Complainant noticed that the Respondent's witness was referring to hand written notes on the divider pages separating the tabs in the Respondent's disclosure. The Complainant submitted that those notes did not appear on the tab divider pages of the disclosure that had been provided to the Complainant. Therefore, those notes should not form part of the Respondent's testimony.

[43] The Respondent submitted that the notes on the divider pages were there for reference only and to ensure that the witness covered all relevant points in his testimony.

[44] The Board ordered that the parties recess and that the Complainant have an opportunity to review the handwritten notes on the dividers. When the hearing reconvened, the parties advised the Board that they were satisfied with the review and the Complainant had no further objection.

D. Objection to Question re: Dan White Family Trust

[45] During cross-examination of the Complainant's Panel of witnesses, the Respondent asked the witness who the beneficiaries of the Dan White Family Trust were. This question was asked on the basis that the trust is an owner of Eco Industrial Business Park Inc. The Complainant objected to this question on the basis of relevancy.

[46] The Board ruled that the question was not relevant and did not have to be answered.

E. Objection to Testimony re: Jackson Discussion with Other Professionals

[47] During Jackson's presentation of the Jackson Appraisal, the Respondent objected to the witness testifying to his discussions with other professionals in the real estate field. In the opinion of the Respondent, this evidence should not be allowed. In the opinion of the Complainant, this information formed part of the Jackson Appraisal.

[48] The Board ruled that the witness could only present very brief statements concerning his discussions with other professionals during the preparation of the Jackson Appraisal.

F. Objection to Question re: Proposed Subdivision of Parcel 11B

[49] The Complainant objected to the Respondent cross-examining Jackson on the subject of the proposed subdivision of Parcel 11B. The Respondent argued that material concerning subdivision had been entered as document C-9 (the map of the parcel). The Board ruled that a question concerning the proposed subdivision would not be allowed as that proposal was not referred to in the Jackson Appraisal.

G. Objection to Question re: s 5.1 of Celanese Restrictive Covenant

[50] During the Respondent's cross-examination of Jackson's presentation of rebuttal material, the Complainant objected to a question concerning Jackson's understanding of possible legislative changes in environmental liability and the relation to s. 5.1 of the Celanese restrictive covenant. The Respondent argued that s. 5.1 of the Celanese restrictive covenant had been referred to in redirect questioning by the Complainant. The Board decided that the witness would be allowed to answer the question.

H. Objection to Question re: Domtar Site

[51] During the presentation of the Complainant's rebuttal, the Respondent objected to the inclusion of material concerning tax information relevant to the Domtar site. The objection was on the basis that it did not rebut any material contained in the Respondent's disclosure. The Complainant submitted that the Domtar material was relevant.

[52] The Board decided that the Domtar material did not refer to information contained in the Respondent's disclosure and would be disallowed.

Definitions

[53] In this decision, the following definitions will apply:

- The "subject" will refer in the aggregate to the roll numbers under consideration, namely:

- Roll 1150986 (Plan 1904 EO, Block OT, **referred to as Parcel 10)**;
- Roll 1340637 (Plan 832 3217, Lot 3, **referred to as Parcel 4)**;
- Roll 10150275 (NE-17-53-23-4, **referred to as Parcel 3A)**;
- Roll 10150276 (Plan 5725RS, Lot E, **referred to as Parcel 9)**;
- Roll 10150280 (includes 10274072, NW-17-23-4, **referred to as Parcel 11A** and 10274073, legal description SW 17-53-23-4, **and referred to as Parcel 11B)**.

[54] The Board notes that the complaints in question are for the 2012 assessment year. A complaint on roll 10150280 was filed at the same time as the complaints for the other parcels forming the subject of these hearings. However, parcel 11 has been subdivided into lots 11A and 11B. Throughout the hearing the parties referred to Parcels 11A and 11B (or Parcel 11 and Parcel 12) and indicated that they wanted decisions rendered on Parcels 11A and 11B (12).

[55] The designation "Panel" in this decision will refer in the aggregate to:

- Alex Lee: Controller of Symmetry Asset Management Inc. ("Symmetry");
- Dan White: CEO of Symmetry; Eco Industrial Business Park Inc. ("Eco"); Worthington Business Park Inc;
- Jim Kumpula: Executive Vice President of Symmetry; and
- Mohammed Farooq: Vice President, Symmetry.

These witnesses provided testimony in a group for the Complainant and a submission from one individual is considered to be a submission of the entire Panel.

Background

[56] The subject consists of a 283.39 acre parcel of land divided into six separate titles. The subject is part of the former Celanese Canada Inc. site situated in the Clover Bar area of Northeast Edmonton. The Celanese site had been used as an industrial processing complex and was sold in its entirety in 2007 to Worthington Properties Inc. That sale consisted of 579 acres of land for a purchase price of $35,000,000 of which $21,000,000 was allocated to the land. Subsequent to that 2007 sale, several of the parcels comprising the original site were sold to third parties. Six parcels from the original land are currently owned by the Complainant. Title to five of the remaining parcels – Parcel 3A, 4, 9, 11A and 11B – are registered in the name of Eco, a successor corporation to Worthington Properties Inc., while the sixth parcel (Parcel 10) is registered in the name of Worthington Business Park Inc., another successor corporation to Worthington Properties Inc.

[57] When Celanese owned the site it had a river access licence and water source with a pump and treatment plant, as well as a network of water and sewer servicing. These services are no longer in use. A power generating plant still present on the site is also not in use. The parcels are assessed as unserviced lots.

[58] The only access to the parcels is via a road off Hayter Road, across the Canadian National Rail right-of-way and onto Parcel 9. From there, access to the other parcels is via a network of private roads through Parcels 11A and11B. The southern portion of Parcel 10 has limited access from the Yellowhead Highway right-of-way. There is some rail access to the parcels from Canadian National Railway lines to the east through some of the sold-off portions of the original Celanese site.

[59] Some buildings not currently scheduled for demolition remain on the subject. On Parcel 11A, there is an administration building and an effluent treatment facility as well as a general warehouse building, a maintenance building, warehouse building and a water treatment facility. The former bank and fire hall remain on Parcel 11B. Most of the buildings are obsolete and non-functioning. The second floor of the administration building is leased to the property manager (Symmetry).

[60] Parcel 10 is an irregularly shaped parcel located in the southwest corner of the subject. It is divided into two sections separated by a Canadian National rail line. The two sections are long and narrow. The northern portion consists of approximately 2.73 acres and the southern portion consists of 2.27 acres. A power line right of way containing large steel towers cuts through the middle of both portions. Parcel 10 is zoned IM.

[61] Parcel 4 is also irregularly shaped, and situated in the eastern part of the subject. The parcel contains approximately 40.62 acres. This parcel has significant contamination and contains a DND area. Parcel 4 is zoned IH.

[62] Parcel 3A is approximately 85.38 acres and is located in the eastern portion of the subject. This parcel has significant contamination and contains a DND area. Parcel 3A is zoned IM and IH.

[63] Parcel 9 is approximately 32.81 acres in size and is located in the southwest of the subject. It contains some roads and open areas. It is zoned IM

[64] Parcel 11A is the northern portion of the former Parcel 11, which is located on the west side of the subject. This parcel is reported to have extreme contamination and contains a DND area. It is zoned IH.

[65] Parcel 11B (or Parcel 12) is the southerly portion of the former Parcel 11. There are a number of older buildings and interior roads on site. This parcel is zoned IM.

Issue

[66] What is the market value of each of the parcels comprising the subject?

Legislation

[67] The legislation relied upon in this decision is outlined in Schedule "A".

Summary of Positions.

[68] The Board heard extensive evidence from both the Complainant and the Respondent. The following is intended to summarize the positions of the parties as submitted to the Board over the course of 9 days of hearing.

Position of the Complainant

A. Complainant's Presentation of its Position

[69] The Complainant filed these complaints on the basis that the assessments of the parcels were in excess of market value. In support of this position, the Complainant presented a Panel of witnesses who individually represented various management aspects of the Complainant and acted for Eco. The Complainant also presented Ed Jackson, the author of the Jackson Appraisal, to comment on his appraisal of the subject.

Presentation of the Panel

[70] The Panel advised the Board that the subject had been purchased in 2007 pursuant to a purchase agreement between Celanese Canada Inc. ("Celanese") and Worthington Properties Inc. ("the original purchase agreement") [Exhibit R-1, Tab 7]. The Panel advised that the parcels that make up the subject of these complaints are now registered in the name of Eco, a successor corporation to Worthington Properties Inc., with the exception of Parcel 10, which is registered to Worthington Business Park Inc., another successor corporation.

[71] The Panel submitted that Celanese had maintained operations on the site from 1953 to 2007 and had used the site for chemical manufacturing. The site also contained a methanol plant. While Celanese was in operation, the site was serviced by water diversion rights from the North Saskatchewan River, by an onsite water treatment plant and by a power generation plant. The Panel advised that these services and facilities are no longer in service.

[72] The Panel also advised that Celanese had produced petrochemical and cellulose acetate fiber during its years of operation on the subject. Celanese had also produced methanol, vinyl acetate monomer, acetic acid, acetic anhydride, and pentaerythritol. The Panel advised the Board that as a result of those operations, there is significant contamination on the subject. The total cost of remediation for the parcels was referred to in the Klohn Crippen Berger report of 2010 (the "Klohn Report") and was estimated at approximately $305.4M [Exhibit C-2, Tab 2, D page 8].

[73] The Panel informed the Board that the Klohn Report identified a number of non-disturbance areas (DND) on the subject that had serious contamination risks associated with their location. The Panel advised that, in their opinion, should a third party disturb these areas, that third party could be held liable for the disturbance and contamination.

[74] The Panel advised the Board that the original purchase agreement outlined the contamination issues and the respective responsibilities of the parties with respect to the contamination.

[75] The Panel directed the Board to a Restrictive Covenant [Exhibit C-2, Tab 2, A] dated effective December, 2007 and registered on title to the parcels that made up the original purchase agreement by Celanese (the "Restrictive Covenant"). The Board heard evidence that, pursuant to

this Restrictive Covenant, Celanese is to monitor the ground water and manage and control the continuing environmental risk for a period of 25 years. The Panel stated that, in its opinion, the Restrictive Covenant would limit the type of purchaser that would be interested in the subject as conventional buyers. In the Panel's opinion, real estate or income trusts would not be interested in a property with such challenges and potential liability.

[76] The Panel advised the Board that Parcels 1, 2, 3B, 5, 6, 7 and 8 had formed part of the original purchase agreement and had subsequently been sold to third parties. The Panel stated that these parcels are not as contaminated as the ones under appeal, and were sold to purchasers including CCS Corporation, Pembina Pipeline Corporation, Plains Midstream, Clearway Recycling and Alberta Diluent Terminal. The Panel informed the Board that these sales were possible as some of the parcels had been isolated from the contaminated sites. One method of selling the parcels was pursuant to the *Pipeline Act*, which allowed for separation of the parcel from the contamination. One member of the Panel commented that there would be a way to subdivide the subject, and stated that "if there is a will, there is a way to do it."

[77] The Panel also advised the Board that, pursuant to a Demolition Schedule, numerous buildings remained on the subject and some were slated for demolition [Exhibit C-2, Tab 2, (2), page 36]. That schedule showed the demolition cost to be $943,516.

Cross-Examination of the Panel by the Respondent

[78] In response to questioning, the Panel confirmed that while the assessment complaint letters filed for the subject were identical, Parcel 10 did not have significant contamination. The Panel submitted that the generic complaint form was intended to explain the Complainant's concerns for the parcels as a whole.

[79] The Panel also confirmed that the members of the Panel worked for Symmetry and that Symmetry paid Eco approximately $5,000 per month for the use of a building on the subject. The Panel further stated that there had been other short term leases to small business operations on the subject, and that these operators were not concerned with the environmental problems. The Panel also confirmed that as a parcel was sold, unpaid taxes were adjusted as part of that sale.

[80] The Panel confirmed that Celanese had placed the Restrictive Covenant on all the parcels under appeal and also advised the Board concerning the DND areas on the subject. The Panel stated that there were deep wells on some of the parcels to be used for the disposal of contaminated water and that these are leased to Absolute for approximately $120,000 per year. The Panel also stated that when CCS Corporation purchased Parcel 2 from Eco, a right of first refusal (ROFR) had been registered on title to Parcels 4, and 11A. The Panel submitted that this posed a significant limitation on value to these parcels since these wells were required by Celanese for ground water contamination for the 25 year period referred to in the Restrictive Covenant.

[81] With respect to contamination on the parcels, the Panel stated that they were not aware of any purchaser who would buy contaminated land and assume responsibility for the clean-up. The Panel stated that although Eco had not been asked to clean up any contamination on the subject, there were ongoing discussions with Celanese, the Province and Eco. The Panel stated that, in their opinion, Celanese was responsible for managing the contamination until the end of the 25 year period referred to in the Restrictive Covenant, but that at the end of that period, Eco would be at risk for inheriting the liability. The Panel stated that at the end of the 25 year period, Eco would be "on the hook" and would have to indemnify Celanese.

[82] With respect to the sales of parcels which formed part of the original purchase agreement, the Panel stated that Parcel 1 had been transferred to a creditor for one million dollars. The Panel indicated that some parcels had been sold pursuant to the *Pipeline Act* and others had been sold using rights-of-way to isolate contaminated areas.

[83] Panel member Dan White stated that he had not been in favor of the withdrawal to correction agreements for the parcels negotiated in 2010, but had relied on the advice of counsel.

Presentation of the Jackson Appraisal

[84] The Complainant presented Jackson to comment on his findings in the Jackson Appraisal [Exhibit C-2, Tab 2C]. Jackson advised that the subject was an unusual property in the Clover Bar Industrial District of Edmonton. Jackson stated that he had consulted with realtors and other real estate professionals and estimated that an appropriate exposure time in the open market for the subject would be twelve months. Although six different parcels were involved, Jackson believed that, since the parcels were contiguous, an overall exposure time of twelve months was appropriate.

[85] Jackson also advised the Board that the subject was basically an unserviced site as the systems that had previously serviced the site were no longer in use. Jackson commented that the access to the parcels was through Parcel 9 from Hayter Road, and a variety of private roads that are in poor condition.

[86] Jackson advised the Board that he had reviewed the Klohn Report and provided the Board with remediation costs for the various parcels. After adjusting for title splits and land sold, Jackson estimated the remedial cost per acre to be $1,091,764. Jackson cautioned that these figures only included remediation for known contaminants and did not include human health costs, worker safety costs or the cost of removal of hazardous building materials. Nor did the estimate take into account higher costs resulting from changing environmental standards.

[87] Jackson pointed out that the Celanese obligation to remediate only extended to August 30, 2032 and that, thereafter, in his opinion, any purchaser would be responsible for any additional liability resulting from changes in environmental standards or from contamination from an adjacent site. In Jackson's opinion, a prospective purchaser of the subject would take into account the risk of inheriting the remediation costs for the subject as well as other risks such as the risk of violating development restrictions imposed by Celanese or the necessity of remediation before subdivision. Jackson also discussed the stigma resulting from the contaminated state of the subject.

[88] Jackson concluded that the environmental risk assessment of the parcels was as follows:

- Parcel 11A: unacceptable;
- Parcel 11B: high;
- Parcel 3A: unacceptable;
- Parcel 4: very high;
- Parcel 9: very high; and

- Parcel 10: minimal.

[89] Jackson also considered the "highest and best use" for the subject and concluded that Parcel 10 could be developed subject to the problems of road access and servicing, but that the use of the balance of the parcels would be constrained by environmental considerations and the Restrictive Covenant. Jackson noted that some parcels would be considered "brownfields", and as such their development would not be economically viable.

[90] Jackson then presented the Board with details of nine comparable sales [Exhibit C-2, Tab 2, page 59]. Four of these sales involved parcels which had formed part of the original purchase agreement, while two were of unserviced land and two were of serviced industrial land. Jackson also provided details concerning another contaminated land sale – the "Domtar" site [Exhibit C-2, Tab 2, exhibit G]. Jackson submitted that when adjustments were made to compare these properties to the subject, a base value of $250,000 per acre for the subject would be appropriate. Jackson stated that, in his opinion, the primary adjustment to be made related to the environmental concerns on the subject.

[91] From this base value of $250,000 per acre, Jackson calculated the value of each parcel separately, making base adjustments and adjustments for the unique environmental situation on each parcel. He summarized his conclusions as follows:

- Parcel 11A would have a value of $0;
- Parcel 11B would have a value of $3,400,000;
- Parcel 3A would have a value of $0;
- Parcel 4 would have a value of $0;
- Parcel 9 would have a value of $1,230,000; and
- Parcel 10 would have a value of $630,000.

To these land value figures, Jackson added $100,000 for improvements. The total value for the subject would therefore amount to $5,360,000.

Cross-Examination of Jackson by the Respondent

[92] During cross-examination, Jackson confirmed that he had not taken the salvage value of the demolished buildings into account but that the adjustment for demolition had been built into the environmental cost adjustment. Jackson also confirmed that he had used the direct sales approach and had not considered the income approach. He also confirmed that an adjustment for access was built into the base adjustment for the parcels but agreed that other factors included in the base adjustment were not set out in his appraisal.

[93] Jackson stated that the parcels would likely remain zoned industrial as they were unsuitable for residential use. He confirmed further that rezoning was not a concern since lands zoned IH could be used for light or medium industrial projects as well as heavy industrial without the need for rezoning. Similarly, a parcel zoned IM would support medium or light industrial projects without the need for rezoning.

[94] Jackson confirmed that he had taken the cost to remediate each parcel from the Klohn Report, as adjusted for title splits, and from discussions with an individual involved with that report. He also confirmed that he did not know the extent of the monitoring equipment referred to by Celanese in the Restrictive Covenant. Jackson discussed the responsibilities of Celanese with respect to the contamination on the parcels for the 25 year period. He also stated that, in his opinion, sections of the Restrictive Covenant could be read to mean that any purchaser could not disturb the topography of the parcels. As well, Jackson said that sections of the Restrictive Covenant referred to possible changes in environmental laws which could impose added liability on a purchaser and that this possibility had been factored into his adjustments. Jackson stated that the most important factor in drawing his conclusions of value was the risk to a purchaser of inheriting environmental liability.

[95] With respect to the comparable sales he had provided to establish the base cost per acre for the subject, Jackson stated that Index 5 and Index 6 were serviced lots whereas the subject was basically unserviced. He also confirmed that the zoning for Index 6, Index 7 and Index 8 was not comparable to the zoning for the subject.

[96] In response to a question from the Respondent, Jackson acknowledged that the certificate he had provided in connection with the Jackson Appraisal was not the most recent version as required by the Appraisal Institute.

[97] The Complainant concluded its presentation by requesting that the Board reduce the 2012 assessments to the values outlined in the Jackson Report (see paragraph 91).

B. Respondent's Presentation of its Position

Presentation of the Halvorsen Report

[98] The Respondent presented Rolf Halvorsen as a witness to comment on the Jackson Appraisal and present the Halvorsen Report [Exhibit R-1, Tab 33]. The Respondent submitted that Halvorsen had experience in conducting technical reviews of peer appraisals to ensure compliance with the Canadian Uniform Standards of Professional Appraisal Practice (CUSPAP).

[99] Halvorsen advised the Board that he was retained only to do a technical review of the Jackson Appraisal and not to provide an independent opinion as to the market value of the subject.

[100] Halvorsen noted that some amenities and infrastructure listed on the Eco-Industrial website as being available were no longer in use. Halvorsen stated that the highest and best use of the parcels might be a continuation of existing use. In Halvorsen's opinion, the question of the responsibility for the cleanup of the contamination on the subject was important. Halvorsen observed that the Jackson Appraisal deducted repair costs to come up with a value for the parcels. However, he submitted that, pursuant to the Restrictive Covenant, Celanese was responsible for the environmental costs on the parcels and it would not be appropriate to factor in repair costs in order to arrive at a value. He provided the example of the value for Parcel 9 of $6,561,750, taking into account assessment stage and ongoing stage costs but not repair costs. In the Jackson Appraisal, which had taken repair costs into account, the value of Parcel 9 was estimated to be $1,230,000.

[101] Halvorsen also stated that even a contaminated property can be used, even if it is just the continuation of an existing use.

[102] Halvorsen then outlined some deficiencies and non-compliance with CUSPAP standards in the Jackson Appraisal. For example, he noted that the term "cumulative value estimate" was not defined in the Jackson Appraisal. He also noted that there was no market analysis for a reasonable exposure time. He stated that the Jackson Appraisal contained differing "highest and best use" conclusions and that there was no market support for the environmental adjustments made in the report, nor for the price per square foot rate applied to the buildings. He further observed that no contaminated property sales had been considered in the Jackson Appraisal. As well, Halvorsen stated that an analysis of a time period for market exposure should be done on a parcel by parcel basis rather than an overall exposure time of twelve months.

[103] With respect to environmental considerations, Halvorsen submitted that there should be a "highest and best" use analysis for each parcel. For example, with respect to the very high cleanup costs for Parcels 11A and 3A, Halvorsen submitted that the best use would be to leave the effluent ponds alone. That would mean a reduced environmental cost for those parcels and increased value. Halvorsen stated that the Jackson Appraisal ignored infrastructure on the subject that would add value, such as an on-site rail system and deep injection wells.

Cross-Examination of Halvorsen by the Complainant

[104] Under cross-examination, Halvorsen stated that the Halvorsen Report did not contain comparable market data as that was not in the scope of his retainer. Halvorsen confirmed that if another party was responsible for cleanup costs, repair costs would not have to be deducted. He further confirmed that, in his opinion, a potential purchaser would still face a risk of responsibility for assessment and ongoing costs but that Celanese in this case was ultimately responsible for repair costs.

[105] Halvorsen also stated that there were significant clean areas on some of the parcels. He also confirmed that it was not within the scope of his retainer to contact Alberta Environment or Celanese concerning remediation of the contaminated areas.

Presentation by the Respondent's Witnesses: Darren Nagy and Doug McLennan

[106] In support of its position that the assessments of the parcels were correct, fair and equitable, the Respondent presented the Board with a brief [Exhibit R-1, 1,060 pages].

[107] The brief included a map of the site as well as a map of the contaminated areas from the Klohn Report [Exhibit R-1, Tab 2, page 5] and the designated DND areas [Exhibit R-1, Tab 2, page 9].

[108] The Respondent outlined the Withdrawals to Correction agreed on by the Respondent and counsel for the Complainant with respect to the 2010 appeals. These withdrawals set out an agreed upon value for the parcels for that assessment year. The Respondent also submitted updated calculations for the assessments of the subject parcels [R-10].

[109] The Respondent reviewed Symmetry's web site and noted that the subject possessed numerous amenities, such as an inclusive on-site rail system; access to the Anthony Henday highway expansion; access to the Yellowhead; proximity to oil and natural gas pipelines and water diversion rights; on site power generation and water treatment facilities; and two deep injection wells for the disposal of oilfield and industrial waste fluids. The Respondent also argued that Eco had sludge facilities and deep injection wells that would be attractive to some potential customers [Exhibit R-1, Tab 11, pages 463-465].

[110] The Respondent presented an appraisal of the subject completed in 2010 for the Complainant's counsel (the "Downey Report") [Exhibit R-1, Tab 31]. The Respondent's witness stated that the areas of contaminated land on the subject were taken from the Klohn Report.

[111] The Respondent referred to the valuation standards for assessors with respect to properties affected by contamination:

> "The unencumbered value is the value that the property would have if no adjustment were made for any environmental encumbrance. This value can be obtained by using standard appraisal methods. There is a tendency to discount this value based on costs related to remediating or isolating environmental contamination. Fully deducting the costs may overstate the decline in value because the value in use concept would then be ignored [Exhibit R-1, Tab 20]."

[112] The Respondent also referred to the Remediation Guidelines from the Alberta Tier 1 Soil and Groundwater document [Exhibit R-1, Tab 21]. The Respondent discussed the process of approval and registration of a plan of subdivision [Exhibit R-1, Tab 22]. The Respondent stated that there was no impediment to subdividing contaminated land [Exhibit R-1, Tab 23] and also reviewed Exhibit R-1, Tabs 24 and 25 which covered the *Environmental Protection and Enhancement Act* (EPEA), the *Pipe Line Act*, *Surface Rights Act* and the *Expropriation Act*.

[113] The Respondent also submitted the policies of the City of Edmonton in relation to contaminated properties and advised that a reduced assessment for contaminated properties would be considered if certain requirements were met [Exhibit R-1, Tab 19, pages 587-614].

[114] The Respondent stated that the contamination must be proven to exist and must have existed as of December 31 of the assessment year. There must also be evidence as to the nature of the cleanup costs, and if cleanup is not required, but contamination will still affect the use of the property, evidence must be presented as to how that use will be affected. As well, the contamination must be of such severity that it will affect the market value of the property. In addition, the Respondent advised that the burden of proving how much contamination exists rests with the Complainant. The Complainant must provide proof as to the nature of the contamination and the cost to cure, and if that is not provided, the City will not assume that the market value of the property has been affected. As well, both purchaser and vendor must be considered in the determination of market value.

[115] The Respondent submitted that the above rules and policies are based on the fact that the obligation to remediate property within Alberta typically does not run with the land but remains with the entity that contaminated the land [Exhibit R-1, Tab 26, pages 793-819].

[116] The Respondent advised the Board that while the City of Edmonton discourages subdivision of contaminated property, subdivision is not impossible. Some subdivisions do not require municipal approval, and some can be approved if appropriate remediation plans are in place. Further, appeals can be made to the Subdivision and Development Appeal Board [Exhibit R-1, Tab 23].

[117] The Respondent directed the Board to the Approval granted to Celanese by the Province, which expires in 2017, and advised that typically an Approval would be extended for 10 years.

[118] The Respondent advised the Board that there was a draft policy for management of risks at contaminated sites in Alberta [Exhibit R-1, Tab 19].

[119] The Respondent presented a chart of the assessments of the parcels [Exhibit R-10] which summarized the factors and values which made up the assessments and values for each parcel. From the value per acre of clean land determined using mass appraisal, the Respondent adjusted that value for lands in the flood plain, for lands in DND areas, in contaminated areas, lands in restricted utility areas and restricted access lands.

[120] The Respondent requested that the Board confirm the 2012 assessments of the parcels as follows:

- Parcel 4: $2,540,500;
- Parcel 11A: $4,078,500;
- Parcel 11B: $7,421,500;
- Parcel 9: $5,178,000;
- Parcel 3A: $2,032,000.
- Parcel 10: $715,000.

Cross-Examination of the Respondent's Witnesses by the Complainant

[121] The Respondent's witness confirmed under cross-examination that he had prepared the 2012 assessments for the parcels and confirmed that the sizes of the contaminated areas on the subject had been agreed on between the parties in 2010.

[122] The witness also confirmed that he had taken pictures of the subject during a site inspection and had not provided prior notice to the Complainant as required by the *Municipal Government Act* (MGA). The witness stated that during this visit he did not enter the DND areas. The witness also confirmed that some of the pictures of the subject contained in the assessment brief could be from as far back as 2010, but stated that he was not involved in the 2010 appeal and was not aware of ongoing discussions between the parties from 2010 to 2012.

[123] The witness also confirmed that the Downey Report was contained within the Respondent's evidence but that permission to use it had not been sought. He confirmed that the Downey Report was presented for information purposes only and had not been relied upon in preparing the 2012 assessments. Instead, he relied on maps, zoning requirements and aerial photos.

[124] The witness also stated that the sales comparables relied upon in preparing the assessments [Exhibit R-7] were all in the Clover Bar area. However, he admitted he did not investigate any contamination issues surrounding these properties, nor did he include either the Domtar site as a comparable, or the former Celanese lands which had been sold since the original purchase agreement.

[125] In response to questions concerning his estimate of $240,000 per acre of clean market area, the witness stated that it was based on a review of sales similar in location, size and servicing, and an analysis based on what the computer selected for size and servicing similarities. With respect to Exhibit R-10, the witness stated that he applied the parkland rate to contaminated property but did no independent research as to how the market would view this. The witness

stated that he did not confirm the contaminated areas and could not recall if there was a formula used for the clean areas of Parcel 11A nor could he recall the formula used for the restricted utility portion of Parcel 3A. With respect to the access granted for Parcel 10, the witness stated that it was different from Parcels 11A or 11B as access was more limited. As well, he stated that there was no access reduction for Parcel 3A and for Parcel 4 as there was access through the Pembina lands.

[126] When asked why the assessment values for the parcels in 2010 and 2012 were so similar, the witness stated that the market had been stable. The witness also confirmed that he did not simply work the numbers to come up with the same values as agreed upon in 2010.

[127] The witness stated that the injection wells had been factored into the assessments and had been taken into account in preparing the chart in Exhibit R-10, but he could not confirm an exact number.

[128] With respect to the Respondent's treatment of contaminated properties, the witness pointed to the *Standard on the Valuation of Properties Affected by Environmental Contamination* (the "International Standard") [Exhibit R-1, Tab 20, page 626] and also commented on property with "incurable contamination" which would be assigned a value of $500 per acre unless used for storage.

[129] Another witness for the Respondent responded to questions from the Complainant concerning Celanese's efforts to remediate the subject. The witness stated that, with respect to remediation efforts, he was only aware that monitoring procedures were in place.

C. Complainant's Presentation of Rebuttal Material

[130] The Board was provided with a Rebuttal disclosure package by the Complainant [Exhibits C-3, C-6, C-7 and C-8].

[131] The Complainant presented Jackson to respond to Halvorsen's critique of the Jackson Appraisal [Exhibit C-3, Tab 2].

[132] Jackson defended his appraisal and responded to elements in the Halvorsen Report which had critiqued it. Jackson stated that the valuation of the parcels had been done in compliance with CUSPAP. Jackson also reiterated that the infrastructure on the parcels carried no value. He stated that it was insignificant that the wording of his certificate on the appraisal differed slightly from the current version. He also stated that some buildings on the parcels had been demolished and that the effluent ponds on the subject might require restoration.

[133] Jackson stated that he had not read the 2007 Approval under the EPEA entered into by the Province of Alberta with Celanese.

[134] The Complainant also presented two members of the Panel (Alex Lee and Dan White) to present other aspects of the Rebuttal. The Panel presented letters from ATCO Gas, Al Terra Engineering, Magna, Krawford and A&A Trenching and Alliance Excavating Ltd. The Complainant wanted to show the magnitude of costs involved with providing services for the subject [Exhibit C-3, Tab 3, pages 1-13].

[135] The Panel referred to an email which showed that a water license for the former Celanese site had not been transferred to Eco [Exhibit C-3, Tab 5, pages 1-2]. As such, Celanese was still responsible for issues around the water intake from the North Saskatchewan River.

[136] The Panel also commented on a calculation of Eco's obligations to Alberta Diluent Terminal (ADT) in respect to their purchase of a parcel in March 2008. The Panel stated that this demonstrated Eco's obligation to provide utility services to ADT, and in lieu of that provision, monetary compensation had to be provided by ECO.

[137] The Panel also commented on the Barenco Decommissioning report which dealt with the decommissioning of the former Celanese site in accordance with the Alberta Environment Approval [Exhibit C-3, Tab 8, pages 1-204]. The Panel stated that they did not know if the Approval was transferrable and they were unsure about the Gantt Chart – Closure Plan Schedule.

[138] They said that there had been an agreement to correction on the parcels for the 2010 assessment year [Exhibit C-3, Tab 21, pages 1-41] and that these had been carried forward in subsequent years exactly by the Respondent.

[139] The Panel commented on the transaction between Gilead and Eco as mentioned in some newspaper articles [Exhibit C-3, Tab 9, pages 11-12]. One Panel member said that the transaction was for approximately 10 acres on Parcel 11B.

[140] Another Panel member referred the Board to the original purchase agreement with respect to the ultimate responsibility for the cleanup of the subject. He advised the Board that, in his opinion, at the conclusion of the 25 year period, Eco would assume all the liability for the contamination.

[141] The Panel member said that to date there had been no approved remediation plan as contemplated by the Approval, although Celanese has continued to monitor the site. He advised that Eco continued to provide site access for Celanese to create a remediation plan and to monitor the test wells on site.

[142] The Panel observed that the Restrictive Covenant between Celanese and Worthington Properties Inc. (now Eco), and which is registered on all titles, allows Celanese to control all information with respect to contamination and to manage the risk assessment required of the site. He stated that the liability for this contamination would be transferred to Eco at the conclusion of the 25 year period. In this regard, the Panel member highlighted s 5.1 and s. 5.2 of the Restrictive Covenant which outlines the liability of Celanese for the contamination [Exhibit C-6, C-7 and C-8]. He further stated that these sections contemplated an end to Celanese liability at the end of 25 years.

D. Respondent's Presentation of Surrebuttal Material

[143] The Respondent introduced a surrebuttal document which contained pages 5-7 allowed as evidence pursuant to the Board's decision on the preliminary matter.

[144] The Respondent stated that this material, which contained a conditional subdivision approval for one of the parcels, showed that under certain circumstances subdivision of the subject would be possible.

[145] The Complainant argued that the surrebuttal material was *post facto* and not relevant to the current complaint.

Argument and Summation by Complainant

[146] Counsel for the Complainant presented closing arguments to the Board.

[147] A 42 page brief had been provided to the Board and to the Respondent prior to the hearing. The Complainant stated that the brief contained an overview of the issues that, in their opinion, were at the core of the complaints.

[148] The Complainant argued that the Board would be hearing conflicting opinions with respect to several matters, including:

- The presence of contamination;
- Assessments and evidence related to clean up of the site and agreements to support that;
- Evaluation of the cleanup of the site;
- The market value of the subject considering the unusual levels of contamination and how a purchaser will approach these lands in the marketplace;
- The reliability of the Jackson Appraisal and whether it is supported by market data.

[149] The Complainant stated that significant portions of the parcels are covered with extreme contamination and in some cases by DND areas that are identified in the Restrictive Covenant. These DND areas contain such significant levels of contamination that the potential of harm to human and ecological health requires that they not be disturbed.

[150] The Complainant stated that the Board had to consider the following issues:

- Was a proper assessment conducted as required by the MGA?
- What are the considerations for a potential buyer and how would a buyer assess the risks for a contaminated site such as the subject?

[151] With respect to the appropriateness of the assessment, the Complainant outlined the definition of a "parcel of land" as defined in s. 1(v) of the MGA (see Schedule "A").

[152] The Complainant also noted that s. 4 of the *Matters Relating to Assessment and Taxation Regulation* states that the value or standard for a parcel of land is "market value". Market value is defined in s. 1(n) of the MGA as "the amount that a property…might be expected to realize if sold on the open market by a willing seller to a willing buyer." This, in the Complainant's view, means the market value of the entire parcel.

[153] The Complainant argued that the environmental risk flows to the entire parcel, regardless of where the contamination is located. As such, the subject should not be valued with a "severed" approach as the Complainant alleged had been done by the Respondent.

[154] With respect to the effect of contamination on the market value of a property, the Complainant discussed several cases.

[155] The Complainant submitted that *Mountain View County v. Alberta (Municipal Government Board)* 2000 ABQB 594, (R-11, Tab 1) established a few principles:

- An assessment may be reduced to reflect market value even if that value was not determined by using the mass appraisal model.
- The use of mass appraisal methods may not be as effective in establishing the market value of a property in site-specific cases; and
- The Board can come to its own opinion of the market value of property on the basis of the record before it.

[156] The Complainant also discussed MGB Board Orders 007/04 and 010/07 (*Canada Lands Company v. City of Edmonton*) [Exhibit C-1, Tab 5A, 5B]. In these decisions the MGB was also dealing with a unique property that was in the midst of transition. One concern was with how to account for the contamination on the property. While the MGB found no specific information on remediation costs, it allowed for a $2,000,000 deduction from the assessed value to account for the contamination. Following judicial review, an agreement was reached between the City and Canada Lands. The agreement reflected a $2,000,000 adjustment for the contamination and this amount was reduced by $400,000 each year going forward.

[157] The Complainant also discussed the *Domtar* decision (Edmonton ARB Order No. 0098 633/10) [Exhibit C-1, Tab 5C]. The Complainant stated that this case demonstrated that a deep discount for contamination was included for the assessment even though the owner was not the polluter.

[158] The Complainant referred to MGB Order 207/00. The Complainant submitted that this decision showed that a market price should be depreciated to account for contamination. This decision referred to three other decisions in which the market value of contaminated land was found to be zero.

[159] The Complainant stated that the following principles flowed from these decisions [Exhibit C-11, page 8]:

- Where contamination is present, it must not be ignored in determining the appropriate market value to assign to a property.
- Remediation costs are taken into consideration in a meaningful way by either a reduction from the market value of the property in an uncontaminated state, being amortized over a reasonable period of time, or being incorporated as an expense.
- Mass appraisal methods do not account for contamination and, therefore, may not produce an assessment that reflects market value.
- The market value must reflect the condition of the property, not just who may or may not be responsible for the contamination.
- Arm's length sales transactions of the property, including the initial acquisition cost, are relevant to the determination of market value and should not be ignored.

[160] The Complainant argued that these principles, when applied to the case at hand, demonstrate that the Respondent's assessed values for the parcels must be rejected. In the opinion of the Complainant, the Respondent's assessment is problematic because the analysis:

- Ignored the original purchase price;
- Did not reflect the cost of remediation;
- Was based on arbitrary values of different land uses;
- Assumed lands could be divided on the basis of what lands were contaminated; and
- Were not supported by market evidence.

[161] In measuring the regulatory risk of the site contamination, the Complainant stated that a potential purchaser would have to consider the risk of inheriting liability. In that regard, the Complainant pointed to Part 5 of the EPEA [Exhibit C-11, page 9, paragraph 36]. The Complainant submitted that a non-polluting owner could be required to clean up the site even if not responsible for the contamination. This risk might lead to an owner becoming liable for a cleanup that could run into the hundreds of millions.

[162] The Complainant also discussed potential changes of environmental law and argued that such a change could affect the risk that a potential purchaser would assume. The Complainant discussed a recent case from Ontario (*Kawartha Lakes (City) v. Ontario (Environment)* 2013 ONCA 310), in which a non-polluting party was required to pay for the cleanup of a contaminated property [Exhibit C-11, page 11, paragraph 40].

[163] The Complainant also argued that a further risk to a potential purchaser is with the use and development limitations of the subject. The DND areas on the parcels are designated as such in order to contain the environmental risk on the subject. As such, there is a risk that a purchaser could not do much with these lands.

[164] The Complainant also summarized the Jackson Appraisal. The Complainant's brief referred to a number of key points from the Jackson Appraisal and Jackson's evidence [Exhibit C-11, page 15, and paragraph 59]:

- Jackson conducted a physical inspection of the parcels at issue and was aided in this inspection by Eco's management team. Jackson took extensive pictures of the parcels which are referenced in his material.
- Jackson also reviewed materials and documents regarding the cost to provide and upgrade utility services on the parcels.
- Jackson directly contacted the following individuals prior to completing his analysis:
    - Anne Laing of Klohn Crippen Berger regarding the remediation cost estimate and how to split the remediation cost between lots 11 and 12;
    - Rhonda Lee Carron with Alberta Environment;
    - Greg Jones at the City of Edmonton regarding drainage;
    - Paul Kowel, a development officer at the City of Edmonton; and
    - Lorri Molton at the City of Edmonton infrastructure planning department.

[165] The Complainant also discussed a number of key points from Jackson's evidence:

- In Jackson's opinion, financial encumbrances would *not* be something that would affect what a potential purchaser would pay for the lands. Such encumbrances would normally have to be discharged prior to completion of a sale.
- Easements, pipelines and restrictive covenants that affect the actual use of the property would affect what a purchaser would be willing to pay.
- The Restrictive Covenant included serious restrictions on the use of the parcels stemming from the seriousness of the underlying environmental condition.
- The current remediation plan did not include any fixing or actual remediation of the contamination – the parcels were simply being monitored.

- Jackson noted that, based on his experiences and conversations with a number of developers, his approach to valuing parcels was consistent with how they would approach a similar site.

[166] The Complainant argued that a purchaser would be at risk of inheriting liability for environmental cleanup on the parcels. The Complainant also argued that the $10 million cap on liability contained in the Restrictive Covenant was specific to breaches of the representations and warranties as outlined in the original purchase agreement. As well, the Complainant argued that sections of the Restrictive Covenant should be interpreted to mean that a party other than Celanese could be responsible for liability as a result of changing laws or standards.

[167] The Complainant stated that the Respondent had justified its values in the assessment by reference to a methodology and approach that is not legislated. Further, the Respondent did not provide market data to show what a buyer would consider in a purchase of this type of property. The Complainant argued that the Respondent's methodology and policy in this respect does not make sense since it is not how a buyer would actually evaluate the purchase of a contaminated property. In the Complainant's view this policy is not an active indicator of market value. The Respondent also did not bring forward the author of the policy to defend it, and as such no weight should be given to it.

[168] The Complainant further stated that the following should be considered in preparing a value for the parcels:

- The original purchase agreement between Celanese and ECO was at market value between a willing seller and willing buyer.
- Celanese and Eco agreed to an attribution of the purchase price between assets and land.
- There have been sales of land that were already subdivided and easily severable from the lands that had significant contamination.
- By 2012, the properties left were those that had significant contamination (with the exception of Lot 10).

[169] The Complainant argued that the challenge before the Board was to determine the value of the remaining parcels. To assist in arriving at a value, Jackson had provided a commercial appraisal for the parcels that outlined the best market evidence available. The Complainant also noted that the Klohn Report is the only evidence as to the cost of cleanup for the parcels. Further, the Complainant stated it was disingenuous for the Respondent to both rely on the Klohn Report in determining the areas of contamination and then to criticize the remainder of it.

[170] The Complainant noted that a breakdown of the remediation cost of the known contaminants on the Parcels shows a total cost of $303.9 million. In the opinion of the Complainant, there is a real risk that Eco or a subsequent purchaser will be responsible for this cleanup.

[171] The Complainant noted that the Respondent had criticized Eco for not putting a Celanese representative before the Board. However, the Complainant noted that the Respondent could have brought any witness it wished, but instead chose to rely on incorrect or unreliable media reports.

[172] The Complainant also argued that Halvorsen did not inspect the subject properties, he did not inspect any similar contaminated properties, nor did he conduct an independent appraisal. All that Halvorsen did was point out flaws in the Jackson Appraisal. The Complainant submitted that the Respondent had an opportunity to have Halvorsen conduct an appraisal and give an opinion of market value for the subject properties but chose not to do so.

[173] The Complainant argued that the Respondent's method of assessment for the parcels was flawed. The Complainant argued that the Board heard evidence from the assessor that a mass appraisal approach was combined with deductions to arrive at an assessment value for each parcel. The Board had been presented with a spreadsheet analysis by the Respondent [Exhibit R-10]. The Complainant reiterated that during questioning the Respondent's witness could not say how he came up with the figures in this spreadsheet. After further questioning, the witness still could not answer whether the numbers in the spreadsheet had merely been plugged in or actually derived from calculations. This was strange, in the Complainant's view, since the witness had been able to point out the recent corrections he had made to the spreadsheet.

[174] The Complainant argued that this suggested something was not quite right with the Respondent's assessment and that the numbers chosen were purely arbitrary. As an example, the Parkland rate of $20,000 per acre was not supported by market evidence to show that it is fair and equitable in relation to properties that are similarly contaminated or in a flood plan. Further, the Complainant stated that the Respondent compartmentalized areas of contamination and deducted this from the clean land. The Complainant argued that a potential purchaser would look at the parcel as a whole.

[175] The Complainant stated there is nothing to suggest that the Respondent's approach is reasonable or validated by legislation. The 2012 assessments were exactly, or at least very similar, to the 2010 amounts agreed to in that year's Withdrawal to Correction. In the opinion of the Complainant, it is hard to believe the Respondent did not just use the 2010 values and neglect to conduct an actual assessment for 2012.

[176] The Complainant referred to the Respondent's written argument which, in the Complainant's view, acknowledges what the City actually did in its 2012 assessment. The Complainant stated that the Respondent acknowledged the 2010 assessment had been carried forward. To further support this, additional comments in R-11 show that the 2010 assessment had merely been superimposed on the 2012 assessment. Given these facts, the Complainant submitted the approach followed in the Jackson Appraisal is to be preferred.

[177] With respect to the Restrictive Covenant, the Complainant stated the following:

- Section 5.1: outlines the liability of Celanese prior to the closing date. Any changes to environmental laws after the closing date are not the liability of Celanese.
- Section 5.2: Celanese ceases to be responsible after 25 years

[178] The Complainant requested that the Board use common sense and come up with a market value. In the opinion of the Complainant, the Respondent did not use a fair and equitable method of assessment but merely retooled the 2010 assessment.

[179] The Complainant asked the Board to accept the Jackson Appraisal as market value or in the alternative to come up with an equitable value of its own.

Respondent's Argument and Summation

[180] The Respondent advised the Board that there are two sides to every transaction under the legislation. As such, one must consider how both a purchaser and a seller will evaluate a property.

[181] The Respondent discussed the parcels under appeal and outlined the 2012 assessment, its recommendations, and the requested values of the Complainant. The Respondent noted there is contamination on all the sites with the exception of Parcel 10.

[182] The Respondent advised the Board that the Klohn Report was relied on in the assessment only to show the location of the contamination on each parcel.

[183] The Respondent stated that the Complainant had used the Klohn Report as an indicator of the extensive contamination on the site and the associated cleanup costs. The Respondent noted that the authors of the Klohn Report were not present during the hearing, so cross-examination was not possible.

[184] However, the Respondent noted the Klohn Report does not state that there is any requirement to clean any of the parcels. Nor does it state that any expenditure of monies will ever be required. The Klohn Report does not state that there is an obligation to remove all the contamination, nor is there any consideration of other options short of remediation that might be considered.

[185] The Respondent submitted that, while there is evidence of contamination, the Klohn Report shows that the cost estimate only contemplates a scenario where the entire site has to be remediated. Since there is no evidence that the cleanup costs will ever be incurred, and certainly no evidence that the cleanup costs will have to be incurred by Eco or a subsequent purchaser, the Board should weigh this evidence accordingly.

[186] The Respondent noted the Klohn Report was commissioned in 2010 and the site was purchased in 2007 by Eco from Celanese.

[187] The Respondent advised the Board that Eco and Celanese entered into the original purchase agreement in 2007, which outlined the various obligations and responsibilities of the parties.

[188] The Respondent addressed a few media articles from the time of the original purchase agreement that stated that Celanese is fully liable for the site contamination. In addition, these articles state that until the cleanup is completed to the satisfaction of Alberta Environment, the Approval holder (Celanese) would be responsible for the contamination.

[189] The Respondent acknowledged that while little weight should be placed on these articles, there is more substantial evidence showing that Celanese believes they are responsible for remediating the site. Celanese commissioned an environmental firm (Barenco) to deal with the decommissioning of the site. In one report, Barenco advised the Province:

> "As indicated in the Closure Plan, it is intended to restore the Celanese plant site into usable land that fully complies with the Alberta environmental guidelines. The goal would be to have regulatory closure on as much of the land as possible, as soon as possible."

[190] The Respondent advised the Board that the Barenco report shows that Celanese is working to remediate the parcels. The report further shows that other options, including exposure control, might be considered.

[191] The Respondent advised the Board that Jackson admitted that the Province told him that it would pursue Celanese even after the expiry of the 25 year limit in the original Purchase Agreement and Restrictive Covenant.

[192] The Respondent stated that Eco had provided no substantive evidence to show that the Province does not view Celanese as the party ultimately responsible for the remediation, or that Celanese has no intention of remediating the site to receive regulatory approval.

[193] The Respondent also noted there was no evidence that environmental protection orders had been issued on any of the properties. In addition, there was no evidence that the Director under the EPEA had designated the site as a contaminated parcel.

[194] The Respondent advised the Board that it was significant that Eco did not call a Celanese representative to testify that Celanese has no intention to clean the site. In fact, the Barenco documents show that Celanese is working towards remediation of the site.

[195] As a result of the original purchase agreement a Restrictive Covenant was registered on title, which places restrictions on the properties due to the contamination. These Restrictive Covenants apply to all the properties, including those properties under appeal and those parcels sold from the date of purchase to the valuation date.

[196] The Respondent noted that the Restrictive Covenant states that there are no current requirements to remedy the soil issues on the properties:

> "The current remediation plan does not require or contemplate soil management or remediation on the site because none is required to satisfy industrial risk based standards under the current industrial use. Any soil issues encountered in grading or development activity for industrial use can reasonably be managed to meet the appropriate industrial risk based standards without off-site disposal."

[197] From the Respondent's perspective, Eco would face liability if Celanese went bankrupt or fled the jurisdiction. The Respondent agreed there is a slim possibility that any new owner would be liable in the eyes of the Province in these limited circumstances. However, there was no evidence that Celanese is in danger of bankruptcy or that they intend to flee the jurisdiction. Rather, the actions and reports of Celanese provide evidence that Celanese has every intention of taking further action respecting the remediation of the subject.

[198] The Respondent discussed the level of risk associated with the properties and suggested the dispute is really over the level of risk. The Respondent advised the Board that they do not agree with the assessment of risk by Jackson. The Respondent stated that Jackson had overvalued the risk associated with the properties.

[199] In the Respondent's view, the Complainant had largely based its case and valuations of the parcels under appeal on the Jackson Appraisal. As such, the Complainant had presented no other values or methodology to support a reduction of the assessments. Therefore, the values requested by the Complainant were based solely on Jackson's opinion.

[200] The Respondent reiterated its opinion that the Jackson Appraisal is clearly unreliable and outlined the weaknesses and/or deficiencies contained within the appraisal:

- While Jackson has expertise with the valuation of industrial land, he has no experience with the valuation of contaminated land. This is the first contaminated site that Jackson has appraised, whereby he was required to make adjustments for contamination. Jackson admitted that he is not qualified to comment on environmental issues that may affect the market value of the property being appraised.

- Jackson was unable to point to any material showing that his adjustments for contamination were an accepted appraisal process. In fact, none of the material in evidence shows Jackson appraised the contaminated properties with accepted practices. Halvorsen testified that the accepted practice for the valuation of contaminated properties was to base the appraisal on market evidence and not solely on the opinion of the appraiser. During cross-examination, Jackson admitted that the entire valuation is very subjective and is based on his opinion.

- Halvorsen, having been commissioned to critique Jackson's appraisal, identified a number of failings, including:

    - Treating the parcels as one property;

    - Ignoring the value that infrastructure such as rail lines and deep water injection wells may give to the parcels;

    - Conflicting statements of highest and best use;

    - Arbitrary base and environmental adjustments;

    - Ignoring the concept of value in use.

[201] The Respondent advised the Board that the Jackson Appraisal did not go into any detail of what went into calculating the base adjustment. The Respondent explained it had been necessary to cross-examine Jackson to determine all of the possible things that had been adjusted for in the base adjustment.

[202] In its summary, the Complainant had argued that Halvorsen's testimony should receive less weight since he did not provide an appraisal of the parcels. The Respondent advised the Board that Halvorsen was commissioned only to critique Jackson's appraisal. Since the Complainant's case relied solely on the Jackson Appraisal, the Respondent wanted to determine the reliability of the appraisal, whether the appraisal complied with CUSPAP, and whether the appraisal was completed in an acceptable and reliable manner.

[203] The Respondent advised the Board it was not necessary to have Halvorsen appraise the properties since the Jackson Appraisal is simply unreliable.

[204] The Respondent addressed Jackson's expertise as it relates to the interpretation of contracts, restrictive covenants, and other documents. The Respondent noted that much of Jackson's opinion was based on his interpretation of the Restrictive Covenant. Jackson did not rely on a legal opinion for his interpretation of that document, and made large adjustments of

value based on his opinion alone. The Respondent noted that Jackson, in effect, based his adjustments on his own interpretation of a legal contract, an area in which he has no expertise.

[205] The Respondent advised the Board that the Jackson Appraisal was incorrect due to a number of factors, including:

- The use of a base value of $250,000 per acre for industrial land and adjusting each of the parcels for the risk associated with the contamination. This was followed by a site specific adjustment called a base adjustment. There was no supporting evidence for the base adjustment found in the Jackson Appraisal on any of the parcels; the majority of the adjustments were made for contamination.

- The opinion of value is based on the assumption that there is a high risk that a new owner will inherit the remediation costs on each of the properties, and that the Province could immediately force a new owner to remediate each parcel. The Respondent reminded the Board that since the first Approval and the Amending Approval are in place, the Province will look to the Approval holder, Celanese, to remediate the property. The Jackson Appraisal makes no reference to these Approvals and clearly does not consider how they affect his risk analysis.

- The fact that Celanese may remediate the site, or portions of the site, as required by the first Approval, is ignored. The Jackson Appraisal appears to ignore the fact that there may never be a requirement to fully remediate the site or that there may be other options that do not require full remediation.

- Jackson's opinion is based on a misreading of the Restrictive Covenant. Jackson admitted he did not read the original purchase agreement and was unaware that there was a provision in it limiting liability for contamination to $10 million.

- The Respondent submitted that the Jackson Appraisal fails to consider the effect of the Approvals on the parcels, and the responsibility that these Approvals create. Jackson also failed to consider that Celanese may actually clean the parcels, and did not acknowledge the indemnity provision. As such, the Jackson Appraisal is completely unreliable as it relates to the assessment of risk.

- The Jackson Appraisal states that if environmental laws become stricter, the purchaser will be responsible for the stricter standards. The Respondent stated this opinion is based on Jackson's interpretation of the Restrictive Covenant, something for which he has no expertise.

- The Jackson Appraisal contemplates that Celanese must approve all developments, not simply the limited development problems arising from the Restrictive Covenant. The Respondent stated there is simply no evidence that shows Celanese must approve each and every development on the site.

- The Jackson Appraisal indicates a parcel is more valuable if it can be subdivided. The Respondent notes that while there is evidence showing subdivision is not as simple as it is with an uncontaminated site, it is not impossible to subdivide contaminated land, as various subdivisions have already occurred. The Respondent

submits that Jackson's opinion on the impossibility of subdivision without full remediation is simply not proven.

- Jackson states that lot 11A is worthless, yet there is evidence showing there are two leases generating a total income of $180,000 per year. The Jackson Appraisal makes no mention of this income stream.

- The Respondent stated that in three cases the methodology applied by Jackson creates a greater reduction than the actual estimated cost of removing the proven contamination on the parcels, when all he is attempting to do is to take into account the risk that the costs will be incurred.

- The Jackson Appraisal fails to consider whether, despite the contamination, there are still uses for any of the parcels that may be unaffected by the contamination. The Respondent pointed out that one of the ways to determine if there is any value to the land is to examine the registrations on title, and see whether any of the registrations establish that someone may have a use for the land. The Respondent notes that certain registrations on title show that there is some interest in the land, and as such, indicate value. The Jackson Appraisal pays lip service to these registrations but provides no analysis respecting how they may be suggestive of value. The Respondent notes that the Jackson Appraisal, by determining a final value of $0.00 on some of the parcels, ignores the actual and potential uses of the subject.

- The Jackson report values Lot 4 as worthless, while the Downey Report values it at $2,600,000. It is of interest that both appraisers had access to the Klohn Report.

- The Respondent submits that the opinion of value within the Jackson Appraisal is entirely unreliable. The Respondent stated Jackson's lack of expertise raised a number of issues. In addition, the Respondent notes the final methodology within the Jackson Appraisal clearly over-values the contamination adjustment on each parcel, and ignores the uses that may be made of the various parcels.

[206] The Respondent further advised the Board that they are not arguing, and have never argued that the contamination on the parcels does not affect market value. In fact, the assessment on each parcel was adjusted to take into account the effects of contamination and the risk that it creates for a potential purchaser.

[207] The Respondent noted that the method by which the Jackson Appraisal calculates the reduction in value for the contamination is unreliable because it fails to take into account a number of factors, including:

- There is no current requirement to remediate the site and it may never be required.

- There may be other ways to deal with the contamination, short of full remediation.

- Celanese is approval holder on each of the parcels and therefore is the responsible party under those approvals.

- There are ways to subdivide the property.

- While development on some areas is limited, most of the site is developable.

- The current zoning allows permitted IH uses on the land, and it is not necessary to subdivide the land to use the land for IH uses.

[208] The Respondent advised the Board that its position is supported by the fact that Eco agreed to similar assessments in the 2010 taxation year. The Respondent noted that while these agreements do not prove that the assessed values for the 2012 taxation year are correct, they do support the view that Eco believed that all of the parcels had value in 2011 when the agreements were signed. The Respondent noted that these agreements were negotiated after the Downey Report was produced and all the parties agreed that market conditions have not changed since 2010.

[209] The Respondent advised the Board that Parcel 10 was listed for $1,350,000 in 2010. Although the listing has expired, it demonstrates the significant value that the Complainant believed was in that parcel.

[210] The Complainant had argued that the Respondent failed to assess each parcel of land for the 2012 taxation year, since the values have been the same since the agreement reached in 2011. The Respondent surmised that the Complainant is really asking the CARB to make a finding that the assessment is therefore invalid as it contravenes provisions of the MGA.

[211] The Respondent noted that the jurisdiction of the CARB on an assessment appeal is found in s. 467(1) of the MGA. The Respondent advised the Board that throughout the Complainant's argument, they could not point to a provision or case that indicates a CARB can make a finding that an assessment is invalid, whether as a result of an assessment value being carried forward from a prior year, or otherwise. The Respondent noted that the jurisdiction of the CARB is to determine what the assessment should be, and not whether a legal assessment has been undertaken. The Respondent advised the Board that nowhere in the legislation does it indicate that the CARB can decide that the City failed to meet legislative requirements, and use that finding to simply invalidate an assessment.

[212] The Respondent stated that the Domtar sale, which involved a contaminated site that was going to be remediated, is not comparable since it was going to be remediated for residential use.

[213] In conclusion, the Respondent submitted that the Jackson Appraisal provides an unreliable method for valuing the parcels. As such, the Complainant has failed to prove that the City's assessment of the subject is incorrect.

[214] While some parcels are contaminated, and the market value of each parcel needs to be adjusted for the risk the contamination creates, the methodology used by Jackson is unsupportable, and clearly over-adjusts for the risk of contamination. The adjustment in at least three cases is greater than the cost to cure. By contrast, the Respondent's adjustments adequately capture the risk on each of the parcels, and also follow a well-detailed City policy on contamination to ensure that all contaminated properties are treated equally.

[215] The Respondent therefore asked the Board to accept the Respondent's values and recommendations on the parcels.

Last Word of the Complainant

[216] The Complainant reminded the Board of the limited extent of the $10 million limitation of liability outlined in the Restrictive Covenant and the fact that the Restrictive Covenant ends in 25 years.

[217] The Complainant also reminded the Board that none of the Approvals between the Province and Celanese contemplate site remediation.

[218] The Complainant stated that nobody has said that the full remediation cost as set out in the Klohn Report may be required to remediate the subject properties, but the market assesses the risk that a purchaser may incur liability in the future by lowering the market price of properties such as these.

[219] The Complainant reminded the Board that, with respect to the parcels previously sold by Eco, the Restrictive Covenant would have had minimal impact on the purchase price as these were relatively clean parcels.

[220] The Complainant further reminded the Board that the Approvals are part of an ongoing process and there is nothing to show that Celanese is ever going to remediate the parcels. The Complainant also cautioned the Board about putting any weight on a proposed *post facto* subdivision on one parcel and asked the Board not to place weight on the right of first refusal which appears on title to the parcels.

Decision:

[221] The decision of the Board is as follows:

- The assessment of Parcel 3A is reduced to $2,032,000 based on the recommendation of the Respondent.
- The assessment of Parcel 4 is reduced to $2,540,500, based on the recommendation of the Respondent.
- The assessment of Parcel 9 is confirmed at $5,178,000.
- The assessment of Parcel 11A is confirmed at $4,078,500.
- The assessment of Parcel 11B is confirmed at $7,421,500.
- The assessment of Parcel 10 is confirmed at $715,000

Reasons for Decision

[222] The task of this Board is to determine the value that a willing buyer and a willing seller would agree is a fair value for each of the parcels.

[223] As set out in the decision in the first preliminary matter, the Board agrees with the Complainant that such factors as the management style or character of an owner, or the fact that property taxes may be unpaid, are not significant when determining market value.

[224] The Board also agrees with the parties that various factors will be taken into account by a potential purchaser of a parcel. Some of these factors, including difficulties with shape, access or topography, can be taken into account by making adjustments to a purchase price with reference to market data. A factor such as extensive contamination will also be significant to a potential purchaser. The question for the Board to determine is the impact that contamination will have on the value of the parcels, and how a potential purchaser will weigh that risk.

[225] The Board acknowledges, and all parties agree, that the parcels in question, except for Parcel 10, have varying levels of contamination. The Board heard evidence that the degree and extent of contamination on the subject makes some of these parcels unique in Edmonton. The result of this contamination is that comparables are virtually non-existent in the Edmonton market.

[226] The Board understands that the contamination on some of the parcels is severe, especially with respect to the DND areas and the effluent ponds. The Board understands that a prospective purchaser would approach an extremely contaminated parcel with caution.

[227] The Complainant argued that the Respondent had not conducted proper assessments on the parcels since the values for 2012 appeared to have been carried forward from 2010. In the Complainant's view this is contrary to the legislation. In the opinion of the Board, s. 467(1) of the MGA provides that an assessment review board may alter an assessment or change it – not declare an assessment invalid on the basis of methodology or otherwise. The Board also heard evidence that the market was stable between 2010 and 2012 which suggests that it may have been fair and equitable to use similar, and even identical values for 2010 and 2012.

[228] The Complainant also argued that the MGA requires that a "parcel of land" be assessed and that the Respondent's method of assigning different values to different portions within a parcel contravenes this requirement. In the opinion of the Board, the Respondent's methodology does not have the effect of treating each portion as a separate parcel. In this case, different portions of a parcel clearly have differing values, such that a contaminated portion would have to be valued at a lower rate than a clean portion. By combining the values for the various portions the Respondent arrived at a single value for each parcel. It is common in commercial or industrial assessments to assign different values to different areas or structures on a parcel of land, and there is nothing in the legislation to suggest this methodology is incorrect.

[229] Therefore, the Board does not accept the Complainant's argument that the assessments of the parcels are invalid.

[230] The Board also reviewed the Complainant's evidence in support of the argument that the assessments of the parcels are excessive and do not reflect market value

[231] To assist the Board in determining the market value for the parcels, the Complainant presented the Jackson Appraisal. The Board recognizes that Jackson has experience in appraising industrial properties; however, it cannot be said that Jackson has experience in appraising contaminated properties. This is the first appraisal of contaminated land undertaken by Jackson. In determining value for the parcels, Jackson urged the Board to consider the costs for cleanup of the various parcels as set out in the Klohn Report.

[232] The Board heard evidence from Halvorsen that there were problems with the Jackson Appraisal in that it did not comply in some respects with CUSPAP. The Board did not qualify either Jackson or Halvorsen as expert witnesses in this hearing as neither had extensive

experience with appraising properties with such extreme levels of contamination. However, the Board accepts that Halvorsen has been a member of the review committees for the Appraisal Institute Professional Practice Group and has experience in reviewing appraisal reports to determine compliance with applicable standards, methodology and rules. The Board therefore gave more weight to Halvorsen's evidence.

[233] The Board heard that the Klohn Report was commissioned by Eco in 2010 to provide an estimate on the cost to remediate the contamination on the parcels. The total cost to clean the parcels was estimated at $305.4 million. By anyone's standards, this is a staggering sum. However, there was no suggestion in the Klohn Report that the cleanup had to be done – simply that if it had to be done, it would cost $305.4 million. The Board heard evidence from the Respondent that other methods, such as containment or monitoring, may be sufficient. These are alternatives to complete remediation that should have been considered in the Jackson Appraisal. The Board also notes that the costs estimated in the Klohn Report included amounts for stripping and hauling away contaminated soil. However, there is no evidence to suggest this is currently required, or will ever be required. As such, factoring these hypothetical costs into an appraisal is at best premature, and at worst, completely unwarranted.

[234] Jackson took the cleanup costs from the Klohn Report and factored them proportionately into an environmental adjustment for each parcel. The result of applying total cleanup costs to each parcel meant that Parcels 3A, 4 and 11A were given a zero land value in the Jackson Appraisal.

[235] In the opinion of the Board, a purchaser would not adjust the purchase price of a parcel to take into account the entirety of the cleanup costs. In the case of the subject and the included parcels, there are several factors to be taken into account which lessen the risk that a purchaser would be responsible for the entire cleanup cost for a parcel.

[236] Celanese, as the polluter of the parcels, has the responsibility to monitor the contamination on the subject under the Approvals issued by the Province pursuant to the EPEA. The legislation, as presented by the Respondent, clearly shows that the holder of the Approval has this responsibility. The Board did not hear any evidence that the Approvals had been transferred to any other party, nor did the Board hear evidence that Celanese was not co-operating with the Province with respect to these responsibilities.

[237] The Approvals require Celanese to present the Province with a Decommissioning Plan (including a plan for decontamination of the plant and affected lands) as well as a Dismantling Plan. The Board is satisfied that the Approvals support the Respondent's contention that Celanese is responsible for, and is addressing, the contamination on the parcels.

[238] As well, Celanese's commissioning of the Barenco Report further suggests it is attempting to comply with its environmental responsibilities on the parcels. Further, the Restrictive Covenants filed on title to each of the parcels pursuant to the original purchase agreement confirm Celanese's responsibilities to monitor and contain the contamination for a 25 year period from the date of the sale. This all suggests that, as of the date of valuation, Celanese bears the responsibility for the contamination.

[239] With respect to the 25 year period for Celanese's responsibility, the Board was persuaded that even when this private agreement expires, the Province will still look to Celanese as the original polluter for remediation. Based on the evidence it is unclear that a polluter like Celanese can simply contract out of its responsibility by transferring liability to a third party.

[240] The factors relating to the responsibility for the contamination on the parcels must be taken into account when determining what a purchaser would pay for a parcel. The Board agrees with both parties that there will always be a risk of liability for a purchaser, whether as a result of changing environmental laws or standards, inadvertent disturbance of the existing problems, or new contamination. However, there was no evidence before the Board that a potential purchaser would be required to pay the entire cleanup cost or indeed, whether the parcels will need to be remediated at all.

[241] There was evidence before the Board that one of the most heavily contaminated parcels is the subject of two leases that are bringing in $180,000 per year. The Board notes that Jackson did not consider the existing use of the parcels nor what income could be generated from them. The parcels are zoned IH or IM and can be used for various industrial activities. The Board noted that there are rail lines, deep injection wells and rights of first refusal on some of the parcels which either add value, or are suggestive of a potential market.

[242] The Board is not denying that there would be risks to a purchaser in buying such a unique, contaminated parcel. However, for the above reasons, the Board is of the opinion that it would be incorrect to value a parcel by taking into account all cleanup costs when those costs might never be required and when another party has taken responsibility for the problem. While there is potential risk to a purchaser, the risk does not rise to the level argued for by the Complainant. The Board was not presented with sufficient evidence to suggest that a purchaser would inherit liability for a complete cleanup of the parcels.

[243] Clearly, there must be some discount to account for the contamination. However, the Board concludes that Jackson's approach incorrectly deducted the full cost of remediation. Jackson also failed to consider the existing use of the parcels, the income that might be generated and the income that is actually being generated.

[244] The Jackson Appraisal also addressed the issue of subdivision. The ability to subdivide adds value and a typical purchaser may want to subdivide for future resale. Jackson states that subdivision on the subject is not possible without complete remediation.

[245] However, subdivision has taken place on parcels which formed part of the original purchase agreement pursuant to legislation such as the *Pipeline Act*, albeit this was on land not significantly affected by the contamination. The Board also heard some *post facto* evidence in the Respondent's surrebuttal package that a subdivision has been conditionally granted for one of the parcels under appeal. The Board also notes a comment by a witness for the Complainant that subdivision is always possible one way or another. The Board therefore concludes that subdivision on the subject remains a possibility, and Jackson's failure to account for this possibility was one of the factors that led to his overvaluation of the risk.

[246] The Board also finds that Jackson's opinions on the Restrictive Covenant were based on a legal interpretation that he was not qualified to make.

[247] The Board was not persuaded by Jackson's comparison of the parcels with the Domtar site. In the opinion of the Board, that situation can be distinguished in that Domtar was to be remediated for residential development purposes. The Board also noted that some comparables relied upon by Jackson to establish a base cost per acre were serviced lots, whereas the subject is unserviced, and therefore not comparable.

[248] For the above reasons, the Board does not accept the values for Parcels 3A, 4, 9, 10, 11A or 11B set out in the Jackson Appraisal.

[249] The Board notes that Eco is a sophisticated owner whose representative advised the Board that at the time of the original purchase he had experience with contaminated properties. The Board notes that the Klohn Report was not commissioned by Eco until some three years after the purchase. The Board also notes that in 2012 the Symmetry website outlined the Complainant's vision for the redevelopment of the remaining parcels as a mixed-used industrial park and model remediated site. The Board concludes from this that Eco was a sophisticated purchaser of the parcels, has definite plans for redevelopment, and sees value in the subject.

[250] A reduced value for the parcels as a result of contamination is reasonable, but the Board does not accept that Parcels 3A, 4, and 11A are worthless when there is evidence that there is some value in their present use, and a potential market for their sale. The fact that the present use and potential market may be limited should not lead to the conclusion that these parcels are valueless.

[251] With respect to Parcel 10, although Jackson did not apply an environmental adjustment to it, the deficiencies in the Jackson Appraisal (as set out above) render his opinion of value for this parcel of little assistance to the Board. The Board also considered evidence that Parcel 10 had been listed for sale in 2010 for $1,350,000, although it had subsequently been taken off the market. The Board finds this indicative of the mindset of the Complainant respecting the value of this parcel.

[252] The Jackson Appraisal was the only evidence of value for the subject presented to the Board by the Complainant in this hearing. An earlier appraisal for the parcels prepared for the Complainant (the Downey Report) was entered as evidence by the Respondent and apparently formed the basis for a negotiated settlement between the parties for the 2010 assessment year.

[253] The Board notes that the Downey Report ascribes value to even the most contaminated parcels. It also takes into account existing use and income producing potential.

[254] The total value for the parcels in the Downey Appraisal was $16,045,000, considerably more than the amount recommended in the Jackson Appraisal. The total recommended 2012 assessment by the Respondent for the parcels amounts to just under $22,000,000. The Board notes that the assessments for the parcels have been reduced significantly since 2010 to reflect the problem of contamination and its effect on market value (See attached chart, Schedule "B").

[255] The Board reviewed the 2012 assessments for the parcels presented by the Respondent along with the recommended changes. The Board agrees with the Complainant that many of the numbers given to value aspects of the parcels are not supported by market evidence. For example, a DND area on Parcel 3 is assessed at $7,500 per acre and the contaminated areas on the parcels are assessed at $20,000 per acre. However, in the opinion of the Board, as a result of the unusual and unique nature of the subject, these values are not unreasonable, and have been satisfactorily, though not perfectly, supported. The Board finds the Respondent has been consistent with the *City of Edmonton Assessment Valuation Procedures in Relation to Contaminated Properties* and the International Standard, and as such, has demonstrated that a fair and equitable assessment of the subject was conducted.

[256] Given the facts and the requirements of the legislation, the Board concludes that the full cost of remediation should not be factored into the value of the parcels. Further, the existing use

and income producing potential, along with the potential subdivisibility of the parcels, should be taken into account when establishing value.

[257] It is the Complainant's responsibility to provide evidence on a balance of probabilities that would bring the correctness of the assessment into doubt. The Board concludes that the Complainant did not discharge this onus with respect to the parcels forming the subject of this complaint.

[258] The Board is aware that the assessments for the parcels may be imperfect – in particular, what appears to be the use of the same values for 2010 and 2012. However, the Board finds that in spite of this, the City has produced a reasonable estimate of the fee simple estate in the subject as required by the legislation. The Board also notes that the Respondent is not required to arrive at a unique value each year, and the fact that the market for a property of this type has remained static since 2010 is not surprising.

[259] The Board concludes that the Complainant failed to provide sufficient market or other evidence to suggest a lower property value than that accounted for by the Respondent is warranted. The Board also concludes that the Complainant did not provide sufficient evidence to allow the Board to conclude that the assessments for the parcels was wrong.

[260] Therefore, the Board concludes that the following assessments are correct, fair and equitable as follows:

- Parcel 3A - $2,032,000
- Parcel 4 - $2,540,500
- Parcel 9 - $5,178,000
- Parcel 11A - $4,078,500
- Parcel 11B - $7,421,500
- Parcel 10 - $715,000

Dissenting Opinion

[261] There was no dissenting opinion

Complainant's Exhibits

Exhibit	Description	Number of Pages
C-1	Complainant Preliminary Objections	4 Pages
C-2	Complainant Assessment Brief	5 Tabs
C-3	Complainant Rebuttal	23 Tabs

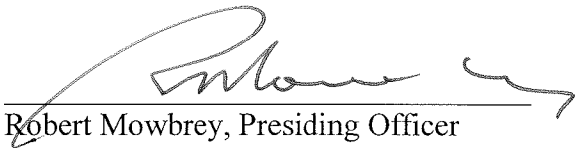
C-4	Complainant Relevant Document Submission	11 Tabs
C-5	Complainant E-Mail Correspondence	3 Pages
C-6	Complainants Disclosure Volume 1	2 Tabs
C-7	Complainants Disclosure Volume 2	2 Tabs
C-8	Complainants Disclosure Volume 3	2 Tabs
C-9	Aerial Map	1 Page
C-10	Curricula Vitae: Ed Jackson	2 Pages
C-11	Argument	25 pages , Tab A-8 pages, Tab B-7 pages

Respondent's Exhibits

Exhibit	**Description**	**Number of Pages**
R-1	Respondent Assessment Brief	1060 Pages
R-2	Respondent Rebuttal	3
R-3	Map of Subject Properties	1
R-4	Brief on Tax Roll 10150276	24 pages
R-5	Brief on Tax Roll 10150275	23 pages
R-6	Brief on Tax Roll 1150986	24 pages
R-7	Brief on Tax Roll 1340637	24 pages
R-8	Brief on Tax Roll 10274072	26 pages
R-9	Brief on Tax Roll 10274073	26 pages
R-10	Summary details	1 page
R-11	Argument	210 pages

Heard commencing March 18, 2013.

Dated this 25th day of June, 2013, at the City of Edmonton, Alberta.



Robert Mowbrey, Presiding Officer

Appearances:

Lyle Brookes
Shauna Finlay
Ed Jackson
Alex Lee
Dan White
Jim Kumpula
Mohammed Farooq

for the Complainant

Cameron Ashmore
Darren Nagy
Rolf Halvorsen
Doug McLennan

for the Respondent

This decision may be appealed to the Court of Queen's Bench on a question of law or jurisdiction, pursuant to Section 470(1) of the Municipal Government Act, RSA 2000, c M-26.

Schedule "A"

[1] ***Municipal Government Act***, RSA 2000, c M-26

s. 1(1)(n) "market value" means the amount that a property, as defined in section 284(1)(r), might be expected to realize if it is sold on the open market by a willing seller to a willing buyer;

s. 1(v) "parcel of land" means

(i) where there has been a subdivision, any lot or block shown on a plan of subdivision that has been registered in a land titles office;

(ii) where a building affixed to the land that would without special mention be transferred by a transfer of land has been erected on 2 or more lots or blocks shown on a plan of subdivision that has been registered in a land titles office, all those lots or blocks;

(iii) a quarter section of land according to the system of surveys under the *Surveys Act* or any other area of land described on a certificate of title;

s. 464 (1) Assessment review boards are not bound by the rules of evidence or any other law applicable to court proceedings and have power to determine the admissibility, relevance and weight of any evidence.

(2) Assessment review boards may require any person giving evidence before them to do so under oath.

(3)Members of assessment review boards are commissioners for oaths while acting in their official capacities.

s. 467(1) An assessment review board may, with respect to any matter referred to in section 460(5), make a change to an assessment roll or tax roll or decide that no change is required.

s. 467(3) An assessment review board must not alter any assessment that is fair and equitable, taking into consideration

(a) the valuation and other standards set out in the regulations,

(b) the procedures set out in the regulations, and

(c) the assessments of similar property or businesses in the same municipality.

[2] ***Matters Relating to Assessment Complaints Regulation***, Alta Reg 310/2009

s. 8(2)(c) the complainant must, at least 7 days before the hearing date, disclose to the respondent and the composite assessment review board the documentary evidence, a summary of the testimonial evidence, including a signed witness report for each witness, and any written argument that the complainant intends to present at the hearing in rebuttal to the disclosure made under clause (b) in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing.

s. 10(3) A time specified in section 8(2)(a), (b) or (c) for disclosing evidence or other documents may be abridged with the written consent of the persons entitled to the evidence or other documents.

Schedule "B"

Tax Roll Number	Lot	Acres	2010 Assessment	Downey Appraisal: July 1, 2009	Agreement to Correction: November 2010	Jackson Appraisal: as of July 1, 2011	2012 Assessment: as of July 1, 2012 valuation date	Recommendation for 2012 Assessment	Request by Comp on 2012 Complaint Form
1340637	Lot 4	40.62	$9,541,000	$2,678,000	$3,800,000	$0	$3,800,000	$2,540,000	$1
10150276	Lot 9	32.81	$7,021,000	$1,080,000	$5,178,000	$1,230,000	$5,178,000	same	$1
1150986	Lot 10	5.08	$719,000	$468,000	$715,000	$630,000	$715,000	same	$1
10150275	Lot 3A	23.167	$16,814,000	$5,613,000	$13,150,000	$0	$4,698,000	$2,032,000	$1
10274072*	Lot 11A	113.62	$33,017,500 for Parcel 11	$6,206,000 for Parcel 11	$11,500,000 for Parcel 11	$0	$4,078,000	same	$1
10274073*	Lot 11B	68.31				$3,500,000	$7,421,500	same	$1
	Totals:	283.607	$67,112,500	$16,045,000	$34,343,000	$5,360,000	$25,890,500	$21,964,500	$6

*10150280 was subdivided into 1024072 and 1024073