Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: May 28, 2025 **CASE NO(S).:** OLT-23-000350

PROCEEDING COMMENCED UNDER subsection 26(1) of the *Expropriation Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	1255870 Ontario Limited
Respondent:	Metrolinx
Subject:	Land Compensation
Property Address:	68-70 Parliament Street
Municipality:	City of Toronto
OLT Case No.:	OLT-23-000350
OLT Lead Case No.:	OLT-23-000350
OLT Case Name:	1255870 Ontario Limited v. Metrolinx

Heard: November 4 to November 26, 2024 by video; final argument in person on January 22, 2025 ("Hearing")

APPEARANCES:

Parties	**Counsel**
Metrolinx	C. Higgs I. Mathany K. Bezprozvannykh
1255870 Ontario Limited ("1255870" or "Claimant")	J. Farber M. Rutledge S. Gould

DECISION DELIVERED BY WILLIAM R. MIDDLETON AND FINAL ORDER OF THE TRIBUNAL

Link to Final Order

PART ONE: INTRODUCTION

[1] This Hearing before the Ontario Land Tribunal ("Tribunal" or "OLT") was to determine the claims for compensation brought by 1255870 pursuant to section 26(1) of the *Expropriation Act*, R.S.O. 1990, c. E.26, as amended ("Act") arising from the expropriation by Metrolinx of the property known municipally as 68-70 Parliament Street ("Property" or "Site"), in the City of Toronto ("City").

[2] In addition to the exhibits referenced in paragraph [3] below, the additional materials submitted to the Tribunal included:

(a) Written Argument of Claimant, December 20, 2024, comprising 101 pages;

(b) Transcript Excerpt Brief of Claimant, comprising 1546 pages;

(c) Claimant's Brief of Authorities, dated December 20, 2024, comprising 391 pages;

(d) Metrolinx Closing Submissions, dated December 20, 2024, comprising 77 pages;

(e) Transcript Excerpt Brief of Metrolinx, comprising 966 pages;

(f) Metrolinx Brief of Authorities, dated December 20, 2024, comprising 327 pages;

(g) Claimant's Written Reply, dated January 16, 2025, comprising 11 pages;

(h) Claimant's Supplementary Brief of Authorities, dated January 16, 2025, comprising 94 pages;

(i) Metrolinx Reply Closing Submissions, dated January 16, 2025, comprising 88 pages; and

(j) Metrolinx Reply Closing Brief, dated January 16, 2025, comprising 56 pages.

[3] There were numerous exhibits tendered at the hearing as set out in **Attachment 1** to this Decision.

[4] As a final introductory matter, the Tribunal was required at the outset of the Hearing to consider a motion brought by Metrolinx to amend its Reply, which was partly opposed by the Claimant. At the Hearing, the Tribunal gave an oral decision on this motion, granting some of the amendments sought, as follows:

> Motion is granted in part; and dismissed in part:
>
> 1 Under OLT Rule 26.3 of OLT Rules makes application of Civil Rules subject to Rule 1.4 and 1.6 of OLT rules being the general discretion of OLT to consider the most fair, just, expeditious resolution on the merits…and that it "may" adopt or follow Civil Rules…The Tribunal exercises its discretion as follows:
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> 2 Proposed amendments to paragraphs 10, 14, 15, 16, 19, 20, 21, 22, 23, 39, 43, set out in the Amended Reply are permitted as the Claimant has not alleged any resultant prejudice from those amendments
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> 3 Proposed amendments to paragraphs 25, 26, 27, 28, 29, 30 and 31 of the Amended Reply are denied for two reasons: firstly, these paragraphs contain purely legal argument and/or evidence – not a concise statement of material facts as required by the Rules of Civil Procedure; secondly, the Tribunal is persuaded that the Claimant will be prejudiced by these new, last-minute pleading

amendments because it did not have an opportunity to conduct discovery on such points nor to consider how, if at all, its witnesses and experts might respond to such positions in their witness statements/reports/Reply reports. This prejudice is not compensable at this late stage of this proceeding without causing undue delay in the conduct of this hearing. As a general rule, the Tribunal reminds parties to expropriation cases to bring written motions to amend their pleadings well in advance of a scheduled hearing – otherwise there will always be the possibility – or even probability – that one party will suffer prejudice. Generally, if amendments are required such motions should be commenced prior to examinations for discovery.

4 The Tribunal's Decision on this Motion to deny the amendments described in 3 above shall not be deemed to thereby prevent or limit reasonable cross-examination by Metrolinx of the Claimant's witnesses about the Lease (as defined in paragraph 6 of the Reply) or the Section 24 Agreements entered into by the Parties, nor shall it be deemed to limit or prevent any final written or oral argument by Metrolinx concerning such matters or any provision of the Act

PART TWO: OUTLINE OF ISSUES FOR DETERMINATION

[5] The issues for adjudication raised in this proceeding are as follows:

A Highest and Best Use of the Property

(i) Planning Evidence
(ii) Urban Design and Architectural Matters
(iii) Transportation Evidence
(iv) HBU Conclusion

B Is there a Project / Scheme Impacting the Development that must be Screened under Section 14 (4)(b) of the Act?

(i) Onus of Proof - What is the Scheme?
(ii) How is the Scheme Properly Screened under S. 14(4)(b)?

C Relevance, if any, of the Ministerial Zoning Order

D Does a Lease Encumbrance Exist and What is its Value if So?

E Market Value Determination

(i) The Claimant's Appraisal Evidence: Seeking $97,127,800 for market value (based on 519,400 square feet at $187 per square foot)

(ii) Metrolinx's Appraisal Evidence: The value should be determined at $46,570,000 (based on 325,448 square feet x $170 per square foot), which includes a deduction for environmental remediation of $2,063,172; a reduction for a 'leasehold encumbrance' of $13,693,000; then an 'add-back' of interim rental income in the amount of $7 Million.

(iii) Summary of Findings On Market Value

F Deduction for Environmental Remediation?

G Summary of Overall Conclusions and Findings

PART THREE: ANALYSIS OF ISSUES

A Highest and Best Use of the Property

[6] The expropriation by Metrolinx ("Expropriation") was the full fee simple taking of the Property and the agreed effective date of the Expropriation was May 18, 2021 ("Effective Date").

[7] The eventual market value determination in any expropriation proceeding is based upon a finding of what comprises the highest and best use of the expropriated property

("HBU"). A recent enunciation of HBU analysis was provided by the Divisional Court of the Ontario Superior Court in *1353837 Ontario Inc.* v. *The Corporation of the City of Stratford*, 2022 ONSC 6347 ("Stratford"). Justice Stewart for the Court stated (below emphasis added):

> 19 In determining market value under the Act, it must be determined what a reasonably informed person would pay for the property based upon the property's highest and best use ("HBU") at the time using the knowledge available to the person as at the valuation date of, in this case, June 2009.
>
> 20 The determination of market value of expropriated property is an exercise that commonly will require the assistance of opinions from real estate appraisers and other experts such as environmental consultants. In undertaking this exercise, different appraisers employing different appraisal techniques and various assumptions may arrive at different opinions as to the market value of the property.
>
> 21 To determine the market value of property, the tests of legal permissibility, physical possibility, financial feasibility and maximum profitability are used... Each one of these tests must be satisfied, and they must be considered sequentially. For instance, a use for property that may be financially feasible but is not legally permissible cannot be considered to be its HBU…
>
> 27 After careful consideration of the evidence, the Tribunal rejected Mr. Simmons' opinion… [appellant's appraiser]…as to HBU, which had been based upon an improved, mixed-use commercial and residential development concept, as being unrealistically optimistic while also underestimating the impact of staggering remediation costs. The Tribunal considered that Mr. Simmons' opinion of value was based upon a proposal that was not feasible from either a land use planning or financial perspective…
>
> 30 After conducting a thorough HBU analysis the Tribunal found that, accounting for the costs of necessary environmental remediation using the lowest cost estimate of the respondent's environmental engineering expert, a negative market value for the property resulted.
>
> 31 The Tribunal acknowledged that a reasonably informed and prudent purchaser would incur these costs to redevelop the property. Given that such a purchase likely would be a sophisticated developer, and considering the unsteady economic climate following the 2008 financial crisis, the

> Tribunal held that, notwithstanding the negative market value resulting from the HBU analysis, it would be likely that a developer nevertheless would purchase the property at a speculative value and wait for an improved economic situation while refining its plans as was postulated by the respondent's expert appraiser. In my view, this finding is a determination of fact based on the evidentiary record before it. As such, it is entitled to deference…
>
> 32 The Tribunal heard and carefully weighed appraisal evidence of market value for the subject property. The evidence before the Tribunal put forward by the respondent's appraiser was that the property was worth at most $290,000 if a purchaser in the marketplace wanted to make a speculative offer and not fully take into account the depth of environmental remediation costs. As a finding of fact, the Tribunal considered and made a determination that this was the highest value supported by the evidence before the Tribunal which it chose to accept as most reliable.
>
> 33 After finding that the costs of developing the property were prohibitively high, the Tribunal chose to accept the evidence on its speculative value as offered by the respondent's expert appraiser instead of arriving at a negative value. The Tribunal found that a developer might be willing to purchase the property at such a speculative value with the hope that perhaps future improved economic circumstances might make the development of the property economically feasible.
>
> 34 The Tribunal therefore undertook a fact-specific exercise to determine that the HBU of the property was to leave it vacant and to hope for a situational change. In doing so, the Tribunal reasonably determined that the speculative value assigned by the respondent's expert appraiser should not be disturbed. The appellant failed to lead evidence of its own regarding the value of the property as a speculative investment, but this is not grounds to overturn the Tribunal's decision in that regard.

[8] In this case, Metrolinx contended at various points in its written and oral argument that the Claimant and its experts simply failed to perform a proper HBU analysis comprising the four sequential steps discussed in Stratford. In particular, Metrolinx argues that the Claimant's experts did not properly consider legal permissibility or financial feasibility. The Claimant rejects this line of argument.

[9] Interestingly, Metrolinx in its Amended Reply specifically pleads the HBU (below emphasis added):

> 39 Metrolinx states that, as of the Valuation Date, the Highest and Best Use of the Subject Property was for a mixed-use high-rise development. The likely development of the Subject Property would consist of one or two 23-storey buildings.
>
> 40 Metrolinx disputes the Claimant's assertion that the Subject Property could have been rezoned for residential/mixed-use development for two towers of approximately 35 stories each, with a density of approximately 14.5 – 15.0 FSI, absent the Scheme or at all, and puts the Claimant to the strict proof thereof.

[10] By the time of final written and oral argument it was clear that the Parties had already agreed that the HBU of the Property is as a mixed-use high-rise development – a proposition with which the Tribunal also concurs. Where the Parties fundamentally disagreed is as to the tower(s) height and total overall density of that development.

[11] The Claimant proposed that the HBU be a high density two-tower mixed use development at heights of 35 storeys (110.10 metres) and 30 storeys (95.35 metres), with a six storey (22.15 metres) base building (podium) comprising an overall total of 519,400 square feet of Gross Floor Area ("GFA").

[12] Metrolinx agreed that the HBU should comprise a high-density mixed-use development on a standalone basis, but by contrast argued that it should comprise density of 8.36 Floor Space Index ("FSI") or an overall total of 325,448 Space Floor ("SF") of buildable GFA. The height of the single tower on the Property would be up to 23 storeys (75 metres) with a four-storey podium (although in its Amended Reply it suggested that there could be two such 23-storey towers).

[13] The evidence on HBU tendered by the Parties consisted of written and oral evidence on matters of planning, urban design, architecture and certain transportation aspects.

(i) Planning Evidence

[14] The Claimant tendered written reports and oral testimony from Peter Smith and Michael Goldberg. Both have several decades of experience and are well-recognized, deeply experienced and highly respected land use planners especially with respect to the planning aspects of downtown City sites including some very near to the Site. Metrolinx's expert was Jane McFarlane from Weston Consulting Group Inc., who is also a skilled land use planner with approximately 20 years' experience.

[15] The key areas of dispute between the planners, as noted, concerned their differing views on what building heights and density would have been permitted on the Property. Metrolinx's experts opined that what Mr. Smith and Mr. Goldberg predicted would not have been permitted. Mr. Smith and Mr. Goldberg adamantly disagreed with those opinions.

[16] Mr. Smith testified that the shape of the Property, its dimensions, and its frontages along three arterial streets (King Street East, Parliament Street, and Front Street East) would efficiently accommodate two tall residential towers on a podium. The Property is an area of the City that included existing and approved tall buildings up to 38 storeys in height as of the Effective Date, and even higher up to 40 storeys in pending development applications. He further noted that over a period of more than 10 years prior to that date there was a clear trend toward progressively increased heights in excess of 30 storeys. The King-Parliament area begin to evolve in this fashion almost 20 years before the Expropriation. By 2018, applications and approved development in that area as high as 29 storeys occurred.

[17] The examples proffered by Mr. Smith were summarized in his tables as follows:

Table 1 - Development Application Summary

Address	Height	Status
Front Street East		
154 Front Street East	Two 26-storey buildings (91.5 metres and 88.5 metres)	Approved by OMB, under construction.
177-197 Front Street East, 15-21 Lower Sherbourne Street and 200 The Esplanade	Two 29-storey buildings (103.4 metres)	Approved by OMB, under construction.
176-178 Front Street East and 33 Sherbourne Street	38 storeys (130.0 metres)	Approved in principle by Council on September 30, 2020. (By-laws 1093-2021 and 1094-2021 subsequently enacted on December 17, 2021.)
250 and 260 Front Street East and 383 King Street East	19 storeys (75.5 metres)	Application submitted October 2017. Property expropriated by Metrolinx.
King Street East		
251-255 King Street East and 37 Sherbourne Street	17 storeys (51.7 metres)	Complete
236-250 King Street East	40 storeys (132.85 metres)	Application submitted December 2020. (Subsequently approved by OLT on August 10, 2022 with a height of 43 storeys (140.0 metres).)
254-266 King Street East, 427-435 Adelaide Street East and 157 Princess Street	36 storeys (122.0 metres) and 34 storeys (116.0 metres)	LPAT approval in principle (January 2019).
275 King Street East and 138 Princess Street	12 storeys (46.3 metres)	Complete
284 King Street East	32 storeys (107.3 metres)	LPAT approval in principle January 2020.
333-351 King Street East and 200 Front Street East (King East Centre)	Original proposal: 17 storeys (83.5 metres, Globe and Mail building)	Globe and Mail building (17 storeys) complete.

	and 12 storeys (61.5 metres, office) New (2018) proposal (revised May 2021): 39 storeys (140.0 metres. residential) and 27 storeys (119.0 metres, office).	Two additional buildings (39 and 27 storeys) proposed for this site in place of the original 12-storey office. (Subsequently revised to 39 storeys (140.0 metres) and 28 storeys (127.1 metres). By-law 850-2022 enacted on July 22, 2022.)
318 King Street East	15 storeys (49.8 metres)	Complete
Adelaide Street East		
406 Adelaide Street East (Ivory)	22 storeys (66.9 metres)	Complete
424-460 Adelaide Street East (Axiom)	21 storeys (74.0 metres) and 19 storeys (68.0 metres)	Complete
Ontario Street		
25 Ontario Street	23 storeys (105.2 metres, office)	Under construction
49 Ontario Street	39 storeys (136.05 metres), 34 storeys (120.55 metres) and 10 storeys (39.15 metres)	Under review. (Subsequently revised to 44 storeys (152.4 metres), 39 storeys (139.9 metres) and 11 storeys (43.2 metres). By-law 1299-2023 enacted on December 15, 2023.
55 Ontario Street (East 55)	25 storeys (83.4 metres)	Complete
69, 71 and 75 Ontario Street, 429-455 Richmond Street East	38 storeys (128.45 metres)	Appealed to OLT (Subsequently approved by OLT in January 2023 at 43 storeys (144.5 metres.)
Queen Street East		
245-285 Queen Street East, 348-410 Richmond Street East, 88-116 Ontario Street	24, 25 and 33 storeys (88.8 metres, 95.4 metres and 113,8 metres)	LPAT approval in principle October 2018. (Subsequently, OLT Order issued in August 2022.)
301-317 Queen Street East	17 storeys (65.3 metres)	LPAT approval in principle February 2021. (Subsequently, OLT Order issued in August 2022.)

Parliament Street		
31 Parliament Street	37 storeys (137.4 metres)	LPAT approval in principle July 2018. (Subsequently, OLT amended its approval to 41 storeys (137.4 metres) on March 23, 2022.)
33-37 Parliament Street	32 storeys (102.0 metres)	LPAT approval in principle May 2020. (Subsequently, OLT order issued in July 2022 at 33 storeys (105.4 metres).)
93-95 Berkeley Street and 112-114 Parliament Street (East United)	24 storeys (74.9 metres)	Complete
48-54 Power Street, 113-115 Parliament Street	19 storeys and 22 storeys (69.4 metres and 78.4 metres)	Under construction
161-167 Parliament Street, 351-373 Queen Street East and 80-94 Power Street	27 storeys (97.5 metres)	LPAT approval in principle November 2020. (Subsequently, OLT Order issued in August 2022.)

[18] The core opinions of Mr. Smith in support of the Claimant's proposed development as the highest and best use were:

(a) The Site is located within an area that included existing and approved tall buildings up to 38 storeys in height as of the Effective Date, and up to 40 storeys in pending applications. In general, building heights step down from south to north and from west to east, although the pattern is somewhat irregular, owing in part to the trend toward increasing heights over time;

(b) Within the existing and planned height context set out above, building heights of 30 to 35 storeys on the subject site would fit harmoniously with the greatest height on the Front Street frontage and stepping down toward the King Street frontage;

(c) The proposed 72 metre height limit in By-law 393-2021 (under appeal), while it recognizes the appropriateness of the Site and the lands fronting on Parliament Street for a tall building, does not reflect the existing heights that have been approved along Parliament Street (e.g. the recently approved 27-storey (97.5 metre) building at 161-167 Parliament Street), nor does it allow for the optimization of land and infrastructure within the applicable Mixed Use Areas 2 and Regeneration Area 'A' designations in the Downtown Secondary Plan and the in-force King-Parliament Secondary Plan;

(d) The Site is sufficiently large to accommodate two tower floor plates, while providing for sufficient separation between the towers (25.0 metres), sufficient setbacks from the west property line (12.5 metres) and sufficient step-backs from the three adjacent streets (3.0 metres) in accordance with the Tall Building Design Guidelines and the Downtown Tall Building Setback By-laws. While By-law 393-2021 had proposed to increase the required tower setback from the adjacent streets to 8.0 metres, it was under appeal and was not in effect as of the Effective Date;

(e) A base building height ranging from 4 to 7 storeys is appropriate and fits contextually with existing and approved base building heights near the Site. Examples include the King East Condos building immediately to the north at 318 King Street East with a 5-storey base building along its Parliament Street frontage. Similarly, the East United building at 112-114 Parliament Street has a 4-storey base building, while the 113-115 Parliament Street/48-54 Power Street development has 5-storey base buildings with a 3-storey link along Parliament Street;

(f) The massing concept provides for two towers, a 35-storey tower (106.5 metres, excluding mechanical penthouse) on the southerly portion of the Site

and a 30-storey tower (91.5 metres, excluding mechanical penthouse) on the northerly portion. The Site is able to accommodate two towers oriented north-south with dimensions of 38.5-40.9 metres by 18.9 metres, with a 25 metres separation between the two towers, a 12.5 metres setback from the west property line and a 3.0 metres setback from King Street, Parliament Street and Front Street. The resulting floor plates (716 square metres) are in keeping with the maximum floor plate size of 750 square metres under the Tall Building Design Guidelines and the Downtown Secondary Plan;

(g) WZMH (Mr. Len Abelman) has prepared a more detailed architectural presentation dated April 3, 2024, which is broadly similar to the above-described massing concept which provides for a 35-storey tower on the southerly portion of the Site and a 30-storey tower on the northerly portion, both set back 12.5 metres from the west lot line and 3.0 metres from the adjacent street lines. The organization of the base building is broadly similar, with a 6-storey base building along the east limit of the Site, stepping down to 3 storeys to the west along both King Street and Front Street;

(h) The WZMH plans are substantially in accordance with the above-described massing concept and would be in keeping with its underlying development principles. No Official Plan Amendment would be required although a rezoning to increase the tower heights, step-backs, parking requirements etc. would be required. From a land use perspective, the massing concept is in keeping with numerous policy directions promoting intensification of underutilized sites within built-up urban areas and from an urban design perspective the architectural plans produced by WZMH, would have fit harmoniously within the existing and planned built form context within the King-Parliament area; and

(i) Rezoning would require approximately 15-18 months to complete and together with site plan approval a combined total of 21 to 24 months would be required. If appealed to the Tribunal, an additional 18-24 months would transpire;

[19] Mr. Goldberg was retained by the Claimant to 'peer review' Mr. Smith's opinion. He supported his conclusions, but actually was of the view that even more density would probably have been approved on the Site. On the other hand, the final position being advanced by the Claimant in written and oral argument does not rely on Mr. Goldberg's opinion as to a higher level of density or greater tower heights. Mr. Goldberg opined that:

(a) The Site has potential for significant intensification with two tall towers and podium building form, given its proximity to identified higher order transit stations and to other existing and proposed tall buildings, its current Official Plan designation and zoning, its size and configuration and because there are no uses close by that are sensitive to tall buildings;

(b) The 6-storey base building identified by WZMH is appropriate and the Site can support two towers located at the north and south ends, incorporating tower floor plate sizes between approximately 708 m² (WZMH) and 716 m² (Bousfield) while maintaining a 25 metres tower separation;

(c) Although both Mr. Smith and WZMH identify tower heights of 30 and 35 storeys, slightly greater heights of approximately 35 and 40 storeys are supportable. Utilizing the Bousfields floor plate size the additional 10 floors would provide for approximately 6,600 m² of additional GFA resulting in a total GFA of 58,171 m² (approximately 626,147 square feet) and a FSI of 16.0; and

(d) The Site could be appropriately designed to accommodate two high rise towers of 35 and 40 storeys with a potential GFA of approximately 58,171 m², resulting in an FSI of approximately 16.0

[20] Metrolinx's planning expert, Ms. McFarlane was also an articulate witness but her views were contrary to those expressed by Mr. Smith and Mr. Goldberg. Her opinion largely focussed on Official Plan Amendment 525 ("OPA 525") – also known as the King-Parliament Secondary Plan – and Zoning By-Law 393-21 ("ZB") which contained a 72 metres height limit. However, as noted by both Mr. Smith and Mr. Goldberg neither of these instruments were in force as of the Effective Date. The 72 metres limit has still never been formally approved by the City because the ZB remains under appeal.

[21] Ms. McFarlane and her colleague Shane Morgan (an architect and urban designer at the same firm, with 15 years' experience) also relied on the interesting conclusion that there was a region adjacent to the Property – which they termed the "Parliament Street Corridor/Pocket" – which was an area of special height restriction that would have precluded the Claimant's proposal because it required height transition from 12 storeys to no greater than 30 storeys. Ms. McFarlane noted the following active development applications within 500 metres of the Site on the Effective Date, as shown in the table below:

Table 1: Surrounding Development Activity

#	Address	Building Height	No. of Towers	Site Area	Land uses	GFA	FSI	Status
1	93-95 Berkley St & 112-124 Parliament St	24 Storeys	1	2,903 m^2	Mixed-Use Residential & Retail/ Office)	22,693 m^2	7.8	OLT Approved – January 15, 2018
2	60 Mill St	31 Storeys	1	1,204 m^2	Hotel Tower	25,318 m^2	21.97	In process at the effective date
		31 Storeys	1	1,204 m^2	Hotel Tower	26,800 m^2	22.26	OLT Approved (In principle Sept 23, 2021, Final Aug 12, 2022)

3	429-455 Richmond St E & 69-75 Ontario St	38 Storeys	1	1,107 m^2	Mixed-use	22,046 m^2	19.56	In process at the effective date
		Ultimately approved for 43 storeys	1	1,107 m^2	Mixed-use	23,250 m^2	20.9	OLT Approved – January 27, 2023
4	49 Ontario Sr & 72-94 Berkeley St	39,34 & 10 Storeys	2	6,953 m^2	Mixed-use	66,368 m^2	11.07	In process at the effective date
		Ultimately approved for 11, 39 & 44 storeys	2	6,953 m^2	Mixed-use	81,500 m^2	11.72	Zoning Approved May 10, 2023
5	53-65 Ontario St & 102 Berkeley St	25 Storeys	1	1,986 m^2	Mixed-use	18,400 m^2	9.26	OLT Approved – November 24, 2016
6	333-351 King St E & 200 Front St E	27 & 39 Storeys	2 proposed 1 existing	15,820 m^2	2 Office Towers (1 existing), 1 Residential Tower	162,108 m^2 Res- 23,053 m^2 Non-res- 139,055 m^2	10.25	Council Approved – July 19, 2022
		Ultimately approved for 28 & 39 Storeys	2 proposed, 1 existing	15,820 m^2	2 Office Towers (1 existing) 1 Residential Tower	163,500 m^2 Res- 22,900 m^2 Non-res- 140,600 m^2	10.33	
7	46-54 Power St & 113-135 Parliament St	19 & 22 Storeys	2	4,675 m^2	Mixed-Use (Residential & Retail)	43,650 m^2 Res – 39,500 m^2 Non-res – 4,150 m^2	9.3	OLT Approved – May 7, 2018
8	176-178 Front St E & 33 Sherbourne St	38 Storeys	1	1,907 m^2	Mixed-use	30,500 m^2 Non-res - 1,300 m^2	15.99	Council Approved – Sept 30, 2020
9	177, 183 & 197 Front St E, 15-21 Lower Sherbourne St, 200 The Esplanade	2x 29 Storeys	2	11,323 m^2	Mixed-use	109,500 m^2 Res: 107,500 m^2 Non-res: 2,000 m^2	9.67	OLT Approved – June 28, 2018
10	373 Front St E & 90 Mill St	12 & 13 Storeys	2	15,075 m^2	Mixed-use	78,700 m^2 Non-res – 3,700 m^2 Res – 75,000 m^2	5.22	Council Approved Oct 27, 2020

11	250-260 Front St E & 383 King St E	19 Storeys	1	5,026 m^2	Mixed-use	45,830 m^2 Non-res – 6,200 m^2 Res – 39,630 m^2	9.11	In process at effective date
12	18-32 Eastern Ave, 1 Gilead Pl & 2 Sackville St	12 Storeys		3,628 m^2	Mixed-Use	26,500 m^2 Non-res – 1,500 m^2 Res – 25,000 m^2	7.3	OLT Approved – Aug 21, 2019
13	301-317 Queen St E	19 Storeys	1	1,781.4 m^2	Mixed-use	12,200 m^2 Res – 10,600 m^2 Non-res: 900 m^2	6.8	OMB Approved – Feb 5, 2021
14	245-285 Queen St E, 348-410 Richmond St E, 88-106 Ontario St & 8-12 Brigden Pl	24, 25 & 33 Storeys	3	14,924.7 m^2	Mixed-use	138,992 m^2 Res – 99,041 m^2 Non-res – 39,951 m^2	9.3	OLT Decision – Oct 31, 2018 OLT Order – August 17, 2022
15	424-460 Adelaide St	21 & 19 Storeys	2	4313.67 m^2	Mixed-Use	Total- 36,500 m^2 Non-res – 900 m^2 Res – 35,650 m^2	8.5	Council approved – July 7, 2015
16	406 Adelaide St E	19 storeys	1	3,102.6 m^2	Mixed-Use	Total- 24,175 m^2 Non-res – 220 m^2 Res- 23,955 m^2	7.79	Council approved – Nov 27, 2007
17	234-250 King St E & 162 Princess St	40 Storeys	1	1,950 m^2	Mixed-Use	Total – 33,847 m^2 Res – 33,242 m^2 Non-res – 605 m^2	17.36	In process at effective date
		Ultimately approved for 43 storeys	1	1,950 m^2	Mixed-use	Total- 34,500 m^2 Res- 33,900 m^2 Non-res- 600 m^2	17.32	OLT Approved – Aug 10, 2022
18	254-266 King St E, 427-435 Adelaide St E & 157 Princess St	34 storeys & 36 storeys	2	4,937.40 m^2	Mixed-Use (Residential, Office, Retail)	Total – 67,000 m^2 Res – 61,560 m^2 Non-Res – 5,440 m^2	13.56	OMB Decision (approved with substantial amendments)– January 23, 2019
		38 storeys & 40 storeys	2	4,937.40 m^2	Mixed-Use (Residential, Office, Retail)	Total – 72,000 m^2 Res – 66,550 m^2	14.58	OMB Order – June 24, 2021

19	284 King St E	32 Storeys	1	1,018 m^2	Mixed-Use	Total – 16,400 m^2 Res- 16,100 m^2 Non-res- 300 m^2	15.89	OMB Decision – Jan 3, 2020 OLT Order – June 9, 2023
20	251-255 King St E, 37 Sherbourne St & 2 Abbey Ln	17 storeys	1	850 m^2	Mixed-use	Total – 9,990 m^2 Res – 9,707 m^2 Non-res – 350 m^2	11.75	OMB Approval – May 7, 2012
21	154 Front St E	26 & 26 storeys	2	3,221 m^2	Mixed-Use	Total – 36,000 m^2 Res – 35,000 m^2 Non-res – 1,100 m^2		OLT Approved – August 27, 2014
22	33 & 37 Parliament St	34 Storeys	1	3,913.2 m^2	Mixed-Use	Total – 37,000 m^2 Res – 36,000 m^2	9.5	OLT approved (OPA 304) – May 1, 2019

						Non-res – 1,000 m^2		
		32 Storeys	1	3,913.2 m^2	Mixed-Use	Total – 35,500 m^2 Non-res – 1,750 m^2	9.07	OLT Decision (approved in principle - OPA & ZBA) – May 21, 2020 OLT Order issued – April 5, 2023
23	31 Parliament St	37 Storeys	1	2, 739.74 m^2	Mixed-Use	Total – 31,000 m^2 Non-res – 134 m^2	12.81	OLT Decision (approved in principle) – July 19, 2018 OLT Order – March 23, 2022 (amended approval to 41 storeys)
24	25 Ontario St & 280 King St E	23 Storeys	1	2,142 m^2	Office	Total – 41,239 m^2 Office – 40,890.90 m^2 Retail – 349 m^2	19.3	Council approved – Oct 2, 2017
25	161-167 Parliament St, 351-373 Queen St E & 80-82, 90-94 Power St	27 Storeys	1	4,834 m^2	Mixed-use	Total – 35,700 m^2 Res – 32,100 m^2 Non-res – 4,000 m^2	7.38	OLT Decision (approved in principle) – November 23, 2020 OLT Order- August 9, 2022

26	318 King St E	15 storeys	1		Mixed-Use			Existing
27	275 King St E	12 storeys	1					Existing
28	234-240 Front St E	17 storeys	1		Globe and Mail			Existing
29	33 Mill St	31 storeys	1					Existing

[22] Ms. McFarlane's and Mr. Morgan's core opinions were:

(a) The developments listed above that were existing or approved prior to the effective date range in height from less than 4 storeys to 38 storeys and largely consist of 1-tower residential or mixed-use developments, except where the site size and configuration allows for multiple tower developments. Many of the development approvals granted prior to the Effective Date decreased in height and density between the initial submission and final approval (e.g., 177 Front St E, 90 Mill St, 18-32 Eastern Ave, 301-317 Queen St E, 245-285 Queen St E, 506 Adelaide St E, 251-255 King St E, 33-37 Parliament St, 31 Parliament St, and 161-167 Parliament St);

(b) The lands along the Parliament Street corridor generally within the Jarvis Parliament Character Area, but adjacent to the Corktown Character Area were approved for building heights that function as a transition between the taller heights to the west and the lower heights to the east, ranging in height from 15 up to 27 storeys. At the Effective Date, the Property is located along the Parliament Street corridor and is immediately south of lands approved for 15 storeys in height and immediately east of lands proposed for a height of 19 storeys;

(c) The lands east of the Property generally bounded by Berkeley Street, Adelaide Street East, George Street and Front Street East, which include a number of approved and proposed developments for greater heights of over 30 storeys, are located within the Old Town of York Area of Special Identity in accordance with the in-force King Parliament Secondary Plan. In contrast,

the Property and the lands generally to the north and east of it generally bounded by Berkeley Street, Queen Street East, St Lawrence Street, Eastern Avenue and Front Street East are located within the Corktown Area of Special Identity of the in-force King Parliament Secondary Plan, which generally has lower heights than Old Town of York;

(d) As such, based on the existing, approved and proposed development activity at the time of the effective date, there is a pocket of development along Parliament Street that functions as an area of transition where heights greater than 12 storeys but lower than 30 storeys are appropriate and have been approved as depicted in blue hatching on Figure 2 (the “Parliament Street pocket”);

(e) The Staff Reports for Development No. 11 (250-260 Front Street East & 383 King Street East), Development No. 1 (93-95 Berkley Street & 112-124 Parliament Street), Development No. 7 (46-54 Power Street & 113-35 Parliament Street), and Development No. 25 (161 & 167 Parliament Street, 351-373 Queen Street East & 80-94 Power Street), dated November 27, 2018, March 25, 2015, October 25, 2016 and May 29, 2018, also recognize that this pocket along Parliament Street is an area of height transition between Jarvis Parliament to the west and Corktown to the east. As of the Effective Date, City Staff were supportive of lower heights within the Parliament Street pocket than in the rest of the Jarvis Parliament area;

(f) Development No. 25 (161-167 Parliament Street, 351-373 Queen Street East & 80-82, 90-94 Power Street) was approved by the OLT six months prior to the Effective Date and is located within the Parliament Street pocket. The application originally proposed two tall building elements, a 29-storey tower and a 16-storey tower. Through OLT proceedings, the application was revised and ultimately approved for one tower of 27 storeys. As stated within

the Staff Report, dated May 29, 2018, the original 2-tower proposal was unable to provide for the required 25 metres tower separation distance and the required 12.5 metres setback to the side and rear property line; a tower separation distance of 18.2 metres was proposed, a tower side yard setback of 1.5 metres (Parliament Street) and 3 metres (Power Street) was proposed, and a tower rear yard setback of 5.5 metres was proposed;

(g) The Claimant actively participated in the King Parliament Secondary Plan Review process. In correspondence dated April 27, 2021, the Claimant's solicitors provided comments to City Council on the Claimant's behalf ,which identified that the Property "should be zoned consistently with the abutting lands fronting on Berkley, and in particular with a permitted height of 90 metres". A height of 90 metres is approximately up to 27-29 storeys, which is consistent with our position that heights of less than 30 storeys is appropriate within the Parliament Street pocket;

(h) The initial Land Use Planning Report of Ms. McFarlane and Mr. Morgan, dated October 2021, contemplated a 1-tower development scenario as the optimal and best use of the Property based on existing and planned context as well as physical constraints of the site. Since then, they considered alternative development scenarios, including a 2-tower development scenario subject to certain assumptions, and a 4-tower development scenario that contemplates the consolidation of adjacent lands;

(i) Option 1 is a one-tower scenario with a 23-storey tower on a base podium of four storeys; Option 2 has two towers of up to 19 and 23 storeys on a podium of four storeys; Option 3 has four towers but is predicated on the assembly of lands at 250-260 Front St. East and 383 King Street East – the towers range from 27, 23 and 19 storeys on a base podium of 4 storeys;

(j) The proposed building heights of 19 and 23 storeys provide a compatible built form transition between the higher-intensity Jarvis Parliament area and the lower-intensity Corktown area. The heights contemplated by the Development Options are reflective of their location within the transitional area of the Parliament Street pocket, as well as reflect the heights being proposed and approved in this pocket at the time of the Effective Date. All above options represent good urban design practices and guidelines;

(k) Based on development precedents in the area, the average review timelines at the City of Toronto, excluding applications appealed to the OLT, are approximately 35 months. For surrounding development applications appealed to the OLT, the average timeline is approximately 47 months for rezoning application. This timeline does not consider delays as a result of other unique factors that may impact the development approvals, such as site contamination or other factors; and

(l) Absent the scheme and as of the effective date, the Property possesses potential for high-rise, mixed-use development including a mix of residential and grade-related non-residential uses. Strictly adhering to tower setbacks and separation distances, the Property can accommodate a single tower and podium built form. Although, a 2-tower scenario may be possible on the Property it would provide for a less optimal tower floor plate and unit layout and would likely involve an appeal to the OLT. The proposed maximum height of 19 and 23 storeys is appropriate for the Property

[23] In the Tribunal's view, there was inadequate support for Ms. McFarlane's opinion as to the existence of a "Parliament Street Corridor" as described in paragraph [21] above nor of any special area height restrictions. As both Mr. Smith and Mr. Goldberg pointed out, there was no enacted City policy that supported Ms. McFarlane's contentions – and the Tribunal agrees. At best, as noted in the summary of Ms. McFarlane's above opinion, she

relied on a planning staff report, but no policy or express guidelines were ever promulgated based on the concepts in that staff report.

[24] On balance, in the Tribunal's view, some of Ms. McFarlane's opinions were successfully challenged during an effective cross-examination. The Tribunal prefers the evidence of Mr. Smith and Mr. Goldberg and notes that they detailed in their written and oral evidence numerous examples of development approvals close to the Property that exceeded the proposed 72m height limit. The Tribunal does not accept that OPA 525 or the ZB are wholly determinative of the question as to what tower heights and density would probably have been permitted and achieved on the Site. Moreover, the Tribunal is of the view that the numerous approvals and approved projects discussed and analyzed by Mr. Smith and Mr. Goldberg are relevant and assistive to the Tribunal in determining these questions of fact. The Tribunal was ultimately left with the analysis presented by Mr. Smith and WZMH

[25] On the other hand, in the Tribunal's opinion, the approach taken by Mr. Smith and Mr. Goldberg - and the resultant design and massing model prepared by Len Abelman – is very aggressive and likely exceeded what would have probably been eventually approved for the Site, absent any influence of the 'Scheme' (further analyzed below).

[26] Metrolinx points out that the Act in section 14(1) requires an objective approach:

> **Market Value**
> 14 (1) The market value of land expropriated is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.

[27] Metrolinx in final argument further argued that:

> Mr. Peter Clewes – a leader in the development and construction of condominiums in the City of Toronto and with extensive experience in the King-Parliament area – advised this Tribunal that his evidence was based on advice that he would provide a potential purchaser. As an architect, Mr. Clewes' extensive knowledge of approvability, feasibility and constructability of high-rise

> developments in the City and in this particular area, provided realistic and insightful information at the Valuation Date (May 21, 2021), stating, "…honestly, my advice to a client in May 2021 would be that you have to have regard, fairly significant regard for that …[King Parliament]…secondary plan…[OPA 525]."

[28] Counsel for Metrolinx maintained that the Claimant's planners – Mr. Smith and Mr. Goldberg – did not employ the same proper approach but instead (below emphasis added):

> …advanced a case based on a developer's point of view – replicating the process that one would undertake when applying for land use permissions from the City of Toronto or before this Tribunal – a process which is not relevant for purposes of determining compensation under the Expropriations Act. For example, Mr. Goldberg confirmed that he was taking the perspective of a developer in his evidence in-chief…

[29] Thus, Metrolinx argues that the overall orientation of the opinion evidence from Mr. Smith and Mr. Goldberg does not correspond to the requirements of section 14(1) of the Act. The Claimant adamantly rejected that line of argument and the Tribunal agrees. From a commonsense perspective, it is difficult to accept the apparent notion that a 'willing buyer' of this Property should somehow *not* be a person or entity seeking to develop this valuable site as a high density, high tower mixed use project – which both Parties agree this Site is capable of as of the Effective Date. Moreover, the fact that both Parties' experts make reference to other comparable sites nearby to the Property - which were clearly development projects - reinforces this point. Much of the evidence called by both Parties concerned development sites and what would or would not have received development approval. This is not to conclude that developers should be considered the only potential 'willing purchasers', but certainly it cannot be incorrect to consider a development perspective as part of this analysis.

[30] Counsel for the Claimant objects to and disagrees with the contentions of Metrolinx as to the alleged lack of market evidence in the Claimant's case. Given the express acknowledgement by Metrolinx in its pleading and by its experts both in their written and

oral evidence as to the HBU, the Claimant essentially argues that the allegation as to the lack of 'objective market-based evidence' in a 'development-oriented approach' (which is not admitted) is ultimately of little consequence.

[31] The Tribunal agrees – it is clear that the 'light between' the Parties here is not concerning whether it is wrong to conclude that a willing buyer of this development land would pay a price based on the potential to build high towers and density – it simply relates to how high and how much density. In turn, this is a matter for both the real estate appraisers, the land use planners, the designers and architects to consider and opine on within the realm of their individual expertise. There is no error on the part of each in considering and relying upon each other's conclusions.

[32] While it may be that Canadian Uniform Standard of Professional Appraisal Practice ("CUSPAP") requires real estate appraisers to opine on the four elements of HBU, it does not bar or restrict them from considering and relying on the opinions of other experts on those elements. It will vary from case to case and from expert to expert, but in the Tribunal's view, this process can always be characterized as an iterative process – in the Tribunal's opinion there is no legal or practical requirement that a real estate appraiser carry out his/her work in splendid isolation, so as to establish rigid adherence to CUSPAP. In any event, the Tribunal's task in determining market compensation under the Act is not determined solely through an exploration of the nuances of compliance with rules of professional practice. This Tribunal seeks to be informed by the actual written and oral opinion evidence of independent expert witnesses on the matters at issue in the litigation.

[33] In this proceeding, the Tribunal heard from a variety of experienced experts from multiple disciplines. As is usually the case in any expropriation proceeding, there were fundamental disagreements among those experts. The Tribunal is charged with evaluating and considering this opinion evidence and with making determinations and findings on the central questions at issue – this will most often involve reaching conclusions as to which elements of which experts' evidence was most persuasive. Rarely, in the Tribunal's

experience, will there be a situation where one or more experts for a Party simply 'did everything the wrong way' therefore leading to an easy conclusion.

[34] Put another way with respect to this case – the Tribunal does not discern any abject failures of analysis by the experts of either Party. What the Tribunal must address and resolve are simply clear disagreements of opinion on the key issues. In the Tribunal's view, the key attributes of HBU are largely agreed on and there was no failure by either appraiser to evaluate the legal permissibility, physical possibility, financial feasibility and maximum profitability. Both relied on the expertise of planners, architects and urban designers in carrying out their work, although it may well be that they did so in a different fashion. Yet they reached different conclusions on value – mainly because their opinions were underpinned by different evaluations of what development was probable for the Property in terms of the numbers of towers and height, podium height and overall density. Again, their reliance in this respect on the opinions of others is not only acceptable but is rather typical.

(ii) Urban Design and Architectural Matters

[35] Mr. Len Abelman of WZMH Architects offered written and oral evidence on matters of architectural and design issues for the Claimant. He had been instructed to prepare architectural drawings for a development concept at the Subject Site in accordance with Mr. Smith's planning opinion dated June 4, 2024, and applicable municipal urban design policies and guidelines.

[36] The WZMH Plan provides for a 35-storey tower on the southerly portion of the Site and a 30 storey tower on the northerly portion, both set back 12.5 metres from the west lot line and 3.0 metres from the adjacent street lines. The WZMH Plan was slightly different than what had been illustrated in Mr. Smith's massing concept, with a 6-storey base building along the east limit of the Site, stepping down to three storeys to the west along both King Street and Front Street. In addition, the tower floor plates in this Plan were slightly smaller than those contained in Mr. Smith's analysis.

[37] In the end, Mr. Smith concluded that the WZMH Plan is consistent with the PPS, would conform with the Growth Plan, and conform with the policies of the City of Toronto Official Plan, the Downtown Plan, and the King Parliament Secondary Plan. Mr. Michael Spaziani of SRM Architects provided written and oral opinions for the Claimant supporting Mr. Smith's analysis and the WXMH Plan.

[38] As noted, counsel for Metrolinx advocated against the opinions and conclusions of Mr. Smith and Mr. Goldberg. However, the criticism of Mr. Abelman's opinions and the WZMH Plan is primarily due to its reliance on Mr. Smith's opinions and massing concept proposal. There was no serious effort in Metrolinx's final argument otherwise aimed at the technical elements of the WZMH Plan beyond one related element raised by Mr. Clewes as noted below.

[39] Mr. Peter Clewes, a well-known Toronto-based architect, offered opinion evidence for Metrolinx on architectural matters. He agreed with the three different massing concepts and tower proposals put forward by the Weston group – which greatly differed from those propounded by the Claimant's experts. Thus, his opinions, being based on altogether different assumptions, stand in contrast to those of Mr. Abelman and WZMH. His view was clearly that the Weston proposal scenarios were represent optimal and probable built form and density options for the Site – not those propounded by Mr. Smith as portrayed in the WZMH Plan and architectural renderings. He also specifically disagreed with Mr. Abelman's treatment of streetwall and podium heights as set out in the WZMH Plan and the tower-to-podium stepback aspect.

[40] In the Tribunal's view, it is unnecessary to make a specific determination or finding on matters of architecture and design stemming from the respective opinions of Messrs. Abelman, Spaziani and Clewes. The Tribunal's central finding on tower height and density (see (iv) below) relates to Mr. Smith's opinions as expressed above, rather than stemming from a particular element of the WZMH Plan or Mr. Clewes' critique of it.

(iii) Transportation Evidence

[41] For the Claimant, evidence concerning transportation related matters was provided by Mr. David Angelakis, a civil engineering technologist and traffic planning expert. For Metrolinx, evidence was tendered from Mr. Amar Lad, an experienced traffic planner.

[42] Mr. Angelakis was of the opinion that that based on publicly available data there does not appear to have been any area transit capacity issues on the Effective Date or thereafter and the Site had excellent transit service. He also stated that the WZMH site plan concept complies with all City requirements (both as of 2021 and current) for site access, site / garage circulation and access to loading spaces. He also opined that the parking garage depicted in the WZMH plan met all City requirements for parking. Originally in his written report, he did not provide an opinion as to the adequacy of parking supply under that plan, but did express his view while testifying that the provision of two levels of parking with 126 spaces would have been approved as an element of a development application for the Site. At a later date, subsequent to the Effective Date, Mr. Angelakis noted that the City moved to a 'zero minimum' approach to downtown parking requirements, consistent with the approach taken by many major North American cities as part of an effort to dissuade the use of motor vehicles downtown.

[43] Mr. Lad opined that there are no issues raised with the proposed site access and internal site circulation related to all options presented by both the Claimant and Metrolinx. The Parties' competing development concepts presented a parking scenario with provided residential and non-residential parking rates below the minimum requirements per the in-effect Zoning By-law at the effective date, based on local context, nearby approved precedent, and general trends in the City with regards to parking rate reductions for new developments at the time of expropriation.

[44] On the other hand, Mr. Lad stated that the Claimant's proposed parking rate falls short of the lowest threshold considered acceptable based on nearby development applications that have approved parking rate reductions under comparable conditions. He

went on to opine that the Claimant's plan is considered overbuilt for the Site and constrained by the maximum supply across two underground parking levels. A combination of greater densities and limited parking supply result in downwards pressure on the overall parking rate, below area-approved precedent. Thus, Mr. Lad was of the view that the proposed parking rate of 0.14 spaces per unit is considered a sizeable, and unacceptable, variance, driven by the Claimant's higher proposed density, which reduces the residential parking rate to an unreasonable level for the Site.

[45] Again, from the Tribunal's perspective it is unnecessary to resolve the modest differences of opinion between Mr. Angelakis and Mr. Lad with respect to parking spaces. The overall Site density is the crucial matter here.

(iv) HBU Conclusion

[46] After full and careful consideration of the extensive evidence of Messrs Smith, Mr. Goldberg (land use planning); Mr. Abelman (architecture); Mr. Michael Spaziani (design); Mr. Angelakis (transportation matters) for the Claimant and of the corresponding, but contrary opinion evidence of Ms. McFarlane, Mr. Morgan, Mr. Clewes and Mr. Lad for Metrolinx, the Tribunal finds that the proposal and concept for the Site presented by the Claimant is reasonable. However, the Tribunal has also determined that not all specific elements of the Claimant's proposal would have been 'probably approved' as at the Effective Date. Although it is a difficult exercise to predict what the maximum density approval on the Effective Date would have been, the Tribunal's opinion is that the Claimant's proposal seeks approval for a level of density, tower and base podium heights, setbacks and stepbacks that are not likely to have been the probable outcomes anticipated by a willing buyer on the Effective Date.

[47] On the other hand, the Tribunal's view is that it is probable that more tower height and density than that featured in any of the scenarios presented by Metrolinx would have been anticipated by a willing buyer to be approved. Clearly, there were approvals in the general area near to the Site for greater density than those scenarios.

[48] Based on its careful consideration of all of the competing written and oral evidence of both Parties, the Tribunal finds that a willing buyer as at the Effective Date would likely have anticipated receiving development approval for a two-tower mixed use development, with heights no more than 30 storeys, with a base building podium of less than six storeys comprising up to an overall maximum density of 475,000 square feet of GFA. In this regard, the Tribunal noted that Mr. Smith's development application summary table noted several developments that were less than 30 storeys and that his lower range for the base podium was four storeys. It is unnecessary and impractical for the Tribunal to expound upon the exact configuration of a development on the Site to achieve that density nor is it practicable for the Tribunal to provide such detailed modelling as part of its analysis and determinations in this proceeding.

B. Is there a Project / Scheme Impacting the Development that must be Screened under Section 14 (4)(b) of the Act?

(i) Onus of Proof – What is the Scheme?

[49] Much of Metrolinx's position opposing the HBU proposal proffered by the Claimant's witnesses is further based on an argument that it is improperly 'reliant' on the scheme underlying the Expropriation, contrary to section 14 (4)(b) of the Act ("Scheme"). That provision states (below emphasis added):

> (4) <u>In determining the market value of land, no account shall be taken of</u>,
>
> (a) <u>the special use to which the expropriating authority will put the land</u>;
>
> (b) <u>any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation</u>; or
>
> (c) any increase in the value of the land resulting from the land being put to a use that could be restrained by any court or is contrary to law or is detrimental to the health of the occupants of the land or to the public health. R.S.O. 1990, c. E.26, s. 14 (4).

[50] There was some discussion during final oral argument as to what the respective obligations of the Parties are with respect to tendering evidence relevant to the requirements of section 14(4) of the Act. It is unnecessary for the Tribunal to pronounce upon a burden or onus of proof that must be met by one Party versus the other, or whether some shifting onus formula should apply. Clearly, the Tribunal is tasked with making findings with respect to this provision and in ultimately ensuring that it "*takes no account of*" what is specified in section 14(4)(a) or (b) of the Act.

[51] The plain meaning of the language in section 14(4) of the Act requires the Tribunal to ignore "*any increase or decrease in the value of*" the Property "*resulting from*" the development underlying the Expropriation. In carrying out these tasks, the Tribunal must rely on *both* Parties to bring forward relevant facts bearing upon these matters. A claimant under the Act must demonstrate that its proposed HBU and its market value assertion do not require the Tribunal to rely on what it is bound not to consider. But the expropriating authority cannot merely respond by directing all its efforts to the proposition that "the Claimant failed to demonstrate that". In the Tribunal's view, the expropriating authority also has a positive obligation to bring forward specific evidence – if any exists - on what specific "*increase or decrease in value*" resulted from the Expropriation that the Tribunal should ignore.

[52] In this proceeding – as is often the case in all expropriation cases – an 'advocacy dance' has ensued between the Parties on the above matters. The Claimant argues that it has tendered opinion testimony from its experts to the effect that nothing in the Claimant's Proposal or value assertion requires the Tribunal to do what it is bound not to do under section 14(4) of the Act. Put another way, the Claimant says there is no evidence that it is aware of that shows that the development underlying the Expropriation contributed to the value it has asserted. On the other hand, Metrolinx through cross-examination and in final argument maintains that the Claimant's experts – primarily Mr. Messrs, Mr. Smith, Mr. Goldberg and Mr. Ian Tilley – ought not to be believed in this regard. However, Metrolinx has not assisted this Tribunal by bringing forward specific evidence to show exactly *how*

the Claimant's case relies on an increase in value resulting from the development relating to the Expropriation. Perhaps, this is simply because no such specific evidence exists – in other words, perhaps there is no empirical way to demonstrate that proposition. This problem will be further explored below.

[53] The first step that the Tribunal must take in carrying out its obligation under section 14(4) of the Act is to decide what constitutes "*the development or the imminence of the development in respect of which the expropriation is made*". Expropriation litigants and their expert witnesses call this the Scheme. That language has been in such common usage for so long that there is no longer any point in considering whether it really is the best word to use.

[54] The Parties seem to agree that the Scheme in this proceeding is – or at least includes - the April 10, 2019, Provincial announcement of the Ontario Line transit project ("Announcement") – although there is a dispute as to how much of the previous 20-plus year history of that project should also be considered to be part of the Scheme. As is determined below, the Tribunal has concluded that it is unnecessary to expand the concept and reach of the Scheme beyond the Announcement. No evidence was called to demonstrate that all - or even any - of the history of high-density approvals in downtown Toronto near the Site were influenced by the more than 20 years of discussion concerning similar subway or other transit projects prior to the Announcement. Thus, the Tribunal was left in circumstances calling for sheer speculation on the impact, if any, of that history.

[55] The issue of the Scheme and whether it was 'screened out' by the experts advising the Parties, as noted above, mostly relates to the argument of counsel for Metrolinx that the opinions of the Claimant's planners Mr. Smith and Mr. Goldberg were influenced by the Scheme. In turn, this then involves the appraisal evidence of Mr. Tilley who relies in part on Mr. Smith and Mr. Goldberg.

[56] Both during cross-examination and then in final written and oral argument, Metrolinx's counsel pressed that contention. However, both Mr. Smith and Mr. Goldberg rejected the notion that they had either been influenced by, or failed to consider, the Scheme if it is deemed to be the Ontario Line rail transit corridor, the Corktown Station (as part of that) or even the earlier Downtown Relief Line was never in fact implemented per se. The Tribunal prefers the evidence of Mr. Smith and Mr. Goldberg in this regard over the assertions made by Metrolinx.

[57] There is no doctrinal approach that can be utilized in every case in order to define a Scheme. It is perhaps easiest to determine when the expropriation is conducted for a single purpose as a one-time event with no prior related history. This is clearly not the situation in this proceeding since Metrolinx contends that the advent of the major rail transit project called the Ontario Line announced in April 2019, is really one and the same as the Downtown Relief Line ("DRL"), which was first planned almost 20 years prior but never constructed. The Claimant argues that the Scheme here can only be the Ontario Line itself and suggests that it commenced only when its dedicated funding was announced later by Metrolinx in June 2019 – although it seems to concede that the Announcement was pivotal.

(ii) How is the Scheme Properly Screened under S. 14(4)(b)?

[58] Interestingly, despite its insistent line of questioning regarding the evidence of Mr. Smith, Mr. Goldberg and Mr. Tilley on their alleged reliance on the Scheme and/or their failure to properly screen it out, Metrolinx's counsel did not take a consistently firm stance on when the Tribunal ought to find that the Scheme should be deemed to have been in existence, beyond its statement that the DRL and the Ontario Line are 'one and the same'. Such issues were not clarified by the testimony proffered by Metrolinx's witnesses. The closest Metrolinx gets is to point to a chart prepared by its architecture expert Peter Clewes, which plotted certain approvals referred to in Mr. Smith's evidence (which was

Exhibit 21 at the Hearing and is appended to this Decision as **Attachment 2**) ("Clewes Chart")

[59] The Clewes Chart simply plots various development approvals then shows a single vertical line entitled "Ontario Line Announcement, April, 2019". Metrolinx's counsel in final oral argument, in response to the Tribunal's questions, suggested that any relevant development approvals after that date had to be Scheme-related (emphasis added):

> Do you know what happened in 2019? They announced the Ontario Line, and that is exactly what this exhibit shows. So, what Mr. Clewes did was he took Mr. Smith's examples, and he plotted the announcement. The announcement shows that there was an...following that, there was an increase in height…And, so, what Clewes was saying is that this is proof that the only thing that changed in the marketplace during COVID, this time, you know, or pre-COVID, was the announcement…
>
> THE VICE-CHAIR: So, is...you know, forgive me for perhaps not putting this too elegantly, but is that correlation or is that causation? How does the Tribunal...how is the Tribunal to interpret that? In Metrolinx's view, does that establish the scheme clearly...
> MS. HIGGS: It is not my view. It is Mr. Clewes' view…
> THE VICE-CHAIR: And just...next question I guess I have is in...it would be your position...Mr. Clewes, his reputation is ...impeccable...
> MS. HIGGS: Same with Mr. Smith.
> THE VICE-CHAIR: ...in his field. But is he the best author of that evidence on causation for the...
> MS. HIGGS: I think so.
> THE VICE-CHAIR: ...Tribunal?
> MS. HIGGS: Well, you have two. You have Mr. Riley. But he is the city builder. You know, I can't get a better witness for you.

[60] However, in prior written argument, counsel for Metrolinx was even more emphatic (below emphasis added):

> To ensure this Tribunal understood the facts underlying the Scheme-influenced heights being relied upon by Mr. Smith, Mr. Clewes prepared Exhibit #21. The exhibit utilizes some of Mr. Smith's cited examples on a timeline. These examples were also ones in which Mr. Clewes was involved with. The

> staggering truth that this exhibit demonstrates is that the examples relied upon by Mr. Smith as justification for his proposed heights at the Subject Property were Scheme influenced. Indeed, 284 King Street East, 49 Ontario Street, 75 Ontario Street, 296-300 King Street East and 134 Parliament Street – all examples relied upon by Mr. Smith – achieved additional height post-announcement of the Ontario Line….
>
> "…the uncontradicted, date-driven, evidence of Mr. Clewes demonstrated that Mr. Smith's reliance on significant increases in height in the King-Parliament Secondary Plan area came following the announcement of the Ontario Line in April 2019.

[61] With all due respect to Metrolinx's counsel – who are very skilled, thorough and eloquent litigators – the submissions set out in paragraph [60] seem overstated. In the Tribunal's view, what is depicted on the Clewes Chart shows, at best, a chronological correlation between one alleged date of the Scheme's commencement and certain approvals granted on development projects. In the Tribunal's opinion, more than this would be required to show positive causation of an "*increase in the value of*" the Property "*resulting from*" the development underlying the Expropriation – the Scheme.

[62] In any event, in the Tribunal's view *neither* Party's counsel has fully addressed the task faced by the Tribunal under section 14(4) of the Act. The Claimant's counsel insists that there is sufficient evidence to show the Scheme was screened out or was simply never relevant to the Claimant's HBU concept or its market value position. However, this consists of the conclusory assertions of Mr. Messrs, Mr. Smith, Mr. Goldberg and Mr. Tilley for the most part, either directly or indirectly claiming that they were not influenced by the Scheme and/or that it was altogether irrelevant. The Tribunal was asked to accept their opinion in that regard. Metrolinx in response says those opinions are unreliable or are simply wrong – yet it offers no better direct evidence beyond the Clewes Chart which plots a dateline.

[63] The Tribunal is also left wondering why the decades of history underlying the Scheme is important, if at all, as was largely covered in the evidence of David Riley, a land

use planner and Principal of SGL Design. Mr. Riley's report was dated September 5, 2024, and his reply report was dated October 15, 2024, which he testified at the Hearing. His evidence was summarized in argument as follows by Metrolinx's counsel:

> In essence, the detailed work undertaken by Mr. Riley demonstrates that the Downtown Relief Line was being supported by both the City of Toronto and Metrolinx for at least a decade. The renaming of the project to the Ontario Line in 2019, and the planning of additional stops along the line, do not change the fact that the Downtown Relief Line is the Ontario Line and its history must be screened out of the expert evidence.

[64] While Mr. Riley certainly was well-positioned to offer historical context for the Ontario Line project, in the Tribunal's view - notwithstanding the contrary insistence of Metrolinx - he does not provide conclusive evidence that would enable the Tribunal to discharge its responsibilities under section 14(4)(b) of the Act. Interestingly, the Claimant argues that the gist of Mr. Riley's evidence was that the Scheme was irrelevant – a position hotly contested by counsel for Metrolinx. Mr. Riley's evidence in his Reply Witness Statement is important in this regard (below emphasis added):

> 2.5.1 I disagree with Mr. Smith's opinion regarding the relationship between the Downtown Relief Line and the scheme, or purpose, of the expropriation. As stated in my Planning Opinion Report, it is my opinion that the Ontario Line and the Downtown Relief Line should both be regarded as factually the same from the time of the announcement of the Ontario Line in 2019. The Ontario Line is a continuation of the Downtown Relief Line, and as such, the Ontario Line encompasses the Downtown Relief Line as it evolved prior to the coming into being of the Ontario Line and should therefore be considered to be factually connected. Mr. Smith later acknowledges this point in the second paragraph on page 8 of his letter, as noted above, where he acknowledges the Ontario Line replaces the Downtown Relief Line.
>
> 2.5.2 Regarding the development potential of the subject site, I agree with Mr. Smith when he states that it "would be no different if the Downtown Relief Line were to be considered as part of the scheme". As stated within Section 2.4 of my Planning Opinion Report, I have described my review of development applications, and associated City staff reports, within the area to understand how the City had been

> relying on the presence of future transit in arriving at recommendations for applications proposing greater heights and density than currently permitted. The conclusion of my review was that recommendations made by Planning Staff do not appear to have been based on a reliance that transit capacity would be improving in the future (in the form of the Downtown Relief Line or Ontario Line), and rather, that recommendations were based on a site's ability to accommodate greater height and density while maintaining appropriate transitions in mass to neighbouring properties, based on the established policy framework.

[65] While Mr. Riley was of the view that the Ontario Line and the DRL should be regarded as 'factually the same', the Tribunal finds it noteworthy that he also opined that the City's staff did not appear to rely on either in making recommendations on applications proposing greater heights and density during the period up to and including the Effective Date. In the Tribunal's view, this is significant point, because it then suggests that there was no influence stemming from the Scheme at play in relation to those applications. This does not of course resolve the difference of professional opinion as to what heights and density would probably have been approved – but it seems to indicate that this would be determined not by the Scheme, but instead by the Site's capacity as described in the last sentence of the quotation set out in paragraph [64]. As stated in her written report and confirmed in her testimony, Mr. Riley's opinions and conclusions were relied on by Ms. McFarlane.

[66] In the Tribunal's view, the historical evidence proffered by Metrolinx does not provide a consistent theory of what comprises the Scheme and its impact under section 14(4) of the Act. As noted, on one hand it is argued that perhaps the entire approximate +20-year history leading up to the Ontario Line announcement ought to be considered the Scheme. Yet, the Clewes Chart and the contentions related to it suggests that only the Announcement in 2019 is truly significant. The Tribunal apparently is asked to speculate whether Metrolinx's position is that *all* development and planning application approvals since the DRL was contemplated have been impacted by the Scheme – or whether only the approvals following the dateline set out in the Clewes Chart can be said to be Scheme-related. Certainly, however, it seems clear that Metrolinx alleges that the 2019 Ontario

Line announcement is *part of* the Scheme. In any event, the Tribunal agrees with the Claimant that it is unreasonable to in effect determine that 20-plus years of development approvals near the Property ought to be rejected – or dramatically discounted - from consideration on the basis that they were all part of the Scheme. The Tribunal concurs with the argument of the Claimant's counsel in that regard:

> The scheme cannot be so expansive so as to deprive the Claimant of the same benefits arising from the decades of transit planning that have accrued to all the properties in the immediate area, simply because the Claimant was the unfortunate party to suffer the consequence of the expropriation

[67] The Tribunal recognizes that the requirements of section 14(4)(b) of the Act are often not easy to apply in expropriation proceedings. As already noted, the reality is that there may be simply no way for either Party to empirically demonstrate whether there was "*increase or decrease in value*" resulting from the Expropriation. The situation might have been quite different if, for example, the Claimant had relied on a particular development approval by the City where the City's staff had made it clear in writing that their approval was predicated on the impacts of the Scheme – or conversely, where City's planners had written that the Scheme was not considered at all. However, no such specific evidence exists in this case.

[68] Metrolinx in oral argument also maintained that Mr. Smith himself essentially admitted that the Ontario Line – and the Moss Park and Corktown Stations planned as part of it – was a relevant factor for City's staff to take into account in a separate planning application he was managing for a client in 2019, related to a property located at 161 Parliament Street. In that application, Mr. Smith was seeking approval for tower height of 29 storeys or 102.7 metres (again, less height than is proposed by Mr. Smith and the Claimant here in the WZMH Plan) in a resubmitted application dated October 23, 2019. In his letter of that date, he specifically referred to the Ontario Line as follows (below emphasis added):

> The subject site would be considered to be part of a "strategic growth area" pursuant to the 2019 Growth Plan (i.e. a focus for accommodating intensification and higher density mixed uses in a more compact built form). "Strategic growth areas" include urban growth centres, major transit station areas, and other major opportunities that may include infill, redevelopment, brownfield sites, the expansion or conversion of existing buildings, or greyfields. The subject site is located in the Downtown Toronto urban growth centre, adjacent to a major road with frequent transit service (Queen Street East) and falls within the definition of a "major transit station area" (within approximately 300 metres of the planned Moss Park Station on the Ontario Line, and within approximately 250 metres of the planned Corktown Station at King and Parliament). In this latter respect, the Growth Plan (2019) amends the definition of "major transit station area" to include the area within an approximate 500 to 800 metre radius of a transit station, representing about a 10-minute walk.

[69] In relation to the above excerpt from Mr. Smith's letter, counsel for Metrolinx, as part of an exchange with the Tribunal, submitted (emphasis added):

> And what is significant, I think, and what I believe is significant to Mr. Smith was that now his property at 161 Parliament was now in an MTSA. And it was important for him to mention this.
>
> … Now, what this tells us, sir, tells me, and tells Mr. Mathany, is that the market is now responding to Ontario Line. They refiled. 161 refiled. They knew they weren't getting anywhere with the Downtown Relief Line. They refiled.

[70] While the Tribunal understands the advocacy point made by Metrolinx, it disagrees that this constitutes the certain 'proof of market response to the Scheme' or demonstrates that Mr. Smith was influenced by the Scheme. Rather, this simply may show that Mr. Smith was raising every point he believed could assist his client in gaining approval for the above-noted application.

[71] One of the leading cases to deal with a difficult application of section 14(4)(b) of the Act was the protracted litigation that led to the Court of Appeal's decision in *Windsor (City)*

v. *Paciorka Leasehold Ltd*., 2012 ONCA 431 ("*Paciorka")*. At the outset of its decision, the Court held that (below emphasis added):

> The determination of which of the various government actions form part of the expropriation scheme…[under section 14(4) of the Act]…is a factual one that engages squarely the OMB's specialized expertise in applying the relevant legal principles under the Expropriations Act. The high degree of deference built into the reasonableness standard is fully warranted.
>
> …In determining market value, s. 14 of the Expropriations Act requires the OMB to eliminate any increase or decrease in the value of the property arising from the expropriation or its imminence. In other words, it is the OMB's task to determine the scope of the expropriation scheme, and the highest and best use for the expropriated lands absent the effects of that scheme

[72] Ultimately, the Court of Appeal in *Paciorka* allowed an appeal from the ruling of the Divisional Court upholding the decision of the Tribunal's predecessor, Ontario Municipal Board ("OMB"), on the basis that the OMB had failed to properly consider the effect of the recently enacted Provincial Policy Statement on the value of the property in that case (as well as with respect to its findings as to the injurious affection claims made - which is not relevant to this current proceeding). However, in the Tribunal's view it is significant that the Court adopted and approved of the reasoning of the single dissenting Divisional Court justice – and did not otherwise discern any unreasonable error in the OMB's approach under section 14(4)(b) of the Act.

[73] Justice Sachs of the Divisional Court in her dissent in *Paciorka* reasoned, in passages approved by the Court of Appeal, as follows (below emphasis added):

> …with or without the expropriation, the claimants would have had to deal with the fact that their land contained natural features that were the subject of a PPS that limited development on land with those features. Any properly advised purchaser would know of these limitations and would have taken them into account in assessing the price that they would have paid for the land. These were the market realities that faced the claimants absent the expropriation. However, by virtue of the award in question, these realities were disregarded and the claimants were able to receive compensation for their land as if the realities never existed.

[74] Earlier in Justice Sachs' dissenting reasons, as adopted by the Court of Appeal, Justice Sachs stated (below emphasis added):

> In West Hill Redevelopment Co. v. Ontario (1998), 64 L.C.R. 81 (O.M.B.), aff'd (1999), 67 L.C.R. 252 (Ont. Div. Ct.), the Board discusses the question of whether a "land use" instrument passed by one public authority should be taken into account in fixing market value in an expropriation affected by a different public authority. In doing so, the Board, at 147, adopts the following principles set out in Jewish Community Centre of Edmonton Trust v. The Queen (1983), 27 L.C.R. 333 (Alta. L.C.B.) rev'd on other grounds (1984), 30 L.C.R. 97 (Alta. C.A.) at 360-61:
>
> In the board's opinion the underlying principle established in each of those cases, which is relevant in the present case, is that there must be a causal connection between the imposition of land use restriction and the expropriation which subsequently occurs. That is to say if the "land use by-law, land use classification or analogous enactment" is made for the purpose and "with a view to the development under which the land is expropriated" then pursuant to s. 45(e) it must be ignored in the valuation process. If, on the other hand, the evidence establishes that the "land use by-law, land use classification or analogous enactment" was imposed independently and unconnected with "the development under which the land is expropriated" then such land use or classification must be considered in the valuation process…
>
> The PPS was issued under the authority of the Planning Act to provide "policy direction on matters of provincial interest related to land use planning and development"…The PPS applies across the province and was not directed at the Expropriated Lands. It was passed independently of, and without any connection to, the specific development for which the land was expropriated. The fact that the Expropriated Lands are covered by the PPS is due to a recognition by the Province that province wide protection is necessary for its natural heritage resources

[75] In this Tribunal's opinion, the words of Justice Sachs adopted by the Court of Appeal in *Paciorka* are particularly germane to this case. The reality is that all of the planning instruments and guidelines that existed as of the Effective Date – although some were under appeal – should not be seen to have any direct connection to the Ontario Line (or the Downtown Relief Line, for that matter). The same can be said for all of the planning approvals in the area close to the Site. In the Tribunal's view, it cannot reasonably be argued that this aforementioned context was solely due to the Scheme. Indeed, although

there are obviously profound differences of opinion between the planning, architecture, design experts on several matters, even Metrolinx's witnesses do not dispute this.

[76] In the hearing that was ordered by the Court of Appeal in *Paciorka*, the late (great) Vice Chair Makuch presided and his Decision was reported at *Paciorka Leaseholds Limited v Windsor (City)*, 2020 CanLII 10059 (ON LPAT). Counsel for Metrolinx briefly referred to his reasons in oral argument and the Tribunal assumes that all counsel are familiar with them. In any event, it is only former Vice Chair Makuch's general comments about the scheme enquiry that are of interest here (below emphasis added):

> [117] Section 14(4)(b) set out above directs that when determining the market value of expropriated property, the Tribunal is to take no account of any increase or decrease in the value of the land resulting from the development, or its imminence, for which the lands are expropriated. This is commonly referred to as "screening out the scheme".
>
> [118] <u>The origin of a scheme is not always clear. It generally starts out as an imprecise concept that becomes progressively more definite and well known as time goes by. The progression from vagueness to becoming more definite generally makes it difficult to isolate the impacts of the scheme when estimating the market value of an expropriated property.</u> To screen out those impacts, it may be necessary to screen out a significant period of time and a substantial number of actions taken by the expropriating authority. <u>The Tribunal is then required to reconstruct a "but for" world in order to determine the value of the expropriated lands without the effects of the scheme.</u>

[77] Taking into account all of the considerable evidence before the Tribunal on this issue, and the detailed written and oral arguments of the Parties' counsel, the Tribunal finds that the Announcement must be seen to comprise the Scheme. However, in the Tribunal's opinion it is unnecessary to decide whether DRL should also be deemed part of the Scheme. The Tribunal finds that neither the City's planning staff nor any potential market participant – prospective buyer of the Property – would have expected that the DRL to be constructed or have been influenced by it. Clearly, the Announcement, which provided long absent clarity to both the City and all market participants, was an important relevant event.

[78] The Tribunal is unconvinced by the arguments of Metrolinx's counsel that the opinions of Mr. Smith, Mr. Goldberg, Mr. Abelman or Mr. Tilley were influenced by the Announcement. In the Tribunal's view, their respective opinions to the contrary were not shaken during cross-examination. As noted, the Tribunal also does not accept the argument made by Metrolinx that the Clewes Chart provides certainty on this matter.

C. Relevance of the Ministerial Zoning Order dated April 8, 2022 ("MZO")

[79] Metrolinx counsel in final written submissions argued:

> The evidence from both parties was clear that the Minister's Zoning Order, dated April 8, 2022 (the "MZO"), and any related Transit-Orientated Communities development (the "TOC"), are Scheme-related and must be screened-out.
> …the evidence tendered was that the future TOC development is subject to a density maximum. Specifically, the MZO that applies to the block (being the Subject Property and the neighbouring lands at 250 Front Street) prescribes a GFA density maximum of 95,381 square meters, or 1,026,673 square feet.
>
> … As the Subject Property comprises 41.8% of the block, the pro-rata allocation of the MZO density maximum of 1,026,673 square feet, is 429,971 square feet to the Subject Property.

[80] The obvious issue with respect to any consideration of the MZO is that it is clearly part of the Scheme and therefore, must not be considered under section 14 (4)(b) of the Act. The Claimant's counsel maintained that the MZO Density Cap is irrelevant and noted that no witness provided any evidence that the densities and/or heights as proposed in the TOC were maximally productive or that any pro-rata consideration of the total density was relevant to the case before the Tribunal. There was no evidence tendered that the MZO in any way reflected what the market anticipated as of the Effective Date.

[81] The Tribunal finds that the post-Expropriation MZO cannot be considered in determining the market value of the Property on the Effective Date and disagrees with

Metrolinx, that it should function as some sort of 'reasonability check' vis à vis the Claimant's Proposal.

[82] The Tribunal further disagrees that there is any persuasive evidence that the MZO was relied on by any of the Claimant's experts to support their opinions on HBU or as the market value conclusion put forward by the Claimant. The mere mention of it tangentially in Mr. Goldberg's written report was inconsequential, in the Tribunal's view.

[83] The Tribunal has therefore had no regard for the MZO in reaching its determinations of any of the issues in this proceeding, including its determination of market value.

D. Does a Lease Encumbrance Exist and What is its Value if So?

[84] On this issue Metrolinx adamantly argues that it must serve to reduce the market value of the Claimant's compensation. Metrolinx argues that almost $14 Million should be deducted – although the claimed net reduction would be approximately half of that as an 'add-back' of interim rental income in the amount of $7 Million is conceded.

[85] The basis for this argument is that at the Effective Date, the Property was encumbered by a long-term lease ("Lease") to DFC Auto Group ("Tenant"), who franchised a Porsche dealership on the Property. In final argument, Metrolinx maintained that since the Lease had no right of early termination by the lessee then it must be considered an encumbrance. Metrolinx contended that under CUSPAP, a real estate appraiser must consider and value that encumbrance as a deduction from market value:

> CUSPAP rule 8.2.10 requires that appraisal reports "analyze the effect on value, if any, of the terms and conditions of the lease(s) when developing an opinion of the value of a leased fee, leasehold interest."
>
> In addition, Rule 9.10.1.i. of CUSPAP, 2024 requires an extraordinary assumption to be made in the event a lease is to be disregarded in the valuation.

[86] Metrolinx further contended (below emphasis added):

> Mr. Penney is the only appraiser who considered the lease encumbrance, in compliance with an appraiser's obligations under CUSPAP. Mr. Penney calculated a discount for the lease encumbrance based on the delay in development timing. Mr. Penney's calculation is as follows:
> *8.5 years remaining in lease term as of the effective date, less 3-year period to achieved development approvals = 5.5-year delay in development, discounted at 4.5% per year =* ***24.75%*** *discount or $13,693,000 in total ($55,326,000 x 24.75%).*
>
> Based on an estimated value of $55,326,000 ($170 PSF x 325,448 SF of GFA), Mr. Penney's net discount for the lease encumbrance is $6,693,000 ($13,693,000 less $7,000,000).

[87] Counsel for Metrolinx argued that Mark Penney's opinion was not challenged on cross-examination and that no contrary evidence proffered explaining how the Tenant could be terminated or relocated without cost to the Claimant. As an alternative argument in the event the Tribunal concluded that the Lease would have been dissolved without cost, Metrolinx submitted that the Tribunal should accept Mr. Penney's unencumbered value conclusion.

[88] Metrolinx's counsel argued that the approach taken by the Claimant's appraiser, Mr. Tilley was in error (below emphasis added):

> Mr. Tilley's explanation for ignoring the Lease is completely unsatisfactory. In chief, Mr. Tilley stated the following:
>
> "…*And it was my understanding that because the tenant was not advancing its own claim for market value, that that was not an issue in this case. It is something that I could have done, but I don't think it changes the opinion in the report, and the value in the report.*
>
> *So, my understanding was that the tenant has not advanced a claim, and therefore, this issue of a tenant claim or the lease was a moot point. So, at the benefit of hindsight, it would have been clear to the reader had I invoked an extraordinary assumption as proposed by MPR, but I don't think it discredits my analysis, and it doesn't change the market value. The market value estimate assumes that the lease was not an encumbrance to redevelopment of the property at the effective date.*

[89] The position now taken by Metrolinx concerning the deduction of a large amount for the lease encumbrance seems to be an evolution from an earlier position taken by Metrolinx under section 13(2) of the Act in respect of the deduction sought for the very substantial relocation costs paid directly to the tenant of the Property. This was outlined in opening submissions at the commencement of the Hearing as follows, in part (below emphasis added):

> …The claimant and its related tenant made the collective, deliberate decision, after the expropriation, for the tenant to relinquish its claim to market value and pursue disturbance damages by an agreement while they were perfectly entitled to do so, they cannot be allowed, by making such decisions, to increase, in any way, the total compensation to which they are entitled under law as a collective unit…
>
> So, at an early stage, the claimant and its tenant asked Metrolinx to pay for the relocation of the dealership. To its credit, Metrolinx agreed. Over the course of the last few years and six agreements, Metrolinx paid the tenant and the claimant a total of $82,079,008, of which $18,379,008 was paid in respect of the tenant's business relocation costs…
>
> The claimant, in the meantime, also proceeded to deliver a claim for additional compensation on the basis that the lease could be ignored, and its Porsche tenant did not have to be relocated as contemplated in the MOU, or otherwise paid out for the remaining eight-and-a-half years on its lease…
>
> And sir, review of all of these agreements between Metrolinx and these parties demonstrate that payments made pursuant to those agreements are exactly the type of damages meant to be caught by Section 13.2 of the Act. These are disturbance damages that cannot be collected at the same time as a redevelopment rate where the lease is ignored. You cannot have it both ways. And again, we cannot disregard the requirements of the Act, we are bound to apply them. In our view, Mr. Vice Chair, this Tribunal has either got to make an adjustment to the claimant's claim by at least 20 percent for the lease, or directly deduct the cost to relocate the tenant, right off the top. To do so, we say, would be a violation of 13.2 of the Act

[90] During the Hearing, however, a dialogue with the Tribunal led to an additional submission made by Metrolinx's counsel (below emphasis added):

> MR. MATHANY: We have one preliminary matter before...Mr. Tilley.
>
> THE VICE-CHAIR: Okay. Please go ahead.
>
> MR. MATHANY: Thank you. So, sir, you recall from the evidence on Friday that Metrolinx, the owner and the tenant entered into an agreement whereby Metrolinx agreed to pay Porsche's disturbance damages to move and to fit out Porsche's temporary premises on Lakeshore. Those costs of $18 million that we were referring to were submitted by Porsche and paid by Metrolinx. Last Thursday, the Tribunal asked whether Metrolinx's position was that the $18 million should be deducted from the market value. The answer was yes. Since that exchange, we have discussed this matter with our client, and have received instructions to confirm that Metrolinx is not looking to deduct the $18 million in disturbance damages, the relocation costs, from the claimant's market value claim.

[91] The above-described dispute between the Parties raises an interesting issue for the Tribunal to determine: In the absence of any identified tenant claims under a lease, must the lease still be considered and valued as an encumbrance which must be deducted from the market value conclusion? A corollary issue stems from the fact that the Tenant and the Claimant are related parties.

[92] Unfortunately, neither Party marshalled any persuasive jurisprudence on this issue. Given Metrolinx's change of position as described in paragraph [90], it now appears that Metrolinx may be seeking an alternative route to recover at least part of the relocation costs it paid to the Tenant – which is of course not a party to this proceeding.

[93] In addition to the evidence of Mr. Tilley, the Claimant tendered a written report from RSM Canada Consulting from Timothy Zimmerman and Stephen Lee (who also testified at the Hearing), both forensic accountants and business valuators. Metrolinx relied on the written and oral evidence of Mr. Penney and also of Glenn Tautrims who is also a business valuator and to whom Mr. Messrs, Mr. Lee, and Mr. Zimmerman responded. In the

Tribunal's view, the evidence of Mr. Tautrims, Mr. Lee and Mr. Zimmerman are for the most part directed to an analysis of the claim no longer being made by Metrolinx as described above. Thus, it is of little relevance to the claim now being made in respect of the Lease encumbrance.

[94] Mr. Lee opined in his co-authored report dated October 15, 2024 that:

(a) The Tautrims Report provides opinions and comments that appear to be beyond the expertise, professional qualification and relevant experience of a business loss expert. The value of the lease encumbrances is a matter of appraisal evidence that should be provided by a qualified real estate appraisal expert since it is related to the market value of the Subject Lands;

(b) It is incorrect to suggest that the incremental temporary relocation costs that were incurred by the Tenant, as a result of the Expropriation should be offset against the compensation for market value of the Subject Lands owed to the Claimant. It is incorrect to consider that the temporary relocation costs are a "proxy" of the minimum value of the lease encumbrances. The temporary relocation costs incurred by the Tenant are fully attributable and caused by the Expropriation as disturbance damages solely as a result of the Expropriation and do not represent the cost of lease encumbrances that would have been incurred by the landlord to achieve market value, but for the Expropriation;

(c) Regardless of a non-arm's length relationship between the Claimant and Tenant, the Tenant's relocation costs were incurred as it was forced on an expedited basis to vacant the Subject Lands and thus, had to temporarily relocate the Porshe car dealership operations until a permanent replacement property was available. This has resulted in two relocation / moving costs and efforts for the Claimant and Tenant (i.e. once for the forced move to a temporary location and then a second move from the temporary location to

the permanent replacement location). As the Claimant and Tenant have not made a claim for the relocation costs of the permanent replacement location. Contrary to the Tautrims Report, there is no double compensation;

(d) It is also incorrect to suggest that the actual temporary relocation costs that were incurred by the Tenant as a result of the forced and expedited relocation would be a representative proxy or be similar to the relocation costs that could be incurred in an orderly planned relocation as part of a redevelopment plan, but for the Expropriation;

(e) The Tenant is not making any claim for leasehold interest or advantage against the Claimant or Metrolinx for the market value of the Subject Land and thus, it is our opinion that it would not be appropriate to make a deduction from the Claimant's compensation for market value;

(f) There is no economic rationale to deduct Tenant's relocation costs from the Claimant's market value claim since the Tenant has released all claims against Metrolinx related to the market value compensation for the Expropriation;

(g) Furthermore, the real estate appraisal reports prepared by both of Metrolinx and the Claimant's real estate appraisal experts have provided their opinions on the market value of the Subject Lands based on the highest and best use to be a high-density/high-rise mix-use redevelopment without the existence of a Porsche car dealership. Therefore, the highest and best use is fundamentally different than the Memorandum of Understanding's ("MOU") conceptual redevelopment plan which included a new Porsche car dealership to be built along with three residential towers. Despite this, the Tautrims Report concludes that but for the Expropriation, the MOU's redevelopment plan would have occurred, and the Tenant would have temporarily relocated during the construction of the new Porsche dealership;

(h) It is disagreed with the Tautrims Report that the Claimant avoided potential costs of the lease encumbrances as a result of the compensation paid by Metrolinx for the temporary relocation costs. The temporary relocation was a forced move as a result of the expedited need for possession by Metrolinx and directly caused by the Expropriation;

(i) Had a redevelopment plan on the Subject Lands been pursued in accordance with the highest and best use assumed by both Metrolinx and the Claimant's real estate appraisal experts, the Tenant would likely had the opportunity to execute an orderly relocation of the Porsche car dealership and thus avoid the need to temporarily relocate. Therefore, the Tautrims Report is incorrect to conclude that the temporary relocation costs incurred by the Tenant would have been the expected relocation costs in any event;

(j) As a result of the Expropriation, the Tenant incurred costs to relocate to a temporary location and will incur costs to move to a permanent location, resulting in paying to relocate the dealership twice. The Tenant is only claiming its business losses / disturbance damages for the temporary relocation costs which were incurred as a result of the Expropriation, and therefore the reimbursement would not result in double compensation; and

(k) Given that counsel that the Tenant is not making a claim arising from the leasehold interest against the Claimant's compensation for market value of the Subject Lands and that no claim is being made with respect to the relocation of the Porsche Dealership to the permanent location, there appears to be no rationale to deduct such an amount from the Claimant's market value claim.

[95] At the Hearing, Mr. Lee largely repeated his views as summarized above. On the other hand, Mr. Tautrims – whose report dated appears to have largely been the basis for the section 13(2) of the Act claim now withdrawn by Metrolinx – did not limit his testimony

to the areas covered in his report. In any event, in light of Metrolinx's withdrawal of its claim to deduct the relocation costs paid to the Tenant from the market value compensation payable to the Claimant, the Tribunal did not find the evidence of Mr. Tautrims to be of material assistance.

[96] Metrolinx made many submissions concerning the number of moves by the Tenant that might be required if the Claimant's HBU-based proposal is accepted. The theory was that upon sale to a willing buyer, the Tenant would need to be relocated and that the Claimant would need to pay the costs of that. More than one move might increase that theoretical costs burden. As an aside, the Tribunal finds that to the extent that Metrolinx's argument relies on the transaction contemplated by the unconsummated MOU transaction (described further below) it is unpersuasive – further amplified by the MOU terms, which contemplated the Tenant's return to the developed site. The facts are that no transaction was ever completed by the parties to the MOU – thus, the hypothetical scenarios that might have transpired had the opposite been true are not of relevance or assistance to the Tribunal.

[97] Metrolinx relies on one Alberta case for its position on the need to assign a value for the Lease encumbrance. In *Gleneagle Developments Ltd.* v. *Edmonton (City)*, 1982 CarswellAlta 984, 26 L.C.R. 50 ("*Gleneagle")*, the Alberta Land Compensation Board found that one of the leases encumbering the expropriated property was impinging on the value of landlord's interest and reduced the market value giving effect to the impact of the lease. That lease was at arms-length.

[98] Counsel for the Claimant unequivocally rejects the arguments made by Metrolinx. He points out that in *Gleneagle* case there was no evidence that the Claimant had the ability to relocate the tenant, whereas in this case the only evidence is that the Claimant had the ability to relocate the tenant and that Porsche Canada, the franchisor, was willing to accommodate any relocation. This evidence, from Mr. Tom Jakobek and from Ms. Paula Kelly of Porsche Canada is accepted by the Tribunal.

[99] The Tribunal also notes that in *Gleneagle* case there was an agreement between the expert witnesses to the effect that the leases there would reduce the market value – there is obviously no such agreement in this proceeding. Additionally, the Board in *Gleneagle* case made other interesting findings as well (below emphasis added):

> The first stage involved a determination of the market value of the expropriated land as though free and clear of any encumbrances. In so doing they also disregarded the improvements on the land as making no contribution to the market value. After having thus determined the value of the expropriated land on a square-foot basis each of the appraisers then turned his attention to the three leases which had been granted with respect to portions thereof. While each appraiser took a somewhat different approach to the treatment of such leasehold encumbrances, they were all in agreement that the existence of such leases would have the effect of reducing the value which had been established in their respective stage-one calculations…
>
> The board now turns to a consideration of the reduction in value, if any, which must be applied by virtue of the expropriated land being subject to three leasehold interests as at the date of taking.
>
> … [the disagreement between the parties concerned] …A lease to Woodward's Stores (Edmonton) Ltd. covering all of Lot 19B and including the concrete block warehouse structure of about 26,842 sq. ft. previously referred to. At the effective date of taking five years and five months remained in the term of this lease and there was no provision for further renewal thereof.
>
> … There are at least two approaches to the determination of the market value of land which is encumbered by a leasehold estate…[one is:] … the market value of the lease fee estate may be calculated as the value of the fee simple estate, free and unencumbered, less the value of the lessee's interest in the lease…
>
> The rule for valuation of this interest was stated in *Re City of Toronto and McPhedran* (1923), 54 O.L.R. 87… [App. Div]… by Middleton J. at p. 92 as follows: ...*the value of the tenancy is always considered to be the present value of the difference between the rental paid by the tenant, and the rental that the property is worth, for the unexpired portion of the lease*.
>
> Professor Eric C. E. Todd in his text *The Law of Expropriation and Compensation in Canada* (1976), at pp. 329-30, cites the *McPhedran* case and comments on it as follows:

> In other words it is the present value, discounted at a market determined rate, of the difference, if any, between the *contract rent* provided in the lease and the *economic rent* which is what the property could have been rented for at the date of valuation assuming it had been available for rent to a new tenant…The difference between the economic rent and the contract rent is known as the "*profit rent"*. In the absence of a profit rent the leasehold interest has no market value and the lessee will not be entitled to compensation for it, although, in appropriate circumstances, he will be entitled to disturbance damages…If a profit rent is determined then such profit rent must be calculated for the remaining term of the lease and discounted at the appropriate market rate to determine the present worth of such profit rent. The resultant calculation represents the market value of the leasehold estate.

[100] In the Tribunal's view, no appraiser or any other expert witness called by either Party in this proceeding considered or applied the rule for valuation of a leasehold interest set out by Justice Middleton of the Supreme Court of Ontario, Appellate Division in *McPhedran* case. Nor has either Party's counsel made detailed submissions as to its applicability beyond the brief reference made by Metrolinx to *Gleneagle.* The context there was a lease with approximately 5.5 years of term remaining. It should also be noted that the deduction made in *Gleneagle* by the Board for a 5.5 year lease amounted to only $211,000 from the market value that had been determined at $4,213,000 – which appears to comprise only a 5% reduction.

[101] Metrolinx's position is partly rooted in an argument that Mr. Tilley did not properly deal with the Lease in accordance with CUSPAP requirements, unlike Metrolinx's appraiser Mr. Penney, who did do so – even though on cross-examination, Mr. Tilley acknowledged that he could have made an extraordinary assumption (which would then have been CUSPAP-compliant apparently according to Metrolinx's submissions). Mr. Penney's valuation deduction analysis is based on the theory that the Claimant would have to pay out its Tenant in the event of a sale, which led to his almost 25% reduction.

[102] In relation to this Expropriation, the uncontested evidence is that the Tenant has released Metrolinx from all such claims in return for receiving an amount for relocation. But of course, this is not the issue being put forward by Metrolinx. Instead, it is contending that

the Claimant's Concept Proposal for redevelopment must account for the Lease as an encumbrance. Metrolinx argues that the Claimant does not do so in its expert evidence and further contends that the Claimant's argument that this is a 'non-issue' lacks a sufficient evidentiary basis

[103] The arguments made by the Claimant are focussed on the fact that the Tenant is not making a claim against Metrolinx and has signed a release in favour of Metrolinx, after having received very substantial sums to compensate for the Tenant's relocation following the Expropriation.

[104] Contrary to Metrolinx's arguments, there is clear evidence that the Tenant and the Claimant are related, non-arms length entities. Thus, there is a basis for the Claimant's assertion that upon execution of its own redevelopment effort – or a theoretical sale to someone else - it would be able to accomplish an orderly relocation of the Tenant at some *de minimis* cost. Metrolinx acknowledged this reality in its original submission to this Tribunal seeking a deduction of the $18 Million paid to the Tenant. Mr. Penney also recognized the same point in his original expert report (below emphasis added):

> Of note, the tenant, "Downtown Fine Cars Inc. (Downtown Porsche)" and the Landlord "1255870 Ontario Limited" …[Claimant]…were affiliated companies…
>
> <u>We have assumed that an owner (a willing seller), who also controls the leasehold interest, would collapse the lease agreement prior to sale in an effort to sell the site "unencumbered" so that it may achieve its highest and best use and associated market value as 'redevelopment land</u>…

[105] The question for resolution is whether the fact that the Tenant and the Claimant are related companies must necessarily lead to a conclusion that there should be no deduction to account for the Tenant's lease. Certainly, the Tribunal finds that if there was a cost associated with the termination of that lease to facilitate the purchase and subsequent redevelopment of the Property by a willing buyer, that buyer would not agree to pay that cost and would instead look to the seller to deal with it. The question is whether there is a proper basis here for the Tribunal to accept the Claimant's argument that the Tenant's

lease could be easily terminated at no cost because the Claimant and the Tenant are corporations under common ownership and control.

[106] It is uncontested that the Tenant and the Claimant are each separate legal entities. There is no evidence before the Tribunal that the terms of the Tenant's lease were not complied with or that the rental payments required thereunder were never made to the Claimant. The Tribunal must assume that there were some valid business – perhaps tax-related - reasons for the creation of these two corporations and for the lease to be entered into under, which the Tenant paid rent to the Claimant. In the absence of contrary evidence, it is also reasonable to assume that each corporation acted in its own best interests at least in respect of that commercial lease arrangement. The fact that the Tenant alone pursued recovery of its very substantial relocation costs also demonstrates that it acted in its objective self interest in that respect. Those costs were paid to the Tenant, not to the Claimant. The Claimant's counsel explicitly distanced the Claimant from the Tenant in terms of those relocation costs, arguing that:

> [the Tenant]…has made no claim for market value compensation and has not received any amounts on accounts thereof. All amounts paid to… [the Tenant]… are on account of relocation costs incurred solely because of the forced move to the temporary dealership location at Lakeshore Avenue caused by the expropriation and the expedited possession requirements imposed by Metrolinx… In the case at hand, the Tribunal has been provided with the uncontroverted evidence that DFC has received no compensation on account of market value arising from its leasehold interest and that DFC has provided a release for market value compensation to Metrolinx

[107] Even though the Tenant and the Claimant are separate legal entities, the evidence from the witnesses who testified at the Hearing on those matters, which was not successfully challenged on cross examination, is that the two companies are essentially controlled by the same persons as also pointed out by Mr. Penney (see paragraph [104] above). Thus, even though the Tenant is legally bound to make lease payments to the Claimant and the lease by its terms would run for another 8.5 years after the Effective Date the available evidence is that the Claimant would have been able to effect an orderly

relocation of the Tenant in the event of a sale of the Property to a willing buyer. The Claimant further contends that it is logical that this could be done at no cost – i.e. the Tenant would pay the rent due until it moved out and no termination costs would be imposed on the Claimant in that event. Metrolinx essentially argues that this is contrary to normal commercial practice and that in effect this situation should be treated no differently because of the common control element between the two corporations.

[108] In the Tribunal's opinion, the argument made here by Metrolinx ignores practical reality. In this situation, there would be no true cost borne by the Claimant company. Thus, in the Tribunal's view, it is unreasonable to artificially reward Metrolinx by way of a market value reduction of the amount otherwise payable to the Claimant. Had the Tenant and the Claimant companies not been non-arms length, and had the Tenant been pursuing a claim pursuant to the Lease, the considerations would change and there would be an appropriate deduction for the leasehold encumbrance. Those were the circumstances in *Gleneagle* and *Meconi* (discussed below at paragraph [112]).

[109] In any event, the underpinning for this very large reduction claim by Metrolinx is inadequate. It consists only of Mr. Penney's bare-bones analysis. While the math proposed by Mr. Penney is simple enough, the Tribunal was not presented with any evidence or jurisprudence beyond *Gleneagle* that the massive reduction sought by Metrolinx results from a reasonable valuation method. Mr. Penney's opinion consists solely of the following passage in his report (below emphasis added):

> DISCOUNT FOR LEASE ENCUMBRANCE (DELAY IN DEVELOPMENT TIMING):
> <u>8.5 years remaining in lease term as of the effective date, less 3-year period to achieved development approvals = 5.5-year delay in development, discounted at 4.5% per year = 24.75% discount or $13,693,000 in total ($55,326,000 x 24.75%).</u> Additional $1,223,766 per annum in average net rental revenue (for 68 Parliament) x 7 years = $8,566,000, discounted to present value of $7,000,000 at the May 2021 effective date at 6.5% per annum, resulting in a net discount of $6,693,000 for the lease encumbrance ($13,693,000 less $7,000,000).

[110] The argument that a 3-year period is needed to achieve development approvals is simple enough (leaving aside the evidence to support a shorter period from Mr. Messrs, Mr. Smith and Mr. Goldberg). However, there is no explanation of why it is a sound idea to simply multiply the resultant 5.5 year period by 4.5% per year to arrive at an almost 25% reduction from total market value, which based on Metrolinx's valuation, creates a large discount of almost $14 Million before the present value of interim rental income is set off. At a higher market value conclusion, this claimed reduction would be even larger.

[111] Ironically, the closer examination of the *Gleneagle* case relied upon by Metrolinx suggests that Mr. Penney's approach also did not conform to a longstanding rule approved by the Court that later became the Ontario Court of Appeal - which has also received favourable commentary in a leading expropriations text. Simply put, the Tribunal does not accept that there is a basis for a reduction based on the Lease encumbrance and is further dissatisfied with the lack of evidence and foundation to support the large reduction from market value sought by Metrolinx as outlined above. In the Tribunal's view, the mere existence of a short, unexplained opinion does not create a compelling basis for such a reduction. Mr. Penney himself seemed to recognize at least the economic rent aspect of the leasehold valuation rule set out in *McPhedran* case, but then did not employ it in his analysis:

> Economic rent is the reasonable rental expectancy of the property if it were available for lease as compared with similar space, as distinguished from contract rent.

[112] In dealing with the Lease encumbrance issue, the Tribunal has also considered the case of *Meconi v. Windsor (City)*, 2008 CarswellOnt 881, 94 L.C.R. 119 ("*Meconi*"), a Decision of the OMB. In *Meconi,* Member Stefanko cited with approval the rule in *McPhedran* case yet then declined to apply it. The reason for this appeared to stem from his concern that it was potentially unfair to permit a deduction for a leasehold interest in circumstances where the tenant had pursued its own claim and the claimant in *Meconi* had not been adequately informed about its valuation – a fact situation different from that in this proceeding. In the Tribunal's view, the following passage from *Meconi* is informative:

> In my view, the interest of the Tenant and, the interest of the Subtenant, are interconnected with the interest of the Claimant and therefore those interests should have… been determined in some way which allowed each party involved to effectively advance its position. In addition, in view of the absence of information and evidence concerning amounts paid by the City to the Tenant and Subtenant for their interests in the Expropriated Land, it is entirely possible that the City could, if I accepted Mr. Brode's submission, pay in the aggregate, less than the market value of the Expropriated Land. This is not, in my view, a result which is contemplated or supported by the Act….Under the circumstances therefore, it would not be appropriate to reduce compensation by any profit rent enjoyed by the Tenant

E Market Value Determination

(i) The Claimant's Appraisal Evidence: Seeking $97,127,800 for market value (based on 519,400 square feet at $187 per square foot)

[113] The Claimant proffered evidence from two appraisers, Mr. Tilley and also Guy Wilson who was retained to conduct a "limited scope technical review" of the appraisal report prepared by MPR Advisors Inc. on behalf of Metrolinx dated September 5, 2024 (Mr. Penney's report) estimating the market value the Property on a retrospective basis as of the Effective Date.

[114] The essential aspects of Mr. Tilley's written and oral evidence were:

(a) Mr. Tilley derived an appropriate set of comparable transactions by including transactions within 3 years prior to the Effective Date but avoiding land assembly transactions, excluding sites smaller than 2 acres and limiting the selection to those east of Yonge Street – those parameters best illustrated the market environment for a similarly sized development site as the Property on the Effective Date;

(b) Mr. Tilley therefore selected four appropriate comparable transactions being 241 Church Street, 89 Church Street, 212 Dundas Street East ("Filmores Hotel") and 162 Queens Quay;

(c) For Mr. Tilley time adjustments to these comparables to take into account the Effective Date, Mr. Tilley considered construction costs, interest rates and local sales data;

(d) In terms of construction costs, Mr. Tilley attributed 50% of any construction cost increase on the basis that construction costs (including hard and soft costs) typically amount to approximately 50% of overall development costs;

(e) For interest rates, Mr. Tilley used the prime rate +2% as an estimate of developer's financing rates and used a 7.5% factor (based on typical development finance costs) as an estimate of the impact of interest rate changes on project development;

(f) Mr. Tilley's time adjustment for real estate sales was based on central Toronto condominium sales, which demonstrated substantial appreciation in sales prices over the period from 2018 to 2021. Although this data included sales beyond the downtown Toronto area, in his view it was still heavily weighted towards downtown area sales due to sheer volume of downtown sales;

(g) 241 Church Street is located approximately 1.2km from the Property and sold in October 2020 for a price of $73,000,000, representing $198 rate per square foot ("PSF") – this property is ⅓ of an acre and was proposed for a 53-storey residential tower with an eight storey podium containing approximately 370,000 sq.ft. of GFA. It was also a corner lot at Church Street and Dundas Street East with comparable characteristics to the Property with

corner exposure on two main streets. It was designated MUA2 in the Downtown Plan, the same as the Property;

(h) Mr. Tilley applied an upward locational adjustment of 10% because although 241 Church Street was closer to the Yonge Subway, the Property also has excellent access to transit including the 504 streetcar along King Street, and the King-Parliament area was considered by Mr. Tilley to be in a slightly superior and higher demand location. He applied a -5% downward adjustment to account for the larger development concept in the WZMH Plan when compared to the rezoning application submitted for 241 Church Street, and also applied a -10% adjustment for development timing and risk given that the development application was submitted in December 2020, shortly after the sale in October 2020, even though an application for the Property could have also been submitted within a couple of months of the Effective Date;

(i) Mr. Tilley arrived at an adjusted value for 241 Church Street of approximately $188 PSF, which is then minimally time adjusted to $187 PSF that corresponds to Mr. Tilley's final conclusion on value - it traded only 8 months before the Effective Date and it required relatively limited adjustments overall.

(j) Mr. Tilley's second comparable is the sale of Filmores Hotel site – 212 Dundas St. E. – a highly irregular site as compared to the Property, which comprises three separate parcels totaling about ⅔ of an acre, which were purchased in January and February 2020, for total consideration of $55,268,000; reflecting a purchase price of $141 PSF based on the subsequent development application. In June 2020, a development application was submitted for the Filmores Hotel site for a 46-storey tall building including a 13 storey podium with a total GFA of 391,035 sq.ft. A +15% locational adjustment for the Filmores Hotel site given its location in a

less desirable area in comparison to the Property, even further east than 241 Church St, consistent with the +10% locational adjustment made by Mr. Tilley for 241 Church Street;

(k) A negative -5% adjustment was applied due to the larger size of the WZMH Plan, and a +10% adjustment for the significant heritage conservation requirements impacting the proposed development at the Filmores Hotel site. The revised time adjustment was +5% for the Filmores Hotel site, which traded more than one year prior to the Effective Date resulting in a final adjusted value of $178;

(l) 89 Church Street is a 0.27 acre development site located at the corner of Church Street and Lombard, which sold in the summer of 2019 for $73,483,764, representing a price PSF of $249. At the time of sale, it had approved zoning for a 45 storey tower containing approximately 310,000 sq.ft of GFA is roughly 1 km west of the subject site and is similarly designated MUA2 in the Downtown Plan. Mr. Tilley made a -10% locational adjustment to account for the superior location of the 89 Church Street, closer to the downtown core being approximately 1 km west of the Site and also a -15% adjustment to account for Comparable #3's zoning status, which had initially achieved zoning approval prior to the sale (although plans were subsequently revised) and to account for the smaller development than is proposed in the WZMH Plan;

(m) Mr. Tilley’s revised time adjustment for 89 Church Street, was +9.3% because it traded in the summer of 2019, approximately 20 months prior to the Effective Date resulting in a final adjusted price of $199 PSF; and

(n) The next comparable was 162 Queens Quay East, being a 0.7 acre site located on the north side of Queens Quay, at Richardson St., just east of Jarvis which sold for $58,000,000 in October, 2018. Subsequent

development applications were submitted for a 21 storey tower and a midrise element, consisting of approximately 300,000 sq.ft, translating to an unadjusted sale price of $195 PSF. This comparable was then adjusted downward by 10% to reflect its superior location near the waterfront and a further -5% to reflect the Site's larger development plan. A further revised time adjustment for 162 Queens Quay was +14% to account for the improved market conditions in the spring of 2021 in contrast to the fall of October 2018. With those adjustments, 162 Queens Quay reflected an adjusted sale price of $189 PSF.

[115] Mr. Tilley's reconciliation summary is shown in the chart below:

Summary Adjustment Chart							
Unadjusted $ / S.F. of GFA	Adj. for Market Conditions	Location	Development Timing & Risk			Overall Adjustment	Adjusted $/ S.F. of GFA
			Absorption	Heritage	Planning		
1. 241 Church Street, $198	-0.58%	10.0%	-5.0%	-	-10%	-5.6%	$187
2. 212 Dundas Street East, $141	5.13%	15.0%	-5.0%	10%	-	26.2%	$178
3. 89 Church Street, $242	9.27%	-10.0%	-5.0%	-	-10%	-17.8%	$199
4. 162 Queen Quay East, $195	13.98%	-10.0%	-5.0%	-	-	-3.1%	$189
						Minimum	$178
						Maximum	$199
						Average	$188
						Median	$188

(ii) Metrolinx's Appraisal Evidence: The value should be determined at $46,570,000 (which includes a deduction for environmental remediation of $2,063,172); a reduction for a 'leasehold encumbrance' of

$13,693,000; then an 'add-back' of interim income in the amount of $7 Million)

[116] Mr. Penney was the lead appraiser for Metrolinx and he provided a report and reply witness statement and testified at the Hearing. Just like Mr. Tilley, Mr. Penney is a well-experienced real estate appraiser with considerable experience in evaluating downtown Toronto development properties.

[117] Mr. Penney relied substantially on the MOU. Metrolinx's theory, based on Mr. Penney's opinion, is that the MOU entered into prior to the Expropriation between the Claimant and its neighbour is an excellent illustration of market value for the Property. He stated that the MOU is dated August 12, 2020 - approximately 9 months prior to the Effective Date – and represents an agreement between a 'willing buyer' and 'willing seller', absent the influence of the Expropriation with a sale price of $52 Million. On the other hand, Mr. Penney conceded in his evidence that (below emphasis added):

> However, as the MOU does not involve the sale of the entire fee simple interest of the Subject Property (vendor to retain strata interests), relying upon it to estimate the market value of the site may be a flawed approach…

[118] The Parties vehemently disagreed with each other in terms of the relevance and importance of the MOU. Counsel for Metrolinx argues that the MOU is valuable and cites jurisprudence concerning the relevance of evidence concerning a genuine, arms-length offer to purchase or to sell, regardless of whether a contemplated transaction was ever completed. None of that caselaw stands for the proposition that such offers or possible transactions are determinative, however – nor does Metrolinx assert that.

[119] Even though Mr. Penney had pointed out that there are aspects of the MOU that make it a difficult reference point, he nonetheless used it as his first comparable sale. In his report and testimony, he opined that (below emphasis added):

> Comparable #1, at $200 PSF, is the price agreed-to by Greenpark Homes and the owner of the Subject Property for the development of a single condo tower of 220,000+/- SF on 68 Parliament Street and a portion of 70 Parliament. Payment was to be made at the time the site received approval for the "rezoning/applications" (per the language of the MOU), which we estimate to be three years for rezoning and site plan approval with contingency allowance. The purpose price was to be reduced or increased based on the final quantum of GFA approved… After adjustments, Comparable #1 supports a value of $170 PSF of GFA for the Subject Property as of the effective date.

[120] Although the Tribunal does not reject the notion that the MOU could have some relevance, on balance the Tribunal is not satisfied that reliance on it is assistive in this case. It is trite to state the obvious fact – undisputed here – that the MOU was not definitive and at best was an agreement to "possibly reach a future agreement" – in the Tribunal's opinion the fact that the MOU and its Parties may have later exchanged draft 'full' agreements does not change this. By its very terms, the brief 2-page MOU was non-binding and it is undisputed that the transaction it contemplated was never fully negotiated or implemented.

[121] The other Party to the MOU was a development company incorporated by the owner (Greenpark Homes) of a neighbouring parcel at 250 Front Street. Moreover, the MOU did not envision the sale of the complete Property, only the portion municipally known as 68 Parliament Street and "a small portion of" 70 Parliament, which also did not include the full air rights. The price was $52 Million, but was highly conditional on a number of terms, including the obtaining of rezoning permissions.

[122] The Tribunal does not intend to analyze in detail on Mr. Penney's treatment of the MOU – nor all of the arguments and counter-arguments of the Parties' counsel about it - as the Tribunal is of the opinion that it does not provide convincing evidence of value for either $200 PSF or Mr. Penney's "adjustment" of that figure to $170 PSF. The situation might have been different if at a date closer to the Effective Date that the Claimant had listed the entire Property for a sale price of $52 Million or had made a bona fide, arms-length definitive offer to sell it for that price. The MOU is neither.

[123] For similar reasons, the Tribunal finds that it was not assisted by the pre-Expropriation development proposal prepared in April 2020, by an architectural firm (Rafael & Bigauskas) retained by the Claimant nor any valuation assumptions based upon them – which received much attention in the Closing Submissions of Metrolinx. It is not contended that those draft plans ever became the basis for any development applications made in relation to the Property. It is akin to the reference made to the MOU and similarly of little utility to the Tribunal.

[124] The Tribunal specifically disagrees with the argument made by Metrolinx that the features of the Rafael & Bigauskas proposal "*provides a significant data point to inform this Tribunal about the reasonableness of the Claimant's proposal in this hearing*". The Tribunal was much better informed and assisted by the thorough and detailed planning, architectural and other development proposal evidence actually marshalled by the Parties for the purpose of this lengthy proceeding as discussed and analyzed at length earlier in this Decision.

[125] The other elements of Mr. Penney's appraisal evidence were:

(a) His second comparable was 261 - 285 Queen Street East & 384-410 Richmond Street East & 78-106 Ontario Street a 2+ acre parcel of land with frontage on Queen and Richmond, west of Ontario Street across from the Moss Park Toronto Community Housing complex ("Brigden Place");

(b) Brigden Place was a much larger parcel than the Property and was an assembly of lots - a locational adjustment of +25% was made due to the site's location near to a large social housing component. A number of other adjustments were made to account for building height, heritage conservation matters, for rental replacement and affordable units and a high amount of non-residential GFA, to reach a final adjusted value of $177 PSF;

(c) The third comparable was 254-266 King Street East, 427-243 Adelaide Street East and 157 Princess Street, another assembly relatively close to the Property but not adjacent, which was a post-Effective Date transaction that was adjusted to $187 PSF – *interestingly, the same figure as Mr. Tilley's overall value conclusion*;

(d) Mr. Penney's Comparable #4 is located just south of the intersection at Dundas Street East and Sherbourne Street and is another transaction which occurred in June 2022, more than a year after the Effective Date. Adjustments totalling 40% were made to this comparable, bringing it to $167 PSF;

(e) Comparable # 5 is located at Comparable #5, at $183 PSF, is located just north of the Subject Site at 126, 128, 130, 134 Parliament Street, 529 Richmond Street East, Toronto – the last part of this assembly transaction occurred on May 10, 2022 almost a year after the Effective Date. One earlier transaction in this matter was also post- Effective Date on December 1, 2021. This a small parcel of only 0.29 acres after adjustment, Comparable #5 supports a value of $174 PSF of GFA for the Subject Property based on adjustments for financing, quantum of GFA (small quantum = lower risk and shorted absorption period), and assembly risk;

(f) Comparable 6 is located at 234-250 King St. East, another assembly, at $168 PSF just west of the Subject Property. Again, 2 of the transactions here occurred after the Effective Date in January and March, 2022. The price was adjusted for VTB financing, building height, assembly risk and market conditions, to $168 PSF;

(g) Comparable 7, at $160 PSF, is located northwest of the Subject Property, close to the intersection of Jarvis Street and Dundas Street East at 212-218 Dundas Street East, 279 1/2 George Street; this area is closer to the downtown core, Toronto Metropolitan University and the Yonge Street

subway; however, the specific neighbourhood is somewhat downtrodden. No adjustment for location was made; and

(h) The final comparable #8 is located at 176-178 Front Street & 33 Sherbourne, another assembly compiled in 2020. Adjusted the price per buildable SF up by 25% to account for assembly risk (+10%) and high densities after the November 2018 sale (+15%), resulting in an adjusted value of $155 PSF of GFA.

Mr. Penney's table summarizing his adjustments of his comparable sales contained in his report was:

TABLE 12
Summary of Adjustments to the Comparable Sales

	Subject Property	Sale No. 1 (per MOU)	Sale No. 2	Sale No. 3	Sale No. 4	Sale No. 5	Sale No. 6	Sale No. 7	Sale No. 8
Address	68 & 70 Parliament Street	68 & 70 Parliament Street	261 - 285 Queen St & 384-410 Richmond St & 78-106 Ontario St., Toronto	254-266 King Street East, 427-243 Adelaide Street East and 157 Princess Street, Toronto	214-230 Sherbourne Street, Toronto	126, 128, 130, 134 Parliament Street, 529 Richmond Street East, Toronto	234-250 King Street East, Toronto	212-218 Dundas Street East, 279 1/2 George Street, Toronto	176-178 Front Street & 33 Sherbourne Street, Toronto
Date of Sale Registration	May 18, 2021 Effective Date	August 12, 2020	May 10, 2021	December 1, 2021	June 22, 2022	Feb 26, 2021, December 1, 2021, May 10, 2022	September 24/30, 2020, January 31, 2022, March 29, 2022	January 16, 2020, February 28, 2020	November 30, 2018 & January 20, 2020
Financing Terms	All cash	All cash	All cash	All cash	All cash	134 Parliament, representing a VTB equal to 34% of total assembly price and 59% of the sale at 4% per annum, due Feb 2024	(38% Cash, 33% other consideration, 29% VTB of total assembly price) VTB: 248-250 King St E ($4,681,427 @2% p.a)	All cash	All cash
Planning Status at Time of Sale	Not Approved	Sale conditional upon planning approval	Approved	Approved	Not Approved	Not Approved	Not Approved	Not Approved	Not Approved
Building Height (# of storeys)	19,23	22	24, 33	38, 40	47	-	40	41	-
Quantum of Buildable GFA (SF)	389,591	220,000	821,304	740,046	443,430	159,575	362,758	344,694	322,118
Other			+10% for Rental Replacement, 20% Non-Residential & Heritage facades; -10% for on-side	On-site parkland	Heritage building to be retained. Sold in June 2022 when interest rates and construction costs were higher.	Assembly	Assembly	Assembly	Assembly; Density/Market Conditions in 2018
Time Adjusted Price PSF of Buildable GFA:		**$200**	**$157**	**$249**	**$120**	**$183**	**$168**	**$160**	**$124**
QUALIFICATION									
1) Financing		Superior				Superior	Superior		
2) Location *(condo price & absorption)*			Inferior		Inferior				
3) Planning Status at Time of Sale		Superior	Superior	Superior					
4) Building Height (# of storeys)			Slightly Superior	Superior	Superior				
5) Quantum of Buildable GFA *(longer absorption, risk)*		Greater	Greater	Greater		Lower			
6) Other			Inferior	Superior	Inferior	Inferior	Inferior	Inferior	+10% for assembly; +15% for market conditions from

QUANTIFICATION (ADJUSTMENTS)									
1) Financing	-	-10.0%				-5.0%	-5.0%		
2) Location *(condo price & absorption)*	- -		25.0%		20.0%				
3) Planning Status at Time of Sale	-		-20.0%	-20.0%					
4) Building Height (# of storeys)	-		-2.5%	-5.0%	-5.0%		-5.0%	-5.0%	
5) Quantum of Buildable GFA *(longer absorption, risk)*	-	-5.0%	10.0%	10.0%		-10.0%			
6) Other				-10.0%	25.0%	10.0%	10.0%	10.0%	25.0%
Sum of Adjustments (%):		-15.00%	12.50%	-25.00%	40.00%	-5.00%	0.00%	5.00%	25.00%
Adjusted Price ($PSF Buildable):	**-**	**$170**	**$177**	**$187**	**$167**	**$174**	**$168**	**$168**	**$155**

(iii) Summary of Findings On Market Value

[126] In summary, the main disagreement between the Parties with respect to the comparables used by the two groups of appraisers, upon which their respective different value conclusions were based, are:

(a) Metrolinx argues that (i) at least some of the comparable sales considered by Mr. Tilley were properties too far away from the Property as compared to those used by Mr. Penney; and (ii) Mr. Tilley did not properly adjust the comparable sale prices to account for the differences v. the Property; and

(b) The Claimant argues that (i) many of Mr. Penney's comparable sales were assembly transactions quite unlike the nature of the Property; (ii) several of the most important comparable transactions occurred <u>after</u> the Effective Date and are unreliable for that reason; and (iii) for some comparables used by Mr. Penney, his chosen adjustment methodology was unsound.

[127] The Tribunal observes that the areas of disagreement described above in paragraph [126] are the same in nature as those typically alleged by the parties in almost every case litigated before the OLT under the Act. Thus, the Tribunal's task is to weigh the two approaches taken, the differences and similarities, if any, and to make findings as to which analysis is most persuasive – sometimes as modified by the Tribunal itself.

[128] After careful review and consideration of all of the appraisal evidence, the Tribunal has reached the following conclusions:

(a) The Tribunal was not assisted by the repeated criticisms made by both Parties' counsel as to the alleged failure of either appraiser to follow certain practices set out in CUSPAP – here, as noted above, the Tribunal is not conducting a professional standards compliance review;

(b) The practice followed by each appraiser here in 'adjusting' comparable sale prices based on various factors is inherently subjective and factual. This required the Tribunal to make findings as to the weight to be afforded various aspects of the appraisers' written and oral evidence.;

(c) While the Tribunal accepts the simple general principle that 'the closer the better' is useful in terms of evaluating the use of a given comparable in relation to the location of the Property, it is not wholly determinative: Downtown Toronto is a large but tightly integrated area with many similar features in its development history and, in the Tribunal's view, the fact that a given comparable may be several blocks away from the Site or a few hundred metres more than another sale is merely one factor among many to be considered and not the most important. Moreover, the Scheme is an element to be considered here;

(d) The King Parliament Secondary Plan area cannot be viewed in isolation from other factors – the fact that a comparable sale might have occurred within that area, or outside of it, is of some relevance but is far from determinative;

(e) Post-Effective Date transactions are problematic in this case – the clear risk is that they may be influenced either negatively or positively by the Scheme . Since there is no definitive empirical method by which to evaluate that

impact, especially on a retrospective basis, sales that occurred after the Effective Date ought to be avoided wherever possible. In the Tribunal's view, this issue is more important as a factor in the evaluation of comparables and market value than are the elements described above in (c) and (d);

(f) In a similar vein, given the strong advocacy by Metrolinx and the focus by its experts concerning the impact of the Scheme and the difficulty associated with evaluating that matter, the choice of reasonable comparable sales further away from the Site and, presumably, from the presence of the Ontario Line, actually may better assist the Tribunal in screening out the influence of the Scheme; and

(g) Where, despite dramatic differences in approach and opinion, there is any commonality as between the value conclusions reached by both appraisers this is an important matter for the Tribunal to reflect upon.

[129] Taking into account the factors and conclusions set out in paragraph [140] above, the Tribunal makes the following additional findings:

(a) The Tribunal finds that the use by Mr. Tilley of comparable sales that occurred prior to the Effective Date to be persuasive and ultimately more convincing than the use by Mr. Penney of comparable transactions that occurred partly or fully after the Effective Date (in some instances more than one year afterward);

(b) The Tribunal finds that the use by Mr. Tilley of comparable sales that occurred outside of the King Parliament Secondary Plan area is acceptable and is additionally useful because it may better control for the impacts of the Scheme. While Mr. Penney's use of sales within that area is not an error it is somewhat less assistive in terms of screening for the Scheme;

(c) The Tribunal found it difficult to understand and accept many of the price adjustments utilized by Mr. Penney in his consideration of his comparable sales. Simply put, the Tribunal was not persuaded that all of his adjustments were reasonable and accurate. The Tribunal was assisted by the similar views of Mr. Tilley and Mr. Wilson on the adjustment issue as well. Generally, the Tribunal found the approach taken by Mr. Tilley in his adjustments to be more persuasive; and

(d) The Tribunal finds it influential that Mr. Penney has utilized his comparable #3 to arrive at an adjusted value of $187 PSF because it is confirmatory of Mr. Tilley's overall market value assessment of $187 PSF. This comparable transaction is valid, although of marginally less utility than would be a 'non-assembly' transaction.

[130] In conclusion then, based on its thorough review of all of the written and oral appraisal evidence in this proceeding and a careful consideration of the factors and findings made above, the Tribunal accepts the value conclusion opinion of Mr. Tilley in preference to the opinions of Mr. Penney. Therefore, the Tribunal finds that the market value of the Property is to be determined on the basis of **$187 PSF**.

(F) Deduction for Environmental Remediation?

[131] Metrolinx claims that a significant deduction from market value must be made to reflect the environmental state of the Property on the Effective Date. The costs of dealing with this issue would be considered by an objective willing purchaser and sensibly leads to a reduction of the purchase price. The Claimant alleges that the estimate of the costs of remediation by Metrolinx's expert Stantec Consulting Ltd. (whose witness at the Hearing was Jason Hudson) is excessive. Metrolinx rejects that position.

[132] Interestingly, the Claimant argues that there is no basis for deducting whatever the costs might be to remediate the Site (below emphasis added):

> While there are environmental costs associated with redevelopment, such costs are not unique to the Property and are costs that would generally apply to any redevelopment site in downtown Toronto. The Stantec cost estimate is, at least in part, premised on typical demolition activities and is not tied only to the environmentally impacted soils…
>
> The anticipated remediation costs are in large part tied to typical demolition costs even in the absence of contamination. These costs would not be a vendor's responsibility…Virtually all the comparables used by the appraisers are redevelopment sites that would require demolition and environmental compliance costs.
>
> None of the appraisers could confirm whether environmental costs factored into the purchase price for any of the comparables. Accordingly, there is no factual basis upon which to conclude that such costs should factor in the market value compensation for the Property….In the absence of any material environmental issue impacting the Property, it is submitted that Mr. Tilley's conclusion that small factors such as environmental costs can be offset against other modest issues such as interim income is the more reasonable approach to take…

[133] Unsurprisingly, Metrolinx adamantly disagrees with the Claimant's above assertions. It notes that Hudson was unequivocal that there was onsite contamination that would need to be addressed before redevelopment construction could occur. In his initial report, Mr. Penney noted (below emphasis added):

> We have been provided with a remediation cost estimate of $2,354,868 by Stantec Consulting Limited dated September 2024. This cost is indicated to be the incremental cost under the highest and best use of a mixed-use development on the Subject Site with a two-level underground parking garage. As per Stantec, the contamination in soil was identified across the Subject Site. This cost has been subtracted from the estimated market value of the Subject Property as clean…
>
> Final adjustments to this rate are required to account for site remediation costs (from the Subject's existing use) and interim revenue prior to redevelopment (from the

> continuation of the dealership until redevelopment). We have been provided with a remediation cost estimate of $2,354,868 by Stantec Consulting Limited.
>
> We estimate that the existing auto dealership use may have continued for 1.5 years after the hypothetical sale at the May 2021 effective date before moving/ceasing in order to make way for a condo sales centre so that presales could begin. This would yield an additional $1,767,000 in net rental income. When discounted to a present value at the effective date by a market rate of return of 6.50% (200 bps greater than a 4.50% retail cap rate), the resulting PV is $1,680,000 in total, rounded…
>
> Based on the preceding, a final "net" adjustment of $675,000 is required ($2,354,868 less $1,680,000). This results in a final adjusted value estimate of $65,560,000 rounded.

[134] In his later report, Mr. Penney did not opine further on this issue in any material way. Mr. Dal Colle, a second appraiser retained by Metrolinx assumed no soil contamination and evidently had not been provided with the Stantec report.

[135] On this topic, in his first report Mr. Tilley stated (below emphasis added):

> We are not aware of any soil tests that may have been performed, nor did we observe anything that would lead us to believe that there was any contamination or environmental condition affecting the subject property. It is assumed that there were no soil, subsoil, hazardous, or environmental conditions, which would preclude development of the property under the estimated highest and best use, or that, would adversely affect the market value estimated herein in any manner

[136] In his second Reply report, Mr. Tilley opined (below emphasis added):

> Layered on top of the two valuation scenarios is an assertion that there is environmental contamination at the subject property that would cost $2,354,868 to address, according to environmental expert Stantec that has been retained by Metrolinx. It is MPR's approach to deduct the environmental remediation cost estimate from the estimate of market value, but then also make a counter-adjustment for interim income. The net downward adjustment is $675,000 ($2,354,868 - $1,680,000). In our experience, these issues there is typically some environmental remediation work required for almost every property, as well as some form of interim income after the sale. Therefore, an average comparable sale already incorporates into its sale price. These items are usually small

and insignificant enough, that they get addressed via contingency allowances in the overall redevelopment budget. However, where either an environmental remediation cost is notably higher than average, or there is an interim income that is higher than what is typical, an adjustment could be warranted. The downward adjustment of $675,000 made by MPR in valuation scenario one is about 1% of the starting estimate of market value at $66,230,000, and therefore is in our view not a major issue in any event.

[137] Mr. Wilson, the second appraiser retained by the Claimant, noted that Mr. Penney had referenced the Stantec environmental cost estimates, but offered no substantive views on the issue.

[138] Stantec was retained by Metrolinx for the purpose of this proceeding. On the other hand, MBN Environmental Engineering Inc. had conducted prior environmental site assessments of the Property in December 2020 and in March 2021 – its testifying expert retained by the Claimant was Rob Hoag. Those reports were made available to Stantec and its Stantec conclusions were partly based on a review of them.

[139] Stantec's final revised opinions of probable costs to complete its proposed remedial approach are summarized in the tables below:

Table 6.1 REVISED. Summary of Remediation Areas

Remediation Area No.	Area (m^2)	Remediation Depth (m BGS)	Remediation Volume (m^3)	REVISED Remediation Depth (m BGS)	REVISED Remediation Volume (m^3)
1	480	4.0	1,920	2.3	1,104
2	1,715	3.0	5,145	3.0	5,145
3	346	0.8	277	0.8	277
4	876	2.0	1,752	2.0	1,752

5	233	0.5	117	0.5	117
Total			**9,210**		**8,394**

A revised opinion of probable costs to complete the proposed remedial approach is presented in **Table 7.1 REVISED** below. A revised detailed cost breakdown is provided in **Table 1 REVISED.**

Table 7.2 REVISED Remediation Opinion of Probable Cost

Tasks	Cost ($)
Environmental Assessment, Planning, and Technical Support	
Supplemental Phase Two ESA	$120,000
Remedial Action Plan	$5,000
Phase One ESA Update	$8,000
Technical Support (permits, approvals, planning, meetings, etc.)	$20,000
Environmental Assessment, Planning, and Technical Support - Total Probable Cost	**$153,000**
Proposed Development	
Incremental Cost for Contaminated Soil Disposal within the Basement Excavation	**$1,007,280**

Tasks	Cost ($)
Soil Remediation - Confirmatory Sampling & Analysis	**$43,680**
Phase Two ESA Report with Remediation Results - To support RSC	$20,000
Removal of Contaminated Groundwater- Management and Treatment	$104,940
Removal of Contaminated Groundwater- Discharge Fee to City of Toronto Sewer	$40,410
Tier 3 Risk Assessment - To support RSC	$120,000
Installation of Post Construction Monitoring Points for CPU Monitoring - To support RSC	$60,000
Annual CPU Risk Management Monitoring Requirements -To Support RSC	$160,000
Filing of a Record of Site Condition (RSC)	$10,000
Proposed Development - Total Probable Cost	**$1,566,310**
Contingency 20%	**$343,862**
TOTAL PROBABLE COST (Excluding HST)	**$2,063,172**

[140] Mr. Hoag in his written and oral evidence opined that the above noted proposal and costs were excessive. In fact, the following table demonstrates that his opinion was that Stantec's cost estimate should be reduced by approximately 50%:

5.0 SUMMARY

Table 5.1 below summarizes MBN's estimated cost for the remedial activities compared to Stantec's estimate:

TABLE 5.1 COMPARISON OF ESTIMATED COSTS FOR REMDIAL ACTIVITIES			
Item	***Stantec Estimated Cost***	***MBN Estimated Cost***	***Comment***
Sub-Total Environmental Activities, Planning, and Technical Support	$ 153,000	$ 153,000	No significant issues with cost or scope; cost carried for comparison purposes
Incremental Cost for Soil Disposal withing Basement Excavation	$1,105,200	$ 605,000	Incremental cost and volume significantly over-estimated by Stantec
Soil Remediation - Confirmatory Sampling & Analysis	$ 47,840	$ 22,260	Effort and cost for confirmatory sampling over-estimated by Stantec
Phase Two ESA Report with Remediation Results - To Support RSC	$ 20,000	$ 20,000	No significant issues with cost or scope; cost carried for comparison purposes
Removal of Contaminated Groundwater - Management and Treatment	$ 104,940	$ 0	Dewatering will be required for excavation; sewer characterization samples indicate no extraordinary treatment is required
Removal of Contaminated Groundwater - Discharge Fee to City of Toronto Sewer	$ 40,410	$ 0	Dewatering will be required for excavation; sewer characterization samples indicate no extraordinary treatment is required
Tier 3 Risk Assessment - To Support RSC	$ 120,000	$ 120,000	No significant issues with cost or scope; cost carried for comparison purposes
Installation of Post Construction Monitoring Points for CPU Monitoring - To Support RSC	$ 60,000	$ 20,000	Cost to install monitoring points over-estimated by Stantec
Annual CPU Risk Management Monitoring Requirements - To Support RSC	$ 160,000	$ 64,000	Duration and level of effort/associated costs over-estimated by Stantec
Filing of RSC	$ 10,000	$ 0	RSC will be required irrespective of whether soil and groundwater meet SCS or RA is completed
Sub-Total	**$1,668,390**	**$ 851,260**	
Contingency (20-percent)	**$ 364,278**	**$ 200,852**	
TOTAL COST (Excluding HST)	**$2,185,668**	**$1,205,112**	**Corrected estimated cost is $980,600 lower (rounded) than Stantec estimate**

[141] Metrolinx points out that Mr. Hudson had an advantage over Mr. Hoag, having been to the Property after the expropriation to carry out the archaeological investigations on the entire Site upon which Mr. Hoag report was partly based. Mr. Hoag instead relied on Mr. Hudson's investigations to form his opinion. On the other hand, Mr. Hoag did prepare a phase one and a phase two environmental Site assessment prior to the expropriation, which Mr. Hudson reviewed as part of his analysis, Mr. Hoag's investigations only occurred on the northern portion of the Property not on the southern portion where the Porsche dealership physically stood.

[142] The Claimant's position is as stated in paragraph [151], but Metrolinx argued that (below emphasis added):

> Ultimately, Mr. Hoag agreed with Mr. Hudson's approach and simply disagreed, without any apparent foundation, with the cost estimates of several items. Although Mr. Hoag provided his own costs estimates, he made no time adjustments to those costs. Given the depth of analysis undertaken by Mr. Hudson and his extensive experience working on development sites in downtown Toronto, Metrolinx submits that Mr. Hudson's evidence must prevail

[143] The Tribunal agrees with Metrolinx that an appropriate amount in respect of the environmental remediation costs does represent a proper deduction from the market value determination for the Property. In that regard, the Tribunal disagrees with the contrary position argued by counsel for the Claimant.

[144] However, insofar as the quantum of the costs is concerned, the Tribunal is of the view that some of the costs predicted by Mr. Hudson and Stantec are excessive and, based on Mr. Hudson's testimony may be partly related to demolition costs rather than environmental remediation. Additionally, that the large contingency allotment of Mr. Hudson seems unreasonable. The Tribunal was also puzzled by the suggestion by Mr. Penney that 'net interim rental income' be essentially set off against the environmental remediation costs (since he had proposed that it would be solely applicable to the Lease encumbrance cost reduction) – and further notes that Metrolinx does not propose this in paragraph 230 of its closing submissions.

[145] Based on its careful review of all of the evidence and opinions provided, the Tribunal determines that the amount of $1,000,000 shall represent the proper reduction for the environmental costs that a willing buyer would likely insist be paid or otherwise accounted for by the seller. This will be applied to the market value determination.

G SUMMARY OF OVERALL CONCLUSIONS

[146] As set out above, the Tribunal has reached the following findings and conclusions based on the oral and written evidence submitted and the detailed final argument submissions made by the counsel for both Parties both in writing and during the oral argument hearing:

(a) The HBU of the Property was a high, two-tower mixed use development, with a significant base building podium and the Claimant would likely have received development approval for density on the Site comprising up to **475,000 square feet of gross floor area (GFA)**;

(b) The Scheme was the announcement of the Ontario Line transit project in April 2019;

(c) The MZO of April 8, 2022, is clearly part of the Scheme and must be disregarded by the Tribunal;

(d) The Lease does not constitute an encumbrance that must be quantified and then deducted from the market value determination for the Property. This is due to the unique circumstances discussed above concerning the common control of the Tenant and the Claimant.

(e) The costs of required environmental remediation of the Property that would be incurred in order for it to be sold to a willing purchaser is **$1,000,000**;

(f) The figure of $187 PSF buildable is accepted as the basis for the market value determination which is therefore = **$88,825,000** (being $187 PSF x 475,000 total GFA).

ORDER

[147] **THE TRIBUNAL ORDERS THAT**:

(a) Metrolinx is liable to pay to 1255870 Ontario Limited the following amount:

$88,825,000

less: $1,000,000 (costs of environmental remediation)

less: The amount of advance payments made by Metrolinx to 1255870 Ontario Limited in respect of its claims made in this proceeding, pursuant to section 25 of the *Expropriation Act*, R.S.O. 1990, c. E.26, ("Act")

(b) Costs and interest payable under the Act shall be as agreed upon by the Parties or as determined by this Tribunal in accordance with Rule 26 of the OLT Rules of Practice and Procedure and the provisions of the Act; and

(c) This Vice Chair shall remain seized with respect to all matters arising from the Orders made above.

"William R. Middleton"

WILLIAM R. MIDDLETON
VICE-CHAIR

Attachment 1

OLT File No: OLT-23-000350

ONTARIO LAND TRIBUNAL

IN THE MATTER OF THE *EXPROPRIATIONS ACT*, R.S.O. 1990, c. E-26
AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

1255870 ONTARIO LIMITED

Claimant

- and -

METROLINX

Respondent

EXHIBIT LIST

Exhibit No.	Description	Date Filed	Filed By
1.	Joint Document Brief of the Parties – Volume 1 (Tabs 1-182), filed on October 25, 2024	November 4, 2024	
2.	Joint Document Brief of the Parties – Volume 2 (Tabs 183-206), filed on October 25, 2024	November 4, 2024	

Exhibit No.	Description	Date Filed	Filed By
3.	Joint Document Brief of the Parties – Volume 3 (Tabs 207-310), filed on October 25, 2024	November 4, 2024	
4.	Agreed Statement of Facts of the Planning Expert Witnesses Meeting Outline, dated November 1, 2024	November 4, 2024	
5.	Agreed Statement of Facts of the Urban Design Planners, dated October 23, 2024	November 4, 2024	
6.	Agreed Statement of Facts of the Business Loss Experts, dated October 25, 2024	November 4, 2024	
7.	TBC – Agreed Statement of Facts of the Environmental Experts, dated _	November 4, 2024	
8. A	Request to Admit of Metrolinx, dated October 11, 2024	November 4, 2024	

Exhibit No.	Description	Date Filed	Filed By
8. B	Response to Request to Admit of the Claimant, dated October 30, 2024	November 4, 2024	
9.	*Evidence Act* Notice of Metrolinx, dated October 28, 2024	November 4, 2024	
10.	Visual Evidence Brief of the Claimant, dated October 25, 2024	November 4, 2024	
11.	Visual Evidence Brief of Weston Consulting, dated October 2024	November 4, 2024	
12.	Visual Evidence of D. Cicero, "Ontario Line" images	November 4, 2024	
13.	Visual Evidence of MPR, "Table A – Average and Median Monthly Price Change for "Condo Apartments" in the TRREB C08 District"	November 4, 2024	

Exhibit No.	Description	Date Filed	Filed By
14. A	Witness List of the Claimant, dated July 15, 2024	November 4, 2024	
14. B	Supplementary Witness List of the Claimant, dated July 18, 2024	November 4, 2024	
15.	Witness List of Metrolinx and Supplementary Witness List	November 4, 2024	
16.	Planning and Urban Design Opinion Letter, prepared by Bousfields Inc. dated June 4, 2024	November 4, 2024	Claimant
17.	Planning Reply Letter, prepared by Bousfields Inc., dated October 15, 2024	November 4, 2024	Claimant
18.	Appraisal Report: Estimate of Market Value for a Full Taking of a Redevelopment Property, prepared by gsi Real Estate & Planning Advisors Inc., dated July 8, 2024	November 5, 2024	Metrolinx

Exhibit No.	Description	Date Filed	Filed By
19.	Peer Review Planning Opinion – Expropriation – 68 & 70 Parliament, prepared by Goldberg Group, dated July 31, 2024	November 5, 2024	Metrolinx
20.	Drawing of WZMH Proposal and a-A Proposal - Cross Street Section of 68 & 70 Parliament, prepared by Weston Consulting, dated October 2024	November 5, 2024	Metrolinx
21.	a-A Project Approval Timeline 2006-2024	November 6, 2024	Metrolinx
22.	Witness Statement of Len Abelman, OAA, MRAIC, dated September 3, 2024	November 6, 2024	Claimant
23.	Urban Design Review of Proposed Development Recommendations relating to Metrolinx Expropriation, prepared by SRM Architects + Urban*Designers, dated July 2, 2024	November 7, 2024	Claimant

Exhibit No.	Description	Date Filed	Filed By
24.	Site Plan Review Letter, prepared by R. J. Burnside & Associated Limited, dated August 8, 2024	November 7, 2024	Claimant
25.	Reply Witness Statement of David Angelakis, CET, dated October 15, 2024	November 7, 2024	Claimant
26.	Expert Reply Report – Transportation Opinion for: 68-70 Parliament Street, Toronto, Ontario, prepared by TYLin International Canada Inc., dated October 15, 2024	November 7, 2024	Metrolinx
27.	Review of Stantec Remedial Estimate, prepared by MBN Environmental Engineering Inc.	November 7, 2024	Claimant
28.	Remedial Estimated: 68 & 70 Parliament Street, Toronto, Ontario, prepared by Stantec, dated September 4, 2024	November 7, 2024	Metrolinx

Exhibit No.	Description	Date Filed	Filed By
29.	Remedial Estimate Update, 68 & 70 Parliament Street, Toronto, Ontario, prepared by Stantec, dated November 6, 2024	November 7, 2024	Metrolinx
30.	Phase Two Environmental Site Assessment of 70 Parliament Street, Toronto, Ontario, prepared by MBN Environmental Engineering Inc.	November 7, 2024	Metrolinx
31.	Redacted Porsche Dealer Sales and Service Agreement – Standard Provisions	November 8, 2024	Metrolinx
32.	Redacted Porsche Dealer Sales and Service Agreement, dated April 22, 2016	November 8, 2024	Metrolinx
33.	Limited Critique Report of the Tautrims Report, prepared by RSM Canada, dated October 15, 2024	November 8, 2024	Claimant

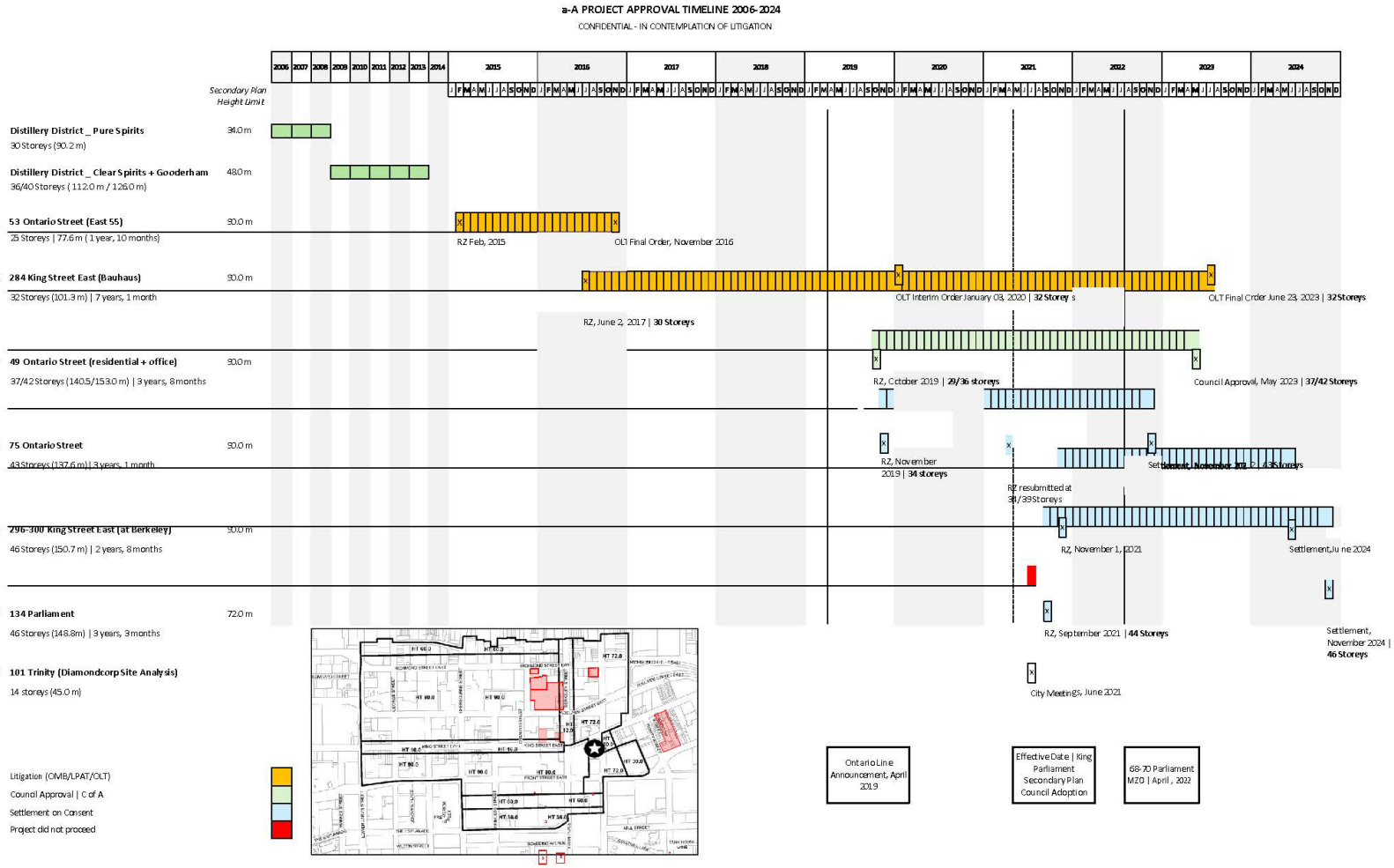
Exhibit No.	Description	Date Filed	Filed By
34.	Fully Executed Section 24 Agreement between 1255870 Ontario Limited, DFC Auto Group Inc, and Metrolinx, dated October 22, 2024	November 8, 2024	Metrolinx
35.	Appraisal Review Report – Estimate of Market Value for the Expropriation of a Redevelopment Property, prepared by gsi Real Estate & Planning Advisors Inc., dated October 15, 2024	November 8, 2024	Metrolinx
36.	CBV Institute Practice Standard No. 410	November 8, 2024	Metrolinx
37.	Revised Time Adjustment Calculations Chart, prepared by gsi Real Estate & Planning Advisors Inc.	November 12, 2024	Claimant
38.	Review of the Appraisal Report prepared by gsi Real Estate & Planning Advisors Inc. regarding the Market Value of 68/70 Parliament Street, prepared by MPR Advisors Inc., dated October 15, 2024	November 12, 2024	

Exhibit No.	Description	Date Filed	Filed By
39.	Markup of gsi Real Estate & Planning Advisors Inc.'s Development Activity (pg. 52)	November 12, 2024	
40.	Context Air Photo with GSI & MPR Comparable Development Land Sales Maps Overlay, prepared by Weston Consulting.	November 12, 2024	
41.	Appraisal Review, prepared by Wilson Realty Services, dated October 11, 2024 and CV & Acknowledgment of Expert's Duty of Guy Wilson, dated October 15, 2024	November 12 & 13, 2024	
42.	Witness Statement of Weston Consulting: Planning Opinion, dated September 5, 2024	November 14, 2024	Metrolinx
43.	Reply Expert Report of the Respondent, prepared by Weston Consulting, dated October 15, 2024	November 14, 2024	Metrolinx

Exhibit No.	Description	Date Filed	Filed By
44.	Witness Statement of Peter R. Clewes, dated September 5, 2024	November 14, 2024	Metrolinx
45.	Staff Report: 517-523 Richmond Street East and 97-115 Berkeley Street – Zoning By-law Amendment Application – Decision Report – Approval, dated September 9, 2024	November 15, 2024	Claimant
46.	Reply Expert Report of the Respondent: Urban Design Opinion, prepared by Weston Consulting, dated October 15, 2024	November 15, 2024	Metrolinx
47.	Reply Witness Statement of Peter R. Clewes, of architects-Alliance, dated October 10, 2024	November 18, 2024	Metrolinx
48.	Development Options Summary, prepared by a-Architects	November 18, 2024	Metrolinx
49.	A0.06 Bylaw 393-2021 Building Setback and Height Diagram, prepared by a-Architects	November 18, 2024	Metrolinx

Exhibit No.	Description	Date Filed	Filed By
50.	October 2020 Google Street View - 411 Richmond Street and East 55 Condos	November 18, 2024	Claimant
51.	City of Toronto Staff Report – PH20.4 – Proposed Review of Parking Requirements for New Development, dated January 5, 2021	November 20, 2024	Claimant
52.	Planning Opinion Report: 68-70 Parliament Street, Toronto, prepared by SGL Planning & Design Inc., dated September 5, 2024	November 20, 2024	Metrolinx
53.	Reply Expert Report on behalf of the Respondence, SGL Planning & Design Inc., dated October 15, 2024	November 20, 2024	Metrolinx
54.	Witness Statement of D. Cicero, dated September 5, 2024	November 20, 2024	Metrolinx
55.	Reply Witness Statement of D. Cicero, date October 15	November 20, 2024	Metrolinx

Exhibit No.	Description	Date Filed	Filed By
56.	Expert Report prepared by Hallinan Tautrims, dated September 4, 2024	November 22, 2024	Metrolinx
57.	Redacted Engagement letter for Hallinan Tautrims, dated January 21, 2021	November 22, 2024	Claimant
58.	Email chain between Hallinan Tautrims and RSM re: "FW: OLT-23-000350 – Metrolinx ats 1255870 Ontario Limited, dated August 2-13, 2024	November 22, 2024	Claimant
59.	Retrospective Appraisal Report: Valuation of High Density Mixed-Use Development Land, prepared by MPR Advisors Inc., dated September 5, 2024	November 25, 2024	Metrolinx
60.	Update to MPR Report (8-pages), dated September 5, 2024, delivered November 25, 2024	November 25, 2024	Metrolinx

Exhibit No.	Description	Date Filed	Filed By
61.	Revised Table 12 - Summary of Adjustments to the Comparable Sales of the MPR Report, dated September 5, 2025	November 25, 2024	Metrolinx
62.	City Council Decision (2024.CC17.11) – 126-134 Parliament Street, 529 Richmond Street East and a Portion of Worts Lane – Ontario Land Tribunal Hearing – Request for Directions, dated April 17, 2024	November 25, 2024	Claimant
63.	Heritage Impact Assessment for 212-218 Dundas Street East – Filmores Hotel, prepared by DBCA Architects, dated June 25, 2021	November 25, 2024	Claimant
64.	Settlement Letter form Aird & Berlis, dated April 2, 2024 – Appendix "A" to City Council Decision 2024.CC17.11 found at Exhibit 62	November 25, 2024	Metrolinx
65.	Read-In Brief of Metrolinx of various examinations of the Claimants representatives, dated November 25, 2024	November 26, 2024	Metrolinx

Attachment 2