LAND COMPENSATION BOARD

FOR THE PROVINCE OF ALBERTA

ORDER NO. 387 **FILE NO. 10785.0**

October 1, 1999

An Application to Determine Compensation payable for the expropriation of land, filed with the Land Compensation Board, pursuant to the Expropriation Act, R.S.A. 1980, Chapter E-16.

BETWEEN:

MOUNT LAWN INDUSTRIES LTD.
and
BRIGGS TRUCKING AND EQUIPMENT LTD.

Claimants

- and -

THE CITY OF EDMONTON

Respondent

BEFORE:

THE LAND COMPENSATION BOARD FOR THE PROVINCE OF ALBERTA

SITTING MEMBERS:
- Marilyn McAvoy, Presiding Member
- Rod Nelson
- Stan Schumacher, Q.C.

APPEARANCES:

For the Claimants: - Donald P. Mallon, Counsel

Witnesses:

- Mr. Robert Briggs;
- Mr. Larry Douglas Thimer;
- Mr. Bryan Clayton Bradley;
- Mr. Bernard Briggs;
- Mr. Chester Owen Mullin;
- Mr. Ronald E. Gallagan;
- Mr. Brian S. Gettel; and
- Mr. Morris D. Maccango.

For the Respondent: - Darren W. Moroz, Counsel

Witnesses:

- Mr. Myron J. Kopylech; and
- Mr. Rick Daviss.

PLACE: Held in the City of Edmonton in the Province of Alberta on June 21, 22, 23, 24, 25 and 28, 1999, at the Office of the Land Compensation Board.

An Application was made on November 29, 1991, by Mount Lawn Industries Ltd. and Briggs Trucking and Equipment Ltd. ("the Claimant Mount Lawn and the Claimant Briggs"), pursuant to the provisions of the Expropriation Act, R.S.A. 1980, Chapter E-16, ("the Act"), for an Order of the Board fixing the compensation to be paid by the City of Edmonton ("the Respondent") as a result of the expropriation of the following lands:

PLAN 782 0106
BLOCK (F)
LOT TWELVE (12)
CONTAINING 1.21 HECTARES, MORE OR LESS
(EDMONTON SEC. 15-53-24-W.4TH)
EXCEPTING THEREOUT ALL MINES AND MINERALS.

("the Mount Lawn Property").

BACKGROUND:

The corporate Claimants are a family owned business. Mr. Robert Briggs started the business which eventually employed his son, Bernie Briggs and son-in-law Bryan Bradley. Mr. Bradley left the company in 1982, but continues to be a shareholder of the Claimant Mount Lawn.

The Claimant Briggs, commencing in 1963 or 1964, operated a farm equipment sales and truck hauling business, from the Mount Lawn Property. The Mount Lawn Property was located across the street from the United Farmers of Alberta Farm Supplies (UFA). Throughout the years, customers would travel back and forth between these two locations.

Originally the Mount Lawn Property was leased, but was purchased by the Claimant Mount Lawn in 1980 and leased to the Claimant Briggs. Once the land was owned, the Claimant Briggs began the process of improving it. A building was necessary to house and maintain the Briggs diesel trucks and to sell and repair farm equipment. Mr. Bradley, the manager of day-to-day operations at the Mount Lawn Property, was in charge of coordinating the new building.

In furtherance of the new building, a development permit was issued in June 1981, contracts were executed, deposits paid and the building was ordered. Mr. Robert Briggs spoke to a machinist, Larry Thimer about leasing a portion of the new building.

In July 1981, shortly after the development permit was obtained, the Respondent notified Mr. Bradley of its intention to acquire all of the Mount Lawn Property for the Capilano Expressway extension (Exhibit 7, Volume 1, Tab 21). The Respondent after being told of the Claimant's plan to construct a building recommended that the Claimants not engage any sub-trades with respect to it. (Exhibit 7, Volume 1, Tab 25)

The Claimants' lawyer in August 1981 notified the Respondent that his client would be seeking costs with respect to the proposed building. The lawyer also confirmed that the Claimants would take steps to mitigate this loss. (Exhibit 7, Volume 1 Tab 24)

Negotiations between the parties continued from 1981 to 1983. In late 1981, the Respondent offered to purchase the property for $750,000.00 (Exhibit 7, Volume 1, Tabs 31 and 32). With winter approaching and no building on the Mount Lawn Property, the Briggs endeavoured to find rental property to house their trucking fleet. Their attempts to secure a rental property were unsuccessful and in February 1982 the Claimant Mount Lawn purchased an improved property located at 128th Avenue and 52nd Street ("the 52nd Street Property") for $140,000.00. A number of improvements were required to be made to the property, including the payment of City of Edmonton local improvement charges.

In late 1982, Mr. Dallin, a realtor on behalf of the Claimants, offered to sell the Mount Lawn Property to the Respondent for $1.8 million. In response to this letter, the Respondent arranged for an opinion of value which came in at $947,430.00 (Exhibit 32).

In March 1983, Myron Kopylech, Supervisor of Acquisitions for the Respondent, notified Mr. Dallin that the funds for the acquisition of the Mount Lawn Property had been cancelled and the Claimants could proceed with development of this site. Mr. Prowse, solicitor for the Claimants, telephoned the Respondent requesting that it purchase the 52nd Street Property. In April 1983, Mr. Kopylech wrote to Mr. Prowse confirming that funding had been cancelled.

The Claimant Briggs carried on business between the two properties, 52nd Street and Mount Lawn, until 1990, when the Respondent formally expropriated the latter property.

The Claimants relocated to property at 11350 - 2nd Street ("the Cloverbar Property"). Following the move, the Claimant Briggs discontinued the business of farm equipment sales and began leasing heavy duty equipment. The trucking aspect of the business continued. The Claimant Mount Lawn continues to own the 52nd Street Property.

FACTS NOT IN DISPUTE:

1. A Certificate of Approval of the Mount Lawn Property was registered at the Land Titles Office on September 25, 1990.

2. A Notice of Proposed Payment and a cheque in the Amount of $417,263.00 was served on the Claimants on December 20, 1990.

3. An Application for Determination of Compensation (ADC) was filed with the Board on November 29, 1991. This application was amended on June 18, 1999.

4. A Reply to the ADC was filed with the Board on December 20, 1991. An Amended Reply was filed with the Board on June 21, 1999 as Exhibit 2.

5. A further payment of $6,000.00 was made to the Claimants by the Respondent on March 14, 1991, with respect to disassembling the canvas structure on the Mount Lawn Property.

6. A further payment of $17,687.00 was made to the Claimants by the Respondent on March 26, 1991 to cover relocation costs.

7. A Notice of Possession was issued on October 4, 1990.

8. The Claimants gave up possession of the Mount Lawn Property with the exception of one building in March 1991 and moved to the Cloverbar Property.

9. The market value of the Mount Lawn Property on September 25, 1990, was $415,000.00.

10. All of the properties, Mount Lawn, 52nd Street and Cloverbar, were or are owned by the Claimant Mount Lawn.

11. Both Claimants are controlled by the same shareholders.

ISSUES TO BE DETERMINED BY THE BOARD:

1. What is the valuation date for the purpose of determining the market value of the Mount Lawn Property?

2. Is the Claimant Mount Lawn entitled to claim the market value of the Mount Lawn Property as of September 25, 1990, and disturbance damages of $455,000.00, being the difference in the market value on July 28, 1981 and September 25, 1990?

3. (a) Were the negotiations between the parties in 1981-1983 part of the expropriation process?

   (b) Were the damages causally connected, not too remote and reasonable?

4. Are the Claimants entitled to the present value of the disturbance damages awarded?

5. Are the Claimants entitled to the disturbance damages claimed for the period prior to the registration of the Certificate of Approval on September 25, 1990?

6. Are the Claimants entitled to the disturbance damages claimed for the period after September 25, 1990?

7. Are the Claimants entitled to an award pursuant to Section 44 of the Expropriation Act?

8. Are the disturbance damages claimed for the period 1981- 1983 barred under the Limitation of Actions Act, RSA 1980, Chapter L.-15?

9. What is the rate of interest payable with respect to any award made by the Board?

10. Is the Respondent entitled to claim set-off?

ANALYSIS:

1. What is the Valuation Date for the Purpose of Determining the Market Value of the Mount Lawn Property?

The Claimant Mount Lawn requests that the market value of the Mount Lawn Property be determined as of July 28, 1981. The basis for this claim the Claimant argues, is that this is the date the Respondent first exercised ownership rights over the property.

Counsel for the Claimants points out, that the Act does not define the date for valuation, although the Board in the past has used the date of registration of the Certificate of Approval.

The Board finds that although the Respondent in 1981 requested that the Claimant not construct a building on the Mount Lawn Property, it did not enter into possession, or in any way replace the Claimants as owner, as contemplated in Birmingham Corporation v. West Midland Baptist Trust (1970) A.C. 874 at p.911. After the termination of negotiations in 1983, the Claimant Briggs occupied the lands until they gave up possession in March 1991.

The Board finds that in the circumstances, the valuation date for determining the market value of the Mount Lawn Property is September 25, 1990.

2. Is the Claimant Mount Lawn Entitled to Claim the Market Value of the Mount Lawn Property as of September 25, 1990, and Disturbance Damages of $455,000.00, being the Difference in the Market Value on July 28, 1981 and September 25, 1990?

The Board finds that the Claimant Mount Lawn is entitled to receive the market value of the Mount Lawn Property as of September 25, 1990, in the sum of $415,000.00.

The Board finds that the Claimant has failed to establish why it would be entitled to claim the loss in value in the Mount Lawn Property between the two dates as disturbance damages. The loss in value was not caused by the expropriation.

3(a) Were the Negotiations Between the Parties in 1981-1983 Part of the Expropriation Process?

Negotiations for the acquisition of the Mount Lawn Property by the Respondent commenced in 1981. The Respondent, by a letter dated April 5, 1983 (Exhibit 29), notified the Claimants that funding for the acquisition had been cancelled. The question for the purpose of these proceedings, is whether the early negotiations were linked to the formal expropriation of September 25, 1990; or put another way, whether their termination in 1983 severed the link.

In Bersenas v. Minister of Transportation 31 LCR 97 (cited in the Supreme Court of Canada decision Dell v. Toronto Area Transit, 142 DLR 206) the expropriation was a lengthy process commencing in 1973 with a visit to the land by government representatives. In 1976 the Ministry advised the landowner that it required vacant possession by April of 1978. Based on this information, the landowner sold his tobacco quota in 1977. Formal expropriation did not occur until February 1979. Part of the owner's claim for compensation was for losses associated with the premature sale of his tobacco rights. The expropriating authority contended that the landowner sold his rights when he was under no compulsion to do so. It argued that it was the landowner's free choice and he must bear the risk of the loss. The Divisional Court of Ontario upheld the decision to award the landowner his pre-formal expropriation losses.

> *The expropriation having in fact occurred in law when the notice was served might also ought to be viewed as encompassing the acts of the parties in contemplation of it,*

> *including the information furnished by the ministry, the negotiations, the forecast of completion, the assurance of the minister that it would in fact be formalized.* (at page 113)

Although these comments were provided in the context of determining the reasonableness of the steps taken by the landowner, they support the Claimant's contention that negotiations prior to the formal expropriation can be part of the process of expropriation.

In contrast to the Bersenas decision, the Manitoba Court of Appeal in JY Investments Ltd. v. The Queen in Right of Manitoba 35 LCR 12, held that the landowner's decision to liquidate its business three years before the formal expropriation, based on a telephone conversation with the Minister, was unjustified.

The Manitoba Court of Appeal on pages 20-21, held, in reviewing the claim for compensation for disturbance damages:

> *Where it is inevitable that expropriation is to follow, it may be arguable that expenses incurred in anticipation of the expropriation may have a causal connection with the expropriation although precedent to it in point of time.*
>
> *...I do not think it is reasonable to see in the conversations with the Minister the beginning of an expropriation process, such as is referred to in the cases cited to us.*

It appears from these two cases, that in order to justify a finding that early negotiations are part of the expropriation process, there must be some evidence or certainty that expropriation is to follow. More recently the Supreme Court of Canada in Dell, confirmed that an act of

expropriation is not merely the transfer of title, but may include, the steps taken in the process to acquire the lands.

In the present case the Respondent in the Northeast Corridor Study dated April 1, 1981, identified the completion of the Capilano Expressway as a high priority (Exhibit 7, Volume 1, Tab 26). The Respondent's five year transportation program identified the first stage of construction for this project for the period 1984-86. Mr. M. Bains, a land negotiator for the Respondent, in July 1981, wrote to the Claimants indicating the Respondent's intention to purchase all of the Mount Lawn Property (Exhibit 7, Volume 1, Tab 21). The Respondent's intention to acquire the property went so far as advising the Claimants in writing not to proceed with sub-trades for its building project. The Board accepts Mr. Bryan Bradley's uncontradicted testimony of his conversation with Mr. Bains, where he was advised that if one brick was laid on another, the Respondent would immediately expropriate and only be responsible for reasonable costs.

The Respondent, after identifying the Mount Lawn Property as necessary for the extension of the Capilano Expressway secured funding from the City's Transportation Department by means of an Interdepartmental Requisition (IDR). Mr. Kopylech testified the IDR demonstrates that budgeted funds are available so that the Respondent's land agents can negotiate. In an exchange of memos in January 1982 between the Land Acquisition and Transportation Departments, the expropriation of the Mount Lawn Property was

recommended and agreed to (Exhibit 36 and Document 34, City of Edmonton Production of Documents). The Respondent offered to purchase the property for $750,000.00 and enclosed documents for execution by the Claimant Mount Lawn in October 1981 (Exhibit 7, Tabs 32 & 33).

Negotiations proceeded throughout 1982 into early 1983, at which time the Respondent advised the Claimants that funding for the acquisition had been cancelled (Exhibit 29). It is important to note that the project had not been cancelled, merely the funding.

The Capilano Expressway continued to be a priority of the Respondent after 1983. Mr. Robert Briggs testified that in 1986, Gordon Menzies from the City Transportation Department, telephoned the Claimants to see if they would be interested in a land exchange. Mr. Kopylech confirmed in testimony that in 1985 and 1986 more public hearings were held on the Capilano Extension. He testified that in 1988 and 1989, City Council approved the project and funding and by January 1989, the Respondent's negotiating team was back on the Claimant's doorstep. Mr. Kopylech testified that the proposed alignment of the Capilano Freeway extension was basically the same in 1981 and 1989.

Based on the foregoing the Board finds that the negotiations that took place from 1981 - 1983 were part of the expropriation process which was finalized on September 25, 1990. The hiatus which occurred between 1983 and 1990 because of lack of funding did not sever the link.

3(b) Were the damages causally connected, not too remote and reasonably incurred?

Having found that the 1981-83 negotiations were part of the expropriation process, all the losses claimed must be examined in light of the statutory requirements and keeping in mind the findings of the Supreme Court of Canada in the Dell case. For damages to qualify for compensation, the losses must be causally connected to the expropriation, not too remote and reasonably incurred. Each claim will be examined separately.

RELEVANT STATUTORY AUTHORITY -- Expropriation Act, R.S.A. 1980 Chapter E-16:

> ***42****(1) When land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.*
>
> *(2) When land is expropriated, the compensation payable to the owner shall be based on*
>
> *(a) the market value of the land,*
>
> *(b) the damages attributable to disturbance,*
>
> *(c) the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land to the extent that no other provision is made for its inclusion, and*
>
> *(d) damages for injurious affection.*
>
> ***50*** *The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs and expenses as are the natural and reasonable consequences of the expropriation, including,*
>
> *(a) when the premises taken include the owner's residence,*
>
> *(i) an allowance of*

(A) 5% of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes, or

(B) the actual amount proved with respect to those items,

whichever is the greater, to compensate for inconvenience and the costs of finding another residence, if the part of the land so used was not being offered for sale on the date of the expropriation, and

(ii) a reasonable allowance for improvements the value of which is not reflected in the market value of the land;

(b) when the premises taken do not include the owner's residence, the owner's costs of finding premises to replace those expropriated, if the lands were not being offered for sale on the date of expropriation;

(c) relocation costs, to the extent that they are not covered in clause (a) or (b), including

(i) moving costs, and

(ii) legal and survey costs and other non-recoverable expenditures incurred in acquiring other premises.

***51** (1) The expropriating authority shall pay to a tenant occupying expropriated land in respect of disturbance so much of the cost referred to in section 50 as is appropriate having regard to*

(a) the length of the term,

(b) the portion of the term remaining.

(c) any rights to renew the tenancy or the reasonable prospects of renewal,

(d) in the case of a business, the nature of the business, and

(e) the extent of the tenant's investment in the land.

(2) The tenant's right to compensation under this section is not affected by the premature determination of the lease as a result of the expropriation.

4. <u>Are the Claimants Entitled to the Present Value of the Disturbance Damages Awarded?</u>

The Claimants, with respect to ongoing disturbance damages and fixed costs, request that the amounts awarded be based on their present value. The Respondent in argument, did not appear to object to this and in fact, asked that such an adjustment be applied to the $415,000.00 purchase price.

The Board finds that the losses should be awarded based on their present value. Such an adjustment does no more than provide indemnity for the losses suffered. The adjustment of disturbance damages to reflect present value has been awarded by this Board previously in <u>Copley</u> v. <u>Alberta</u> 43 LCR 184.

Mr. Gallagan, an accountant and an expert witness for the Claimants in business valuation and financial analysis, calculated present value for the period up to 1989 by applying to the claims the average of interest paid on 90-day Treasury Bills (10.5%) and compounded the interest annually. For the period 1990 onwards, Mr. Gallagan utilized the average annual interest rates and compounded the interest annually. Those interest rates were as follows:

1991 - 8.73%
1992 - 6.59%
1993 - 4.84%
1994 - 5.54%
1995 - 6.90%
1996 - 4.21%
1997 - 3.26%
1998 - 4.72%
1999 - 4.63%

The Board finds this method both reasonable and appropriate and orders that the claims be present valued utilizing this method, from the date the costs or damages were incurred, to the date of the award.

If a disagreement arises in calculating this amount either party may return to the Board.

5. <u>Are the Claimants Entitled to Disturbance Damages Claimed for the Period Prior to September 25, 1990?</u>

(i) The Development Costs Lost as a Result of the Cancellation of the Building on the Mount Lawn Property:

Prior to the commencement of the process of expropriation, the Claimant Briggs had taken steps to construct a building on the Mount Lawn Property. Those plans were interrupted by the expropriation process. In fact, the Respondent by letter dated August 11, 1981, went so far as to advise the Claimants not to engage any sub-trades.

The "thrown away" expenses, which included the cost of a development permit, commercial crossing permit and cancellation fees on the building, totalled $9,036.00 (Exhibit 11). The expenses are supported by invoices found in Exhibit 7, Volume 1, Tabs 4, 6, 7, 8, 9, 11, 12, 13, 17, 18 and 20. The Board finds the losses are properly claimed as a direct and reasonable consequence of the expropriation. The Board orders that this amount be present valued from January 1, 1981, to the date of the award, utilizing the method previously approved by the Board.

(ii) Loss of Rental Income:

The Claimants claim a loss of $1000 per month for nine years for a lease with Larry Thimer which was frustrated because the building was not completed.

The Respondent submits that the claim should be denied because it is not clear from the evidence that the lease would have materialized. The Respondent also submits that the $1000 a month should be reduced to reflect that the Claimant made a greater capital investment to construct a building larger than it required for its own needs.

The Board finds that the expropriation process interfered with the completion of the building on the Mount Lawn Property. The Claimant's decision not to construct, was as a result of the representations made by the Respondent in its letters of July

14, 1981, and August 11, 1981. Mr. Bradley testified that after receiving the initial letter he contacted Mr. Bains and informed him of the Claimant's intention to construct a building. He was advised by Mr. Bains that if one brick was laid on another, the Respondent would immediately expropriate and only pay reasonable costs.

Mr. Robert Briggs and Mr. Thimer testified that the tenancy would have materialized had the building been completed. The witnesses were consistent in their evidence on the terms of the lease, namely, $1000 per month for 2000 sq. ft. for a term of at least four or five years. Mr. Thimer testified that he had a long standing relationship with the Briggs family and that a written lease was unnecessary. He felt the Mount Lawn Property was the ideal location for his machine shop because of it proximity to potential customers.

The Board is satisfied that on the evidence that the lease would have materialized had the building been constructed.

Mr. Gallagan reports the rental loss as $108,000.00, based on the net rental value of $1000/month for a term of nine years (1981-1990). Mr. Gallagan felt there was every reason to believe that Mr. Thimer would have continued his tenancy up to the date of the expropriation.

Mr. Gallagan justified not reducing the $1000/month value on the basis that an investment in the new building on the Mount Lawn Property and the purchase price of the 52nd Street Property were roughly equal. A building on the Mount Lawn Property provided a rental component which the 52nd Street Property did not. Mr. Gallagan concluded that what the Claimant Briggs had lost was the additional revenue which would have been generated by a lease with Mr. Thimer. The Board finds Mr. Gallagan's explanation reasonable.

The loss of the rental revenue was a reasonable consequence of the process of expropriation. Mr. Gallagan in Exhibit 11, calculates the present value of the rental loss to June 30, 1997 as $253,974.00. The Board orders payment of this amount, further present valued to the date of the award.

(iii) Loss in Value of 52nd Street Property between February 13, 1982 and September 25, 1990:

The Claimant Mount Lawn submits that because of the process of expropriation it was forced to purchase the 52nd Street Property to carry on its business. Their position is that the loss in value of this property between the date of purchase and September 25, 1990, is a loss it is entitled to claim.

Respondent's Counsel would deny this claim on the basis that the decision to purchase the 52nd Street Property was a business decision and that there is no causal connection to the expropriation.

The Respondent strongly recommended to the Claimant that it not build on the Mount Lawn Property. Messrs Robert and Bernie Briggs and Mr. Bradley testified that a building was necessary to house and maintain their trucks and farm equipment. Mr. Bradley testified that approximately 7 of the 10 trucks operated by the Claimant Briggs were diesel and this type of vehicle required housing in the winter. The success of the trucking business depended on the reliability of the Claimant's trucks.

Messrs. Robert Briggs and Bradley testified that after the July 1981 letter from the Respondent, they attempted to find rental property but without much success, as rental property was scarce. Mr. Robert Briggs stated that they entered into a month to month lease for land owned by Cyril Clarke, but after 4 months they were turned out. In February 1982 they purchased the 52nd Street Property from Cyril Clarke for $140,000.00.

The Board finds that the Claimant's decision to purchase the 52nd Street Property was reasonable in the circumstances. However, the important question is whether

the Respondent is liable under the Act for the all the losses it claims resulted from the acquisition. The Board finds that the claim for loss in value of the 52nd Street Property is too remote, too speculative. The damage, if damage has occurred, was not caused by the expropriation process but rather as Mr. Gettel (Claimants' appraiser) testified by a major downturn in property values between 1982 and 1983. The Mount Lawn Property also showed a loss in value of approximately 50% between 1981 and 1990. Had the building proceeded on the Mount Lawn Property, the market would have influenced that property's value as well.

The damage claimed in this case is distinguishable from the Bersenas decision referred to by Counsel for the Claimants. In that case, the Ministry told the landowner that it wanted vacant possession by the spring of 1978. As a consequence of that statement, the landowner did not plant a crop in 1978. The loss was a direct result of the Ministry's statements.

In the Dell decision, the expropriating authority's intention to take a portion of the landowner's land held up the development and the landowner was forced to carry the property and pay the higher development costs three years later. The damages were the immediate result of the authority's actions.

The Claimants also relied on LaFranco v. Metropolitan Toronto 25 LCR 11. In that

case, because of an expropriation the landowner could not proceed with the construction of a new restaurant. The landowner was forced to purchase a space which it previously rented and acquire an additional property. The landowner's claim was for the premium it paid over market value to acquire the new properties which were not listed and the higher costs of renovating old premises over new. The Ontario Board accepted both of these claims as damages flowing from the expropriation. The LaFranco case is distinguishable as it deals with extraordinary costs actually incurred, while here the Claimant seeks protection against normal business risks.

The claim is too speculative. There was as much chance that the 52nd Street Property would increase in value between 1982 and 1990. The Claimant Mount Lawn continues to own the 52nd Street Property, which is has leased to a third party since 1990. The Board denies this claim.

(iv) Cost of Operating from Two Locations:

From the date of the purchase of the 52nd Street Property to September 1990, the Claimant Briggs operated its business from two locations. The Claimant Briggs claims a loss resulting from carrying on business in this manner.

The Respondent submits that the decision to operate out of two locations was a business decision not associated with the expropriation process. As a consequence

the authority should not be responsible for any losses flowing from that decision. The Board has already found that the decision to purchase the 52nd Street Property was reasonable in the circumstances. Mr. Robert Briggs testified that the location across the street from UFA Farm Supplies was essential to the sale of used farm equipment. Mr. Bernie Briggs testified that after 1983 it appeared unwise to proceed with a building on the Mount Lawn Property as it was unclear when the Respondent would acquire it. He also gave evidence that the Claimant Mount Lawn had expended all of its building funds on the 52nd Street Property and had no cash left to construct a building on the Mount Lawn Property. Based on the foregoing the Board finds the Claimant's decision to operate the business from the 52nd Street Property and the Mount Lawn Property reasonable.

The evidence of Messrs. Bernie Briggs and Bradley, was that operating between the two locations was inefficient and costly in terms of time and manpower. Mr. Bernie Briggs testified that in the winter, at least two trips a day were necessary, with each round trip taking 45 minutes. Drivers had to travel to 52nd Street to pick up their trucks and then return to the Mount Lawn Property to pick up loads and receive instructions. In the summer the number of trips were less because the trucks could be stored outside. However, it was still necessary to travel to the site for repairs and security reasons.

The Board finds Mr. Gallagan's calculations of the loss associated with operating out of two locations reasonable and conservative (Exhibit 11). Mr. Gallagan calculated the extra cost to the Claimant Briggs at $5,670.00 per year, based on 252 trips a year for nine years. In Exhibit 11, Mr. Gallagan calculates the loss to the Claimant Briggs to June 30, 1997, as $120,002.00. The Board finds that the expense was a reasonable consequence of the expropriation and orders that claim be further present valued to the date of the award, in accordance with the Board's previous ruling.

6. <u>Are the Claimants Entitled to Disturbance Damages Claimed for the Period After September 25, 1990?</u>

(i) Business Losses - Loss of Contribution Margin and Increased Overhead:

As a result of the expropriation on September 25, 1990, the Claimant Briggs was forced to relocate its business. The Claimant Briggs claims certain losses and costs associated with its decision to discontinue the sale of farm equipment and the startup of the leasing of heavy equipment.

The Respondent suggested in cross- examination, that the decision to abandon farm equipment sales had nothing to do with the expropriation. The Board finds the suggestion contrary to the evidence. Both Briggs and Mr. Bradley testified that they knew as far back as 1981 that the success of farm equipment sales was tied to its location next to the UFA Farm Supplies. Mr. Bradley described the partnership as

symbiotic. Farmers travelling to the UFA site would cross the road to purchase equipment. The Claimant Briggs got a free ride on the coattails of UFA with respect to advertising and a customer base.

Mr. Robert Briggs testified that after the expropriation it was not practical for the Claimant to relocate to Fort Saskatchewan next to the new UFA Farm Supplies site. Such a move would have negatively impacted the trucking side of its business. In addition, there was no vacant lot next to the UFA site in Fort Saskatchewan. Messrs. Robert and Bernie Briggs both testified that but for the expropriation, the Claimant would have continued in the sale of used farm equipment.

Due to the loss of the UFA advantage, the Board finds the Claimant's decision to discontinue the business of used farm equipment sales and switch to the leasing of industrial equipment reasonable.

In reviewing the claim for business loss, the Board is aware that the Respondent at the outset of Mr. Gallagan's testimony, accepted his qualifications as an accountant, business valuator and financial analyst with expertise in business interruption losses. The Respondent's cross-examination in no way challenged Mr. Gallagan's methodology or results with respect to Exhibit 10. The Respondent called no rebuttal evidence and the Board finds that Mr. Gallagan's evidence is the best evidence.

(a) **Loss of Contribution Margin**:

The Claimant Briggs claims a loss of contribution margin from equipment sales for one year, 1991. Mr. Gallagan in Exhibit 10, compared the gross margin from equipment sales in 1991, to the average of that figure based on the Claimant's performance for the three years prior to 1991. Mr. Gallagan testified that he found gross margin and the operating income (gross margin less overhead) to be the most relevant figures for determining business losses. In testimony he stated that operating income tells you how much discretionary cash flow or income the business has to work with, "How much money is in your pocket". The Board accepts his explanation.

The Respondent questioned Mr. Gallagan on why he restricted his comparison or projection, to the three years prior to 1991, why not more? Mr. Gallagan explained that usually the results closest in time to the period you are predicting, are the best indicator. Also, the financial results of the most current three years were similar to the six year average prior to 1991. The Board accepts this explanation as reasonable.

On pages 30-31 of Exhibit 10, Mr. Gallagan summarizes the results of his examination of contribution margin. The three year average pre-move for

equipment sales was $178,533.00, or 23.54% of gross sales. In 1991, the contribution margin from equipment fell to $37,753.00, or 7.10% of gross sales. The difference between the three year average pre move and 1991 is $140,000.00. The final calculations appear on page 39 of Exhibit 10 and reflect the normalized loss of contribution margin (pg. 32, K.15.2, Exhibit 10). The final figure for loss of equipment contribution margin in 1991 is $123,147.00.

(b) <u>Increased Overhead</u>:

Mr. Gallagan testified that the Claimant Briggs suffered a short term loss due to the increased overhead required by the relocation of its business. The average normalized overhead pre-1991 was $108,747.00. The normalized overhead for 1991 including "new recurring costs" (Exhibit 10, page 40) was $185,000.00. Therefore, the loss under this category is $79,204.00.

Included in the claim for increased overhead are two items, Chester Mullin's 1991 salary and imputed interest. The decision of the Claimant Briggs to hire Mr. Mullin was reasonable in the circumstances. Mr. Briggs had very little knowledge of leasing heavy duty equipment. Mr. Mullin had been in the business for 40 years.

The imputed interest arises as a result of the $350,000.00 shareholder loan by Mr. Briggs to the business. Mr. Briggs testified that this loan was necessary to finance the purchase of heavy duty equipment for the new business. Mr. Gallagan has charged to the Claimant Briggs, an amount for interest on the money loaned for 1991. Mr. Gallagan justified the claim for increased overhead, " *...because to the extent that the contribution margin is not enough to cover the overhead you continue to have a loss."* The claim is restricted to one year. By 1992, Briggs had generated sufficient profits to cover the overhead.

The Board finds that the company suffered business losses as a result of the expropriation. The decision to move out of farm equipment into leasing industrial equipment was a reasonable one, which ultimately mitigated the Claimant's business losses.

The Board accepts Mr. Gallagan's calculations with respect to loss of equipment contribution margin and increased overhead in the amount of $202,351.00. The Board orders the preceding amount be present valued from January 1, 1992, to the date of the award.

(ii) Moving Costs

The move to the new premises was a consequence of the expropriation. The Claimant Briggs used its own resources to move after receiving quotes from two outside sources. Those quotes greatly exceeded the bill now submitted by the Claimant Briggs.

The Respondent did not call any evidence to suggest that the costs were unreasonable or not the natural consequence of the expropriation.

Mr. Gallagan reported moving costs under the categories internal (costs incurred by the Claimant using its own resources) and external (amounts paid to outside persons). The supporting invoices were introduced into evidence by Chester Mullin (an employee of the Claimant Briggs) and Bernie Briggs.

(a) Internal

The total of Exhibit 10, Schedule K (Labour Costs Only) and Schedule L (Equipment and Operator), is $64,011.00.

(b) External

External Moving Costs are identified in Exhibit 12, Column 3, as $2,247.81. Two further items were introduced in evidence and are identified as telephone costs of $270.00 for call forward and fuel costs of $645.00.
The total claimed for moving costs is $67,173.81.

The Board finds these costs reasonable and a direct consequence of the expropriation and orders payment of $67,173.81 less $17,687.00 (paid to the Claimant by the Respondent) to be present valued from January 1, 1991 to the date of the award, in accordance with the Board's previous ruling. It was unclear to the Board if the cost of removing the canopy fixture from the Mount Lawn Property was included in this claim. If it is, the $6,000.00 payment made by the Respondent shall be credited.

(iii) Additional Employees

The Claimant Briggs claims as a loss a portion of Mr. Mullin's 1990 and 1991 wages.

Mr. Mullin testified he was hired in 1990 to supervise the site preparation, moving, building construction and to facilitate the switch to leasing heavy duty equipment. Mr. Bernie Briggs testified it was necessary for the Claimants to hire someone of Mr. Mullin's experience to oversee that change from farm equipment to leasing heavy duty equipment. The Claimants had no experience in this area in contrast to Mr. Mullin, who had been in the business for 40 years.

Mr. Mullin estimated that he spent three months in 1990 clearing old houses from the Cloverbar site. He spent five months on the move and 50% of his time in 1991

promoting the leasing business.

Mr. Gallagan who reviewed the Claimant's records testified that between June and the end of 1990, Mr. Mullin's salary was $22,096.00. The Board finds that the Claimant is entitled to claim 50% of Mr. Mullin's salary for 1990 ($11,000.00). This amount should be present valued from January 1, 1991, to the date of the award in accordance with the Board's previous ruling.

The Board also finds that the Claimant Briggs is entitled to claim two-thirds of Mr. Mullin's 1991 salary of $32,865.00. This reflects the time spent by Mr. Mullin supervising the move and promoting the new business. The present value of this sum on June 30, 1999 is $46,926.00, and the Board orders that the Claimant Briggs is entitled to this sum, further present valued to the date of the award, in accordance with the Board's previous ruling.

(iv) Site Preparation

As a result of the expropriation, the Claimant submits it was required to prepare the Cloverbar site for its operations. The Claimant Briggs claims the costs associated with this item.

The expenses associated with site preparation are summarized in Exhibit 12 with the following revisions:

(1) Al-Terra Engineering Ltd. charge of $2,344.60 deleted
(2) TBG Engineering Ltd. charge of $3,222.73 deleted
(3) Twin City Excavating charge reduced to $2,566.00
(4) The salary of Len Dobie added $5,000.00

The invoices supporting this claim were introduced in evidence by Messrs. Mullin and Bernie Briggs.

The Respondent suggested that preparing a site for heavy duty equipment was different than used farm equipment. Other than this suggestion, the Respondent did not question the reasonableness of the charges.

The total claim for site preparation is $46,968.00. The Claimant is entitled to claim this amount, as a reasonable consequence of the expropriation, to be present valued from January 1, 1991, to the date of the award in accordance with the Board's previous ruling.

(v) <u>Equipment Loss During the Move</u>

Mr. Bernie Briggs testified that, because of the Respondent's requirement for possession the Claimant was forced to move during the winter months when the ground was frozen. Although damage was kept to a minimum, the forklifts, in attempting to remove equipment from the frozen ground, damaged a plough and two combine platform augers.

The Claimants' claim is for $3,500.00 for loss of equipment, which the Board finds reasonable and a consequence of the expropriation. The Board orders that the amount be present valued from January 1, 1991, to the date of the award in accordance with the Board's previous ruling.

(vi) Loss of Executive Time

The Claimant advanced a claim for $5,000.00, representing the time spent by Messrs. Robert and Bernie Briggs, in dealing with the expropriation. The Board finds the amount claimed is reasonable and the loss of management time to the business was an expense arising from the expropriation.

(vii) Interest Arising from the Purchase of the Cloverbar Property

The Cloverbar Property was purchased by the Claimant Mount Lawn in May 1990 for $275,000.00. Mr. Robert Briggs testified that the first $100,000.00 of the purchase price was financed by a loan from Robert Briggs to the Claimant Mount Lawn . Interest was charged to and paid by the Claimant.

The Agreement for the Cloverbar Property did not close for eight months and interest was charged at the rate of 12% on the outstanding $175,000.00. Mr. Bernie Briggs testified that this interest was paid by the Claimant Mount Lawn. Mr. Gallagan summarized the interest paid on acquiring alternate premises as follows:

(i) Interest paid to R. Briggs: $1,000.00/month x 8 months = $ 8,000.00

(ii) Interest paid to the vendor of Cloverbar Property:
$1,750.00/month x 8 months = 14,000.00

Total: **$22,000.00**

The Board finds that the interest paid is a reasonable expense caused by the expropriation and the Claimant Mount Lawn is entitled to recover this amount and that the amount be present valued from the date of the payment to the date of the award, in accordance with the Board's previous ruling.

7. Are the Claimants Entitled to an Award Pursuant to Section 44 of the Expropriation Act?

Section 44 of the Expropriation Act states as follows:

> ***44*** *In determining the amount of compensation payable no allowance shall be made on account of the acquisition being compulsory except where unusual circumstances exist for which no provision for compensation is contained in this Act.*

The Claimants seek the sum of $100,000.00 each, pursuant to the above section. Although the Claimants' Counsel stated in argument that the circumstances of this case were unusual, he provided no details.

The Board dismisses this claim. The circumstances of this expropriation, although protracted, are not unusual. Other sections of the Act adequately address all of the claims advanced by the Claimants.

8. Are the Disturbance Damages Claimed for the Period Prior to the Formal Expropriation Statute Barred Under the Limitation of Actions Act, RSA 1980, Ch. L-15?

In argument, Counsel for the Respondent submitted the Claimant's request to move the valuation date to July 1981, was based on the principle of "defacto expropriation". He argued that a defacto expropriation must meet certain tests, which the Claimants had failed to satisfy. The Respondent further submitted that even if there was a defacto expropriation, it is a common law remedy and therefore subject to Section 4 of the Limitation of Actions Act. The ADC in this case, was not filed until 1991, well outside the six year limitation period.

The Board has dismissed the claim to move the valuation date to 1981, although for reasons other than the Limitation of Actions Act. It is unclear from the Respondent's argument if it extends to the claim for damages which arose in 1981-1983. On the presumption that it does, the Board finds that the Claimants do not base their claims on a defacto expropriation. The claims for disturbance damage result from the process of expropriation which the Board has found commenced in 1981 and became a legal certainty on September 25, 1990. The Board is persuaded by the argument of Counsel for the Claimants, that Section 36 of the Expropriation Act sets out a specific limitation date. As a consequence, pursuant to Section 4(2) of the Limitation of Actions Act, the limitation date of six years it not applicable to a claim for damages under the Expropriation Act.

9. What is the Rate of Interest Payable with Respect to Any Award Made by the Board?

Section 66 of the Expropriation Act states that interest payable on disturbance damages is payable from the date of the award until payment in full.

The Board awards interest on the amounts ordered until the date of payment at a rate equal to the average annual interest paid on 90-day Treasury Bills, to be compounded annually. For 1999 that rate of interest is 4.63%.

10. Is the Respondent Entitled to Claim Set-Off?

In its Amended Reply to the ADC, the Respondent claims that the sum of $40,011.81 be deducted from any amount awarded to the Claimants. The Respondent submits that this was the cost of cleaning up the Mount Lawn Property because of contamination of the site.

Mr. R. Daviss, Director of Real Estate Services for the Respondent, testified that the $40,011.81 was paid pursuant to a 1997 agreement with a purchaser of a portion of the Mount Lawn Property. Two reports by Omni McCann Consulting Engineers and supporting invoices were entered as exhibits. The authors of the reports were not called.

The Claimants called an expert hydrologist, Mr. M. Maccagno, who reviewed the Omni McCann Reports and the invoices submitted with respect to the clean-up. It was Mr. Maccagno's opinion that there was no evidence to show why the clean-up of the Mount

Lawn Property had been so extensive. Only two bore holes were drilled and only one showed any existence of pollutants. He testified that more holes should have been drilled. Referring to the Department of the Environment's 1994 Remediation Guidelines for Petroleum Storage Tanks, Mr. Maccagno felt there was no evidence which would support a clean up of this magnitude on an industrial site like the Mount Lawn Property.

Mr. Maccagno also suggested that the Respondent may have been over-billed with respect to the quantity of clean fill used to fill up the 200 cubic metre hole which remained after the contaminated soil was removed. He stated that the Respondent paid for approximately 700 cubic metres of fill when typically a hole of this size would only require 250 cubic metres.

In the absence of a witness to respond to Mr. Maccagno's testimony, the Board finds that the Respondent has not proven its claim with respect to set-off.

The Board dismisses the Respondent's claim for set-off.

COSTS:

The Board acknowledges that the parties have reserved the right to appear before the Board in the matter of costs.

THE BOARD HEREBY ORDERS AS FOLLOW:

The Respondent shall pay to the Claimants:

(i) Development costs lost of $9,036.00, present valued from January 1, 1981 to the date of the award, in accordance with the Board's ruling.

(ii) To the Claimant Briggs, the loss of rental income of $1000/month for the period January 1, 1982 to December 31, 1990, to be present valued to the date of the award in accordance with the Board's ruling.

(iii) To the Claimant Briggs, the cost of operating out of two locations of $5,670.00/year, for the period January 1, 1982 to December 31, 1990, to be present valued to the date of the award in accordance with the Board's ruling.

(iv) To the Claimant Briggs, business losses and increased overhead of $202,351.00, present valued from January 1, 1992, to the date of the award in accordance with the Board's ruling.

(v) To the Claimant Briggs, moving costs of $67,173.81 less $17,687.00 (paid by the Respondent and less $6,000.00 if the claim includes the canopy fixture), present valued from January 1, 1991, to the date of the award in accordance with the Board's ruling.

(vi) To the Claimant Briggs, cost of an additional employee for 1990 of $11,000.00, present valued from January 1, 1991, to the date of the award.

(vii) To the Claimant Briggs, cost of an additional employee for 1991, present valued to June 30, 1999, in the amount of $46,926.00, to be further present valued to the date of the award in accordance with the Board's ruling.

(viii) To the Claimant Briggs, cost of site preparation of $46,968.00, present valued from January 1, 1991, to the date of the award in accordance with the Board's ruling.

(ix) To the Claimant Briggs, equipment loss during the move of $3,500.00, present valued from January 1, 1991, to the date of the award in accordance with the Board's ruling.

(x) Loss of executive time of $5,000.00 for Mr. R. Briggs and Mr. B. Briggs.

(xi) To the Claimant Mount Lawn, the expense of interest arising from the purchase of the Cloverbar Property of $22,000.00, present valued from the date of payment to the date of the award, in accordance with the Board's ruling.

(xii) Interest on items (i) to (xi) from the date of the award to the date of payment, at a rate equal to the annual average of interest paid on 90-day Treasury Bills, to be compounded annually.

LAND COMPENSATION BOARD

MARILYN McAVOY, PRESIDING MEMBER

ROD NELSON, MEMBER

STAN SCHUMACHER, Q.C., MEMBER