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

AND IN THE MATTER OF the intended expropriation by the City of Edmonton of certain interests of lands registered under Certificate of Title Number 122 157 606, legally described as:

DESCRIPTIVE PLAN 1222066
BLOCK3
LOT 1
EXCEPT THEREOUT ALL MINES AND MINERALS
AREA: 2.78 HECTARES (6.78 ACRES) MORE OR LESS,

And municipally located at 14950 Yellowhead Trail NW, Edmonton, Alberta (the **"YMI Property"**);

AND IN THE MATTER OF the Notice of Objection to the said intended expropriation filed by Yellowhead Motor Inn by its solicitor Paul Barrette of Prowse Chowne LLP;

AND IN THE MATTER OF the Notice of Objection to the said intended expropriation filed by Husky Oil Operations Limited by its solicitor Shauna N. Finlay of Reynolds Mirth Richards & Farmer LLP;

AND IN THE MATTER OF the Notice of Objection to the said intended expropriation filed by DS Classic Grill Ltd. by its solicitor Shauna N. Finlay of Reynolds Mirth Richards & Farmer LLP;

AND IN THE MATTER OF the Notice of Objection to the said intended expropriation filed by PetroJaffer 116 Ltd. by its solicitor Paul Barrette of Prowse Chowne LLP; and

AND IN THE MATTER OF an Inquiry in respect thereof pursuant to the provisions of the said Act by Sharon Roberts, as Inquiry Officer appointed to conduct the said Inquiry by the Minister of Justice and Attorney General for the Province of Alberta, as represented by Lorne Merryweather, Q.C, Barrister and Solicitor.

INQUIRY REPORT
Inquiry Officer: Sharon Roberts
July 5, 2021

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I. OVERVIEW AND PROCEDURAL HISTORY

A. Appointment and Initiating Procedure

1. I was appointed as noted on the cover page of this Inquiry Report. My role as Inquiry Officer in this matter stems from that appointment and is, in large part, defined by the provisions within section 15 of the *Act*.

2. No concerns or issues were raised with respect to the validity of my appointment, the scheduling or procedure agreed upon by the parties, through their counsel, and myself as Inquiry Officer, for how the Inquiry process was to unfold. I find the Inquiry was property constituted and accept the jurisdiction delegated to me in accordance with the *Act*.

3. The Inquiry pertains to four Notices of Objection tendered in relation to a Notice of Intention to Expropriate signed on behalf of the City of Edmonton (the **"COE"**) on January 25, 2021 and registered against title to the YMI Property as defined on the cover page of this Inquiry Report on April 14, 2021 (the **"NOITE"**).

4. The NOITE pertains to, and was registered against title to, the YMI Property. Each of the objecting parties who submitted Notices of Objection have expressed an interest in the YMI Property, or some portion thereof, or operate businesses on the YMI Property.

5. The four parties who served Notices of Objection are:

    a. Yellowhead Motor Inn Ltd. (**"YMI"**), being the owner in fee simple of the YMI Property and owner/operator of the Ramada-branded hotel on those lands;

    b. PetroJaffer 116 Ltd. (**"PetroJaffer"**), a related entity to YMI and sublessor to one of the other Objectors;

    c. Husky Oil Operations Limited (**"Husky"**), which leased lands from YMI on the YMI Property for the purpose of constructing, operating and maintaining a fuelling station, integrated convenience store and car wash; and

    d. DS Classic Grill Ltd. (**"DS Classic"**), a tenant of YMI that owns and operates a restaurant business located within the hotel operating on the YMI Property.

6. The COE, being the expropriating authority within the meaning of sections 1(f), 6, 8 and 15[1] of the *Act*, was represented by Gordon A. Buck and Kyla Schauerte. Donald P. Mallon, Q.C. and Paul Barrette of Prowse Chowne LLP represented the Objectors, YMI and

[1] Other sections of the *Act* make reference to the expropriating authority. I have limited my reference to those provisions of particular relevance and application in this Inquiry.

PetroJaffer, and Shauna Finlay and Greg Weber of Reynolds Mirth Richards and Farmer LLP were representing the two other Objectors, Husky and DS Classic.

7. The Inquiry hearing was held on June 16-18, 21-23, and 28-29 at the Edmonton Tower, located at 10111 104 Street NW in Edmonton, Alberta. Counsel for the expropriating authority and the various objecting parties attended in person with the Inquiry Officer. All witnesses testified by videoconference pursuant to the Chief Medical Officer of Health (Alberta) guidelines and City of Edmonton bylaws related to the COVID-19 pandemic.

8. Before my appointment, the COE raised an issue with respect to the standing of one party who filed a Notice of Objection. After an initial discussion about how and when this issue should be addressed, counsel for DS Classic advised that insofar as there was considerable overlap in the evidence among the various objecting parties, the most efficient process was likely to have the standing issue determined in my ultimate Inquiry Report, rather than as a preliminary matter.

9. This was the path taken and my decision on whether DS Classic has standing as an objecting party is addressed in this Inquiry Report. For simplicity and no other purpose, and not as a reflection of any predetermination on the objection with respect to standing, I refer collectively to the four objecting parties as the **"Objectors"** throughout.

B. Interim decision

10. I made an interim direction with respect to the admission of expert evidence tendered on behalf of the Objectors. The decision was required because the COE objected to my admitting all but two of the Objectors' expert opinion reports (collectively, the **"Impugned Objectors' Evidence"**).

11. The COE sought a direction to exclude the Impugned Objectors' Evidence on the basis that all of it was irrelevant to the question I am required to answer, per s. 15 of the *Act*, namely, "whether the intended taking is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority. The COE argued that the Impugned Objectors' Evidence was out of scope, meaning it spoke to issues outside of my jurisdiction, particularly to matters of compensation.

12. I heard argument on behalf of the COE and the Objectors. Ultimately, I allowed the Impugned Objectors' Evidence to be tendered without predetermining whether it was, in fact, "out of scope" or addressed only issues outside my jurisdiction. I did so without making any decision with respect to what use may be made of that evidence, and what if any weight it would be given in forming my opinions on the merits of the intended expropriation.

13. In hearing from the parties on the interim application, I advised all counsel that they would be afforded further opportunity to advance arguments with respect to the Impugned Objectors' Evidence, including as to the use and weight, if any, that I should

attribute to it, if I relied on it at all. Each party addressed this question in their submissions.

14. No concerns were raised with respect to the initiating procedure undertaken pursuant to the *Act*. For the purposes of the Inquiry and my preparation of this Inquiry Report and the within recommendation to Council for the COE, I find that the Inquiry was properly constituted and the statutory requirements for my appointment and exercise of jurisdiction were met.

15. As is my statutory duty under section 16(1) of the *Act*, I set out below my summary of the evidence led by counsel for each set of parties, followed by a summary of those parties' arguments. Next, I set out my findings of fact upon consideration of the evidence before me.

16. Finally, I provide my opinions on the merits of the various issues raised, as well as on the key question before me. I have determined that question to be whether the intended taking of a small portion of the YMI Property is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority?

II. SUMMARY OF EVIDENCE

A. Agreed Statement of Facts

17. The parties, through their respective counsel, tendered an Agreed Statement of Facts, which was marked as Exhibit 1 to the Inquiry. Within that document the following facts, among others, were agreed upon.

    a. The COE is an "expropriating authority" within the meaning of the *Act* and Alberta's *Municipal Government Act*, RSA 2000 c M-26 (the "*MGA*").

    b. YMI is the registered fee simple owner of the Lands, defined by the parties as the "Yellowhead Motor Inn Property" (**"YMI Property"**).

    c. Husky leases a portion of the YMI Property under a lease agreement between Husky and YMI dated April 1, 2006 (the **"Husky Premises"**), pursuant to which Husky registered a caveat on title to the YMI Property in April 2009.

    d. PetroJaffer subleases the Husky Premises from Husky under a Marketing Outlet Lease Agreement dated June 19, 2019 (the **"PetroJaffer Sublease"**).

    e. DS Classic leases a portion of the YMI Property under a lease agreement with YMI dated August 22, 2018 (the **"DS Classic Lease"**), pursuant to which DS Classic registered a caveat on title to the YMI Property on May 6, 2021.

f. The COE has issued or adopted by passing Bylaws a number of planning documents, including:

   i. Circa September 2009: Transportation Master Plan ("The Way We Move");

   ii. Circa May 2010: Municipal Development Plan ("The Way We Grow");

   iii. Circa June 2012: Implementation Plan for the 2009 Transportation Master Plan;

   iv. Circa 2019: Strategic Plan for 2019-2028 ("ConnectEdmonton"); and

   v. Circa December 2020: further Municipal Development Plan ("Edmonton City Plan").

g. COE Council approved capital profile funding for the Yellowhead Trail Freeway Conversion Project on February 21, 2017.

h. Circa late October 2020, the COE sent "a courtesy notification letter" to YMI and Husky advising of a forthcoming report recommending COE Council approve commencement of expropriation with respect to the YMI Property.

i. On November 9, 2020 Executive Committee of Edmonton City Council passed a motion recommending COE Council commence the expropriation process in relation to the YMI Property.

j. COE Council accepted the recommendation of its Executive Committee on November 16, 2020 and authorized the commencement of expropriation.

k. The COE sent further notification letters to YMI in November and early December 2020 and to each of Husky and DS Classic on December 23, 2020.

l. On January 18, 2021, Executive Committee to COE Council met and passed a motion recommending COE Council approve a bylaw providing for closure of existing vehicular accesses to various titled parcels, including the YMI Property, as part of the Yellowhead Trail Freeway Conversion Program. On behalf of YMI, Alim Somji attended that meeting and spoke to the proposed bylaw.

m. COE Council passed the proposed bylaw providing for certain access closures on January 25, 2021. Although the resulting Bylaw 19468 came into force on April 1, 2021, the access closures at the YMI Property have not occurred yet.

n. The NOITE (signed January 25, 2021) was registered against title to the YMI Property on April 14, 2021 and served on YMI, Husky and PetroJaffer.

o. The parties all agreed that the *purpose* for the intended expropriation is as follows (the **"Project"**), and the COE described the following as "[t]he work or purpose for which the interest in the [YMI Property] is required":

> Without limitation, to facilitate the construction of the Yellowhead Trail Freeway Conversion Program, which may include the widening and upgrading of Yellowhead Trail and nearby roads, intersections, over/underpasses, public utilities, sidewalks, as well as access modifications, road network improvements, interchange construction, construction of public utilities, drainage infrastructure and sidewalks, and any other infrastructure incidental to the construction of the Yellowhead Trail Freeway Conversion Program[.]

p. The Project is in the public interest.

B. Evidence of the Expropriating Authority, The City of Edmonton

18. The COE called two witnesses in direct, namely one lay witness, Kris Lima, and one originating expert witness, Robert Gibbard of CIMA+. Later the COE called one rebuttal expert witness, Catherine Oberg of Bunt & Associates, to respond to the Objectors' evidence from Marcia Eng of Urban Systems. All three COE witnesses are engineers, and specifically have experience in transportation planning and engineering.

1. Kris Lima

19. Mr. Lima is a project engineer employed by the COE part way through the planning and execution of the Yellowhead Freeway Conversion Project. He is the senior project manager on that project and inherited the portfolio, by and large, from Robert Gibbard, the City's other witness in direct.

C. Lay evidence of Yellowhead Motor Inn Ltd. and PetroJaffer 116 Ltd.

20. YMI and Petrojaffer called one lay witness, Alim Somji. In addition, they called expert evidence from Ryan Archer of Colliers, Graham Quast of MNP, and Marcia Eng of Urban Systems.

1. Alim Somji

21. Mr. Somji testified about YMI's client base, describing them as largely blue collar. He said the majority are truckers, followed by construction workers. He said the YMI Property has truck parking (many others in the area do not) and offers truckers corporate rates. He described having a loyal customer base, and many "walk ins" as well as "repeat customers."

22. Although YMI did not track metrics on calls to the front desk to book a room, he suggested 50% of people who called for a room did so the same day, before arriving. Mr.

Somji estimated that between 15% and 25% were same-day calls, and the balance were reservations made two to five days prior to arrival.

23. With respect to the other businesses within the hotel, Mr. Somji said no surveys were done or statistics kept to determine the proportions of guests that were at the hotel, relative to walk in customers.

24. Mr. Somji testified that the hotel would experience a 30% to 60% loss in business, which estimate he based on discussions with counsel, and looked to the Urban Systems reports to draw conclusions about impact of the intended taking on YMI and PetroJaffer.

D. Lay evidence of Husky Oil Operations Limited

1. Jessica MacDonald

25. Jessica MacDonald testified for Husky. She is the Manager of Husky's Real Estate Team in Retail and has been with Husky for over 7 years. She described this service station as "corporate owned, dealer operation", with the dealer being PetroJaffer and Husky owning all property and infrastructure.

26. Ms. MacDonald noted that features which make for successful service stations include a convenient and visible location, ease of entering and exiting them, visibility in a variety fo other forms (signage, branding, entry), market demand and/or need, density of development, traffic patterns, available market share, curb appeal and the presence of a car wash and other programs.

27. Ms. MacDonald described the process of evaluating these factors using a Strengths-Weaknesses-Opportunities-Threats (SWOT) matrix, and testified that Husky had flagged the site as having potential to be a premium location. Ultimately, Husky spent a great deal demolishing a former gas station and renovating the site to maximize its earning potential. Husky spent $3.4 million on that work and calculated that it would need a long term security to get sufficient return on investment. It signed a 20 year lease with two 5-year renewal options. It also sought other protections against changes that could have negative consequences for Husky.

28. Ms. MacDonald testified that losing the site benefits that Husky currently enjoys on this site will likely result in it ceasing to operate. Rather than being one of Husky's best locations, it would become "an exit strategy."

29. The witness noted that the car wash currently generates about 25-30% of overall revenue for the Husky site. Ms. MacDonald testified that the proposed taking would likely make the car wash not viable in light of the impact on the drive path for fuel delivery trucks following the intended taking.

30. Finally, Ms. MacDonald gave evidence about the dearth of engagement by the COE in the period leading up to registration of the NOITE. In particular, no requests were made of Husky to provide fuel truck entry/exit paths to assess the anticipated impact on Husky.

E. Evidence of DS Classic Grill Ltd.

1. Earl Strohschein

31. Earl Strohschein is the owner and operator of DS Classic, which he described as being largely dependent on the hotel. He testified as to his understanding that most customers were guests of the hotel but conceded that his basis for this understanding was observations made by his two business partners who work in the restaurant.

32. Mr. Strohschein gave evidence about the restaurant's use of a mobile sign located adjacent to Yellowhead Trail. He believed it was located on the lands identified in the intended taking. On cross examination the COE attempted to disrupt this belief by suggesting the sign was, in fact, on other lands adjacent to Yellowhead Trail.

33. It was unclear to me whether Mr. Strohschein was not committal or unconvinced by the COE's suggestion. In any event, he admitted the sign can be moved and that DS Classic does not operate its business in the area of the proposed taking.

34. Mr. Strohschein expressed concerns about a reduction in traffic to the hotel would mean a corresponding loss in guests attending or using the in-room or take-out dining services it offers.

F. Expert Evidence

35. The City called two experts, namely, Robert Gibbard of CIMA+ in direct, and Catherine Oberg of Bunt & Associates.

36. YMI and PetroJaffer called Marcia Eng of Urban Systems, Ryan Archer of Colliers, and Graham Quast of MNP.

37. Husky and DS Classic also called Marcia Eng., Ron Conlin of Site Check Research Group, and Don Jonasson of CTM Design Services Ltd.

1. Robert Gibbard, CIMA+

38. Robert Gibbard, P.Eng, is a Senior Project Manager with CIMA+ in Edmonton. Prior to joining CIMA+, Mr. Gibbard was employed with the COE and was extensively involved in earlier stages of the Yellowhead Freeway Conversion Project. Finally, Mr. Gibbard acknowledged having a pecuniary interest in CIMA+, and that CIMA+ won detailed design work contract with the City respecting a portion of the Project in the area in issue in this Inquiry, and, further, that CIMA+ is currently involved in the Yellowhead Freeway Conversion Project and will remain so for three years yet.

39. Concerns were raised as to the impartiality of Mr. Gibbard. To illustrate, one of the Objectors characterized Mr. Gibbard's evidence as "reviewing his own work". I disagree that this reflects the entire utility that can be made of this witness' evidence, though the point is taken.

40. There was no dispute raised over Mr. Gibbard's qualifications and he was qualified.

41. I have considered the concerns raised and, while mindful of them, I am not prepared to disregard Mr. Gibbard's evidence or to give it no weight. It is admitted, and given some weight, particularly in assisting with my understanding of the expropriating authority's objectives, the process of stakeholder engagement that was undertaken at least with respect to some of the Objectors.

42. Mr. Gibbard was the only COE witness with awareness and involvement of the City's stakeholder consultation processes pertaining to the Project. He conceded that such consultation was largely limited to owners, not tenants.

2. Ryan Archer, Colliers International

43. Ryan Archer was qualified as a land appraiser and expert in expropriation impact analysis from a real estate valuation perspective.

44. In his opinion, the *block* value of the YMI Property was $1.4 milion per acre , the interest taken was valued at $173,000 and the injurious affection was $8.76 million. Using an income approach, the hotel's current value according to Mr. Archer is $13.6 million. Assuming the Project proceeds, Mr. Archer found the value from a highest and best use approach, being demolition and redevelopment in this case, to be $900,000 per acre.

45. Mr. Archer relied on his own estimates, but did review the Urban Systems report.

46. VLT Revenue from Lucky's Lounge was assumed at $335,070.

3. Graham Quast, MNP

47. Mr. Quast relied on the first Urban Systems Report in quantifying loss to YMI and PetroJaffer relating to the foreseeable impacts of expropriation. His analysis compared expected results for each company but for the expropriation.

48. According to his analysis, losses caused by expropriation were estimated to be $16,654,449, apportioned as between YMI ($13,654,449) and PetroJaffer ($3000).

49. After testifying and completing cross examination, Mr. Quast prepared and tendered an addendum to his first report with the consent of the COE.

4. Marcia Eng, Urban Systems

50. The various Objectors retained Marcia Eng of Urban Systems, an engineer qualified as an expert in transportation engineering, planning, modeling and construction.

51. Ms. Eng tendered three reports, the first dated May 11, 2021 and provided for Prowse Chowne LLP, the second dated June 3, 2021 for RMRF LLP, and the final report being in the form of a memo dated June 14, 2021.

52. The purpose of the first two reports, according to Ms. Eng, was to examine traffic impact to the YMI Property due to the freeway modification. She forecast a 56% reduction in traffic to Husky, and increased travel times to arrive at the YMI Property of 50% to 90% based on detoure routes. Ms. Eng conservatively forecast a 10% reduction in traffic from the east travelling to the site. In addition, Ms. Eng sought to determine the impact on traffic from the proposed changes to Yellowhead Trail.

53. Ms. Eng's calculation of lost trips to the YMI Property was an estimate based on assumptions and information that YMI provided. Ms. Eng took this information into account in her modelling, rather than strictly relying on land use trip tables.

5. Catherine Oberg, Bunt & Associates

54. In responding to the Urban Systems reports, the COE called Catherine Oberg, a transportation planning engineer from Bunt & Associates.

55. Ms. Oberg critiqued the analysis used by Ms. Eng for being "overly complex in its analysis", for having failed to make adjustments for different land uses, and took issue with some other methods or means of calculating traffic impacts.

56. On cross examination, Ms. Oberg conceded that ordinarily in a report like those from Ms. Eng, Ms. Oberg would have gathered owner information, as Ms. Eng did. Ms. Oberg did not do that here. She acknowledged the client's superior knowledge with respect to site specific variables.

57. Ms. Oberg had opined that there would be no loss of traffic travelling westbound, but admitted she did so without considering sight decision distances. She also conceded that in a freeway lane travelling 90 kph, drivers would need considerable sight decision distance *before* the transfer lane to make the exit (up to 375 metres).

58. On the whole, Ms. Oberg's own estimates were within +/-5% of the Urban Systems figures in the assessment of the proportional trip allotment; this was within the required order of magnitude for her to agree with Urban Systems' conclusions.

59. Ms. Oberg also confirmed that reduction in impact on traffic to the site, which she mentioned in direct, would be overstated if negative impacts for traffic travelling west existed; she conceded that if Mr. Gibbard were mistaken, this would be the case.

6. Ron Conlin, Site-Check Research Group

60. Ron Conlin testified and provided a report estimating predicted impacts resulting from the access closures on the YMI Property. He specifically looked at effects on the Husky station forecast to follow closure of those accesses. Under his model, Mr. Conlin predicted fuel consumption at the Husky site to drop by 45.9% after access closures and predicted convenience store sales to drop by 48.1%.

7. Don Jonasson, CTM Design Services

61. Don Jonasson was qualified in civil engineering for the purpose of giving opinion evidence on the layout and design of refueling and gas station facilities. His report was responsive to reconfigurations of the Husky site proposed by Mr. Gibbard.

62. Mr. Jonasson prepared four figures and a report to review whether a fuel delivery truck could drive onto the site and exit the site safely using either of Mr. Gibbard's two options.

63. Of the first Gibbard option, Mr. Jonasson noted it would not be possible to safely exit under the conditions on site. With respect to the second Gibbard option, which involved relocating the garbage enclosure into the drive path of fuel delivery trucks; again, the trucks could not exit safely.

64. Given the property lines and lease constraints, it was Mr. Jonasson's opinion that there was no suitable option to both safely enter and use the car wash as well as to enter and exit the fuel delivery truck under either of the City's proposed alternatives.

III. SUMMARY OF ARGUMENTS

A. Argument of the Expropriating Authority, The City of Edmonton

65. The COE argued that this Inquiry was constituted to determine whether the proposed expropriation of a portion of the YMI Property is fair, sound and reasonably necessary in the achievement of the objectives of the COE in its capacity as the expropriating authority.

66. Further, the COE argued that it requires the intended partial taking of land on the YMI Property for three key reasons, namely:

a. to allow for the construction of the new one-way two-land service road running along the southern edge of the YMI Property;

b. to allow for construction of the related infrastructure such as sidewalks and street lighting; and

c. to allow for the placement of linear utility infrastructure in accordance with provincial regulations and other engineering guidelines.

1. Whether DS Classic has standing to object

67. The COE argued, in essence, that it had reasonably concluded that DS Classic lacked standing as an "owner" within the meaning of the *Act* and, accordingly, had not engaged in the same sort of engagement and communication with DS Classic as it had with other Objectors.

2. Scope of the Inquiry and issues for determination

68. The COE cited s. 15(8) of the *Act* in arguing that my mandate is to inquire into whether the intended expropriation is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority and, further, in asserting that the Inquiry "can have no broader scope or jurisdiction than what is expressly provided for in the legislation."

69. In short, the COE urged me to adopt a narrow reading of specific provisions with the *Act,* and a conservative application of some, but not all, principles of statutory interpretation. Specifically, the COE argued the following:

a. The *Act* is remedial and should be given a broad and liberal interpretation, but this does not extend to expanding the scope of words within he statute beyond their plain meaning so as to create substantive rights and entitlements where they do not exist otherwise.

b. Only once an entitlement to the benefits of remedial legislation is established should those benefits be construed liberally.

c. A broad and liberal interpretation of remedial legislation does not permit deviation from the plain and ordinary meaning of the words used in the statute.

d. If the plain and ordinary meaning of the words used in the statute do not admit of any ambiguity, there is no basis to apply a broad and liberal interpretation to enlarge that meaning.

e. Here, it is only the partial taking from within the YMI Property that is subject to examination, not access modifications or injurious affection resulting from the Project writ large.

f. The Objectors are seeking to have this Inquiry stretch the definitions of "expropriation", "land" and "owner" in the *Act* beyond their reasonable plain and ordinary meaning in the absence of any reason to do so. This is contrary to the Legislature's intention.

g. Notwithstanding some conflict among previous Inquiry decisions in which Inquiry Officer Graham McLennan was asked to consider whether it would be more "fair" to the objecting landowner for the expropriating authority to take an

entire parcel as opposed to a portion of one, this is not a matter properly before me or open to my determination.[2]

h. The Objectors seek to conflate the impact of access changes arising from the Project with the intended taking, but that intended taking of the land is the only thing this Inquiry is concerned with. Instead, the Objectors are concerned with the Project as a whole, and its impact on the YMI Property (and its various occupants and otherwise affected parties).

i. A harmonious and contextual reading of the *Act*, the *MGA* (particularly s. 15 respecting how much land ought to, or ought not to, be taken), and the *Highways Development and Protection Act*, SA 2004 c H-8.5 (specifically, ss 28, 29 respecting access closures) indicates that the Legislature did not intend for the issues raised by the Objectors to be addressed during an expropriation Inquiry brought under the *Act*.

(a) The Impugned Objectors' Evidence

70. With respect to the admission and use of the Impugned Objectors' Evidence, the COE argued that the role of this Inquiry "is to inquire into the Proposed Taking of land, not the entire Project of which the Proposed Taking is part."

71. Further, the COE argued, issues related to business losses and compensation go beyond the factual questions to be considered on an inquiry such as this and the extensive evidence led by the Objectors regarding the impact of the Project on their respective businesses "is simply not relevant to the issues to be decided" by me as Inquiry Officer.

72. Finally, the COE urged me to find that what it considers to be the only "relevant evidence before this Inquiry" – i.e., the remaining lay and expert evidence following an exclusion of all of the Impugned Objectors' Evidence – "amply demonstrates" that the intended taking is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.

73. In advancing these arguments, the COE made specific submissions against each specific report within the collective Impugned Objectors' Evidence. Those arguments are summarized below.

74. According to the COE, I ought to give the first and second Urban System opinions very little weight and prefer Ms. Oberg's conclusions in the Bunt opinion because:

a. The Urban Systems methodology was unduly complicated and failed to account for the possibility that different land uses could have different peak times.

[2] *Guaranty Properties v The City of Edmonton*, Report of Inquiry Officer G. McLennan dated April 3, 2000 and *Red Deer (City) v Northey*, Report of the Inquiry Officer G. McLennan, Q.C. dated September 3, 2009.

b. The Urban Systems opinions focused on determining what the modifications of Yellowhead Trail would mean for traffic to the YMI Property, rather than considering the specific intended taking of only a portion of the YMI Property.

c. Ms. Eng made multiple assumptions, including that:

   i. post-COVID increases in traffic would increase in proportion to the breakdown of land uses;

   ii. 100% of motorists travelling from west to east on Yellowhead Trail and from south to north on 149 Street would not use alternative routes to attend the YMI Property; and

   iii. the assumption that heavy traffic would travel to another site was premised on an alternate destination for that traffic that enjoyed more direct access to Yellowhead Trail.

d. Instead of using ITE trip generation data that presumes all hotels are "destination" properties, Ms. Eng adjusted data to account for her understanding of the YMI's clientele, but that understanding was inconsistent with Mr. Somji's evidence, and did not account for repeat customers.

e. Ms. Eng received no information about which patrons of Shakers Lounge and DS Classic Grill were hotel guests and which were not.

f. Most of the sites identified by Urban Systems as competitors to the YMI Property would require a driver to exit Yellowhead Trail well in advance of reaching the YMI Property.

75. The COE also argued for the Colliers report prepared by Ryan Archer to be given little to no weight because:

a. Mr. Archer's oral evidence, demeanor and answers to questions indicated he was acting in an advocacy capacity and not as an impartial expert witness.

b. Mr. Archer denied having applied a 35% discount to the YMI Property as-vacant after Project construction, contrary to statements in his written report.

c. The two sales indices he used to determine the as-vacant value of the YMI Property after Project completion are nearly 10 years old. The COE argued that Mr. Archer ignored more recent examples of a site that also had limited access to a major thoroughfare.

d. Mr. Archer suggested the percentage figures used to measure the impact on future lease rates were his own opinion, but they were taken from the estimated traffic reduction data in the Urban Systems report.

e. Although Mr. Archer received financial information for YMI and PetroJaffer as early as the 2015 financial statements, he chose to presently financial information from 2019 forward in his pro formas.

f. The Colliers report contained numerous statements with little to no analysis or support, including:

i. that disruptions from the pandemic and anticipated impact of access changes to the YMI Property were "analogous";

ii. future net operating income pro formas were based on an assumption hat the hotel market would fully recover in 12 months, and his support for this assumption was that there was a "general consensus" that this was so, and it was a "widely-held opinion"; and

iii. Mr. Archer considered one of the hotel sales indices he reviewed to be an "outlier" but did not provide support for that characterization.

76. The COE was also dismissive of the MNP report, calling it "unreliable" and arguing I should give it little to no weight because:

a. Graham Quast's conclusions are largely dependent on the Urban Systems conclusions with respect to future site traffic.

b. Mr. Quast omitted relevant fixed costs from his analysis. When corrected, this resulted in a $1.6 million different in his conclusions.

c. Mr. Quast did not use the 2014-2020 financial statements prepared by YMI and PetroJaffer's accountants on a review engagement basis. Nor did he review the general ledgers and trial balances. Rather, he relied on internal financial documents covering a very limited time period (in some cases, as little as 8 months), resulting in a limited data set. He then used these limited data sets to project losses into perpetuity.

d. The MNP report includes unreasonable assumptions regarding lease renewals, and uses these assumptions to project losses into perpetuity.

e. Mr. Quast's understanding of what constituted a "walk in" guest was inconsistent with Mr. Somji's evidence.

f. Mr. Quast was unable to explain why his assessment of variable costs for calendar year 2020 was approximately 50% of what was shown on the financial statements for fiscal years 2018 through 2020.

g. Mr. Quast did not summarize the financial statements, and neither analyzed or considered the impact of steady declines in revenues and customers to the YMI in years leading up to 2020.

77. The COE also argued that there appears to be a double-count between the MNP and Colliers opinions insofar as the Colliers report uses the delta between future income streams for the YMI Property as the basis for conclusions on valuation and injurious affection while MNP quantified lost future income stream for YMI and PetroJaffer and presented same as a business loss.

78. With respect to the Site Check opinion from Mr. Conlin, the COE argued that it is both unreliable and ought to be given little to no weight because:

a. Mr. Conlin acknowledged there was a subjective element to his "SAM" model (i.e., 80% science, 20% art). Specifically, the COE argued that Mr. Conlin's decision to designate accesses as *easy* or *difficult* "appears to have been an entirely subjective judgment".

b. Although Mr. Conlin advised his opinion had not properly accounted for the loss of a traffic "choke factor" on Yellowhead Trail adjacent to the YMI Property, and further noted he had run a new analysis, that information was not provided during the Inquiry.

c. Mr. Conlin did not review the Key Performance Indicator (KPI) reports for the Husky station, which included actual sales and costs, in preparing his opinion.

d. Mr. Conlin agreed there were only four competitor sites in close proximity to Yellowhead Trial and that none had direct access to Yellowhead Trail.

e. Mr. Conlin's conclusions were subject to an assumption that there would be no change to the trade area and competition, despite his acknowledgment that, as time passed, the likelihood of such changes increased and impact on the YMI Property could change accordingly.

f. Finally, Mr. Conlin did not refine his analysis to reflect the impact of the Project on any of the Husky site's competitors.

79. More broadly, the COE argued that even if I accepted conclusions set out in the Impugned Objectors' Evidence, the fact that an intended taking will impact the Objectors or result in injurious affection to remaining lands is not, absent more, grounds for finding the intended taking to be unfair. The COE argued that the Inquiry process would be rendered meaningless if all it took to establish that an intended taking was unfair was showing that the expropriation would cause some injury or loss.

3. The statutory test

80. Design, engineering and construction of the Project are consistent with the COE's strategic objectives as set out in its policy documents.

81. Further, the COE's engineering and design work are at a developmental level to attract "a sufficient level of engineering confidence" to determine that the intended taking is required. Indeed, the intended taking is needed so imminent work on this segment of the Project can proceed. Work was put out to tender; construction is imminent.

82. The COE considered reasonable alternatives to its designs and sought affected stakeholder input (including from YMI and Husky). It participated in "extensive engagement and discussions with YMI and Husky". These Objectors, and PetroJaffer, have known for some time about the Project; some of them were first consulted in 2012. These Objectors got "adequate notice" of the COE's intention to expropriate and there cannot, in the COE's submissions, be any reasonable suggestion that the COE has not deal fairly with the Objectors.

83. Concerns about the potential impact of the intended taking on the Objectors' respective businesses "flow entirely from the proposed changes to road layout and access in the vicinity of the YMI Property as part of the broader Project" and not the *actual* taking that is currently proposed.

(a) Fair

84. In the present Inquiry context, the City argued, "fairness" must be assessed objectively. It is not founded on perceptions of fairness, or whether the intended taking will cause hardship to an owner or trigger compensation damages.

85. These factors, absent more, do not render a taking unfair. Indeed, compensation-related impacts of the Project are beyond the scope of this Inquiry and my jurisdiction. Said the COE: such impacts are *irrelevant* to my deciding whether the intended taking is fair.

86. Rather, the COE argued, assessing fairness in this context requires me to consider the following factors:

a. Did the expropriating authority follow a reasonable procedure with respect to acquiring private land?

b. Has the expropriating authority made reasonable efforts to engage impacted parties?

c. Has the expropriating authority made reasonable attempts to minimize the extent of the intended taking?

d. Did the expropriating authority reasonably consider alternatives?

e. Has the expropriating authority reasonably considered a balancing of public interest versus private interest?

87. The COE argued that the following is in evidence before me and demonstrates that the proposed taking is fair:

a. The COE's procedure has been reasonable and in compliance with applicable statutory regimes;

b. The COE had extensive public engagement respecting the Project;

c. The COE specifically engaged with YMI, PetroJaffer and Husky in relation to the Project, and each of these Objectors had an opportunity to provide input into the design for the Project in this area and, although the COE requested financial and other information from YMI that would have allowed the COE to complete its own appraisal and impact assessment, YMI provided limited information prior to the expropriation process being commenced;

d. The COE made reasonable efforts to understand the Project's impact on the YMI Property;

e. The COE reasonably considered alternative designs for the Project;

f. The harms alleged by the Objectors result from the access closures, and not the intended partial taking;

g. Any such harm is properly a matter for a compensation claim in any event, not for this Inquiry; and

h. The Objectors' evidence in this Inquiry is unreliable.

(b) <u>Sound</u>

88. With respect to soundness, the COE argued that none of the operational concerns flagged by CTM and Urban Systems with respect to the anticipated impact of the intended taking on the service station business, and in particular the car wash and parking, are insurmountable obstacles or a basis to find the intended taking unsound.

89. The COE acknowledged that the intended taking includes part of the Husky leasehold premises, that the intended taking will require changes to the site layout, and that fuel trucks require safe drive paths for entry onto and exit from the YMI Property. However, the COE argued that the CTM Report provides that truck can still safety enter and exit the YMI Property even after the southern accesses are closed

90. According to the COE, even if parking cannot be accommodated and must be eliminated, this can be compensated in damages. Similarly, if demolition and reconstruction of the

carwash proves to be the only solution, the result can be compensated for in damages. Put another way, the taking is not unsound just because it may result in compensation claims.

91. Any intended expropriation will have an impact on affected landowners. However, issues relating to harm to an Objector arising from the expropriation "are properly reserved to a compensation proceeding" and ought not be before me, in my capacity as an Inquiry Officer. It is inevitable, the COE argued, that the Objectors *will* advance claims for compensation from the COE. Such compensation claims being a practical inevitability do not render the intended taking unsound.

92. My role as Inquiry Officer is not to "micromanage" details of the municipality's design and planning process. Nor am I to evaluate and weigh in on alternative designs to assess if the COE has selected the "objectively 'best' option."

93. In major infrastructure projects such as the Project, it is inevitable that an expropriating authority must consider and balance various factors, some of which may be competing. In this case, the COE argues it has "amply demonstrated" that the intended taking is sound.

(c) Reasonably necessary

94. It is not disputed that the intended taking is reasonably necessary for the construction of the Project, or that the Project is in the public interest. The COE argues, further, that it demonstrated that construction of the Project is consistent with, and in fulfilment of, the COE Council strategic goals, including those set out in its current City Plan and predecessor planning documents. Finally, the COE argued before me that a substantial impact on the entire Project would result if the intended taking is not approved.

4. Costs of the Inquiry

95. The COE argued that only two of the Objectors' expert reports, namely, the CTM report and the Urban Systems memorandum (third opinion) are relevant and within the statutorily prescribed scope of the Inquiry.

96. Further, the COE argued that where expert evidence does not assist the decision maker, that evidence and any legal fees for time spent in relation to that evidence, should not be paid for by the expropriating authority.

97. In addition, the COE argued that insofar as the Impugned Objectors' Evidence, or some of it, will also be led before the Land and Property Rights Tribunal at the *MGA* s. 15 application brought by some of the Objectors the COE may be asked to pay the costs of litigating the same issues twice in different forums.

98. Finally, on the subject of costs of the Inquiry, the City urged me to deny DS Classic costs if I find it does not have standing to object to the intended taking.

B. Argument of Yellowhead Motor Inn Ltd. and PetroJaffer 116 Ltd.

99. The Objectors, YMI and PetroJaffer, argued that if, upon reviewing the evidence and arguments of all parties, doubt exists in my mind as to the fairness and soundness of the taking, that doubt must be resolved in favour of the Objectors.[3]

1. Soundness

100. These Objectors argued that the intended taking is not sound in the achievement of the objectives of the expropriating authority. In doing so, they submitted:

a. 'Sound' in sections 15(8) and 6(2) is an adjective. The partial taking is not sound financially in that, when contrasted with a full taking, it does not make financial sense: it is not strong, secure or reliable. Further, it is not sound because it is not strongly or reliably connected to the achievement of the expropriating authority's objectives. It is not based on reason or judgment.

b. To illustrate the point, these Objectors documented the anticipated breakdown of municipal spending in the event of a partial and full taking as follows:

	Partial Taking	Full Taking
Market value[186]	$173,000.00	$13,600,000.00
Injurious Affection[187]	$8,760,000.00	
Business Loss damages to YMI to 2028[188]	$4,319,750.00	
Business Loss damages to Petrojaffer116 Ltd. to 2028[189]	$921,921.00	
Total:	**$14,860,490.00**	**$13,600,000.00**

101. These Objectors acknowledge that the above table is *pro forma*. They acknowledge that "there is more to the picture", including other heads of damages likely to be payable in both scenarios (e.g., franchise termination fees and mortgage prepayment penalties). They also note that "in a partial taking, the City ends up paying for much of the value of the remainder land but doesn't get that land; in a full taking, it gets all the land."

102. Evidence from Mr. Gibbard indicated he made design deviations to minimize the land taken, in most cases to minimize the costs for the COE. In doing so, he failed to follow

[3] *City of Edmonton v. Sokil*, May 14, 1987 per Inquiry Officer Lewis, p. 39

design criteria set out in Complete Streets, including the use of Shared Use Paths of 3.0 m width as opposed to minimal sidewalks of 1.8 metres.

103. The Objectors led unchallenged evidence that the Project changes the highest and best use of the YMI Property, despite which the COE is forcing the owners of that land to carry on continued uses that the COE has doomed to a fate of suffering and loss, for which there is no corresponding gain. It is a waste. It is not sound.

2. Fairness

104. With respect to fairness, these Objectors argued that fairness is deployed as an adjective in the relevant provisions of the *Act*, and "implies that the taking must be just and equitable having regard for the expropriating authority's objectives."

105. In effecting a balancing of interests, it is not enough to say the *Act* provides compensation provisions designed to make an owner whole. If that were so, no Inquiry would be necessary. To recommend the expropriation, it is the COE that must prove that fairness is balanced in favour of the expropriation as presented by them. They have failed to do so.

106. These Objectors argue that the overwhelming evidence placed before me on this Inquiry indicates that the expropriation in its present form will cause the businesses on the YMI Property to be unviable.

107. These Objectors propose an alternative, namely, one they have been advocating for since 2013, and one that the COE itself considered and presented to City Council in 2017, and that the COE used in its budgeting for the Project. That alternative is the taking of the entire YMI Property.

108. In striving to achieve its objective, the COE should, these Objectors argue, seek to inflict the least harm on citizens impacted by that objective.

109. These Objectors provided an illuminating timeline or chronology that I believe may be informative to City Council. I have pasted the contents, absent footnotes in the original, into Appendix "A" to this Report.

C. Argument of Husky Oil Operations Limited

110. As Inquiry officer, I must balance private and public interests affected by the proposed taking. That balancing must include what impacts result from the project giving rise to the partial taking and not be confined to the size of land intended to be taken.

111. The COE has wrongly equated impact on private landowners with taking the least amount of land. The COE has sought to limit consideration of broader business and financial impacts on private owners, including by promising to fight over whether it ought to pay for Objectors' legal costs of the Inquiry and by objecting to most of the Objectors' expert

evidence. This fairness evidence militates against the City's intended partial taking rather than the entire YMI Property.

112. Determining the fairness of an expropriation requires the balancing of impacts to private parties against the public interests served by the Objectives for which land is being taken. Also, general principles relating to the interpretation of expropriation statutes should also inform how the Inquiry officer approaches the consideration of fairness. Husky and DS Classic cited 2018 Supreme Court decision that reads, in part:

> The concept of expropriation concerns the power of a public authority to deprive a property owner of the enjoyment of the attributes of his or her right of ownership. Because of the importance attached to private property in liberal democracies, the exercise of the power to expropriate is strictly regulated to ensure that property is expropriated for a legitimate public purpose and in return for a just indemnity.[4]

113. An expropriating authority has a responsibility to attempt to reduce or lessen the burden on private citizens and businesses who will suffer impacts as a result of works that will benefit the public. This is particularly so where the ultimate cost to the authority of doing so will be roughly the same, if not less, due to the operation of provisions such as s. 56 of the Act. Notably, s. 56 includes compensation for losses arising from access closures when there is also an expropriation as part of the same scheme.

114. In most cases where the taking of less land is recommended, it is because it would lessen the impact on the Owner's lands. In other words, the taking of less land is not an objective or value on its own, it is the lessening of the impact that is the goal.

115. Virtually all of the COE's evidence related to why the partial taking is necessary in the achievement of its objectives. The COE led little to no evidence on why it is fair and sound aside from the fact that it has tried to take the least amount of land possible.

116. Yet, a partial taking will be unfair and unsound. DS Classic's and Husky's businesses will be destroyed, yet they will be required to suffocate slowly until no longer able to survive. The cost of this slow death with be equal to or greater than if the COE acquired the entire parcel. The COE has not led evidence that materially challenges this proposition, advanced by each of the Objectors.

117. Rather than ignore the difference in consequences for the Objectors between a full and partial taking, Husky and DS Classic outlined those impacts in the table below:

Full Taking	**Partial Taking**
• Parties can plan for an organized closure of their operations at the site	• Parties are required to either limp along until it is impossible for the to continue –

[4] *Lorraine (Ville) v 2646-8926 Québec Inc*, 2018 SCC 35 at para 1 (emphasis added by Objectors).

	potentially saving business relationships or causing other consequential impacts
• Timing of site closure is certain	• Timing of any closure is uncertain
• Tenants on site will be entitled to claim compensation	• Certain tenants may be denied compensation and have to litigate this right despite suffering impact resulting from the Project
• Site can be redeveloped for an appropriate use	• Redevelopment to different use now responsibility of land owner whose business experience may not be related to redevelopment
• Tenants and landlords an co-operate to address taking	• Tenants and landlords are potentially adverse in interest should tenants need to exit their lease prematurely
	• Risk of litigation amongst parties relating to termination of leases
	• Any site reconfiguration discussions to accommodate continued use of all features of gas station becomes a conflict downloaded to the landlord and tenant to address.

D. Argument of DS Classic Grill Ltd. re: standing

118. Although the COE said it intended to challenge DS Classic's standing at the outset of this process. Yet, it did not object to any of DS Classic's evidence in this proceeding. The COE has acquiesced to DS Classic's standing to object.

119. Further, if the sign is not in the area proposed to be taken, it is still within the area of land required for the service road. Had the COE properly done its due diligence with respect to the sign, it would have found DS Classic to be an owner under section 1(k)(iii) of the Act and served it with a NOITE.

120. The COE owes duties of good faith as an expropriating authority. It should not be permitted to thwart DS Classic's rights as an affected owner in this proceeding simply because the COE did not perform proper due diligence and follow proper procedure.

IV. FINDINGS OF FACT

121. I accept the facts set out in paragraph 18 of this Inquiry Report and recited in the Agreed Statement of Facts.

122. For the purposes of this Inquiry, and for no other purpose, I make the further additional findings of fact:

a. YMI, PetroJaffer and Husky are all "owners" for the purposes of s. 6.2 of the *Act* and have standing as Objectors in this Inquiry.

b. DS Classic is also an "owner" for the purposes of s. 6(2), within the meanings set out in ss. 1(k)(ii), 1(k)(iii) and 1(k)(iv). DS Classic accordingly qualifies as an "owner" within the context of, and for the purposes of applying, ss. 15(8)(b) and 15(10)(b).

c. The City's objectives are very broad, as particularized in paragraph 37 of the Agreed Statement of Facts.

d. Achievement of those objectives includes all work incidental to completion of the Project.

e. As noted by Messrs Gibbard and Lima, removal of the signalized intersection at current 149 Street and Yellowhead Trail is a necessary prerequisite to completion of that section of the Yellowhead Freeway Conversion Project for which the intended taking is required and is also a matter of safety.

f. The hotel on the YMI Property, currently branded as a Ramada hotel, is not exclusively a destination land use insofar as the hotel receives a material number of walk-in and pass-by occupants.

g. Changes resulting from the southern access closures on the YMI Property threaten the viability of the business operated on the Husky site.

h. As all transportation planning and engineering experts agreed, the changes to access to the YMI Property will also have a deleterious effect on traffic flow to the YMI Property.

i. Although preliminary COE planning documents indicated the entirety of the YMI Property was to be taken, as the Project moved from concept through detailed design phases, the intended taking was substantially reduced.

j. At no time was the entire parcel needed to complete the Project. There is no evidence before me to suggest the reduction in size of the intended taking was a function of design, engineering, planning or other technical changes to the Project, or a result of a shrinking COE budget for acquiring land.

k. There are reasonably foreseeable and impactful effects on all businesses on the YMI Property. While negative impacts are certain to follow from the intended partial taking, those effects are not divided equally in terms of impact across the four Objectors.

V. OPINION ON THE MERITS

A. Introduction

123. As counsel for the COE aptly noted, this is not a typical expropriation Inquiry. Indeed, rare are occasions on which Objectors seek a greater, not a lesser, taking of lands in which they claim an interest. In my opinion, two questions arise from the parties' disagreement over my jurisdiction and role in this atypical Inquiry.

124. First: What use, if any, can I make of the phrase "and any other infrastructure incidental to the construction of the Yellowhead Trail Freeway Conversion Program" in assessing whether the intended taking is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority?

125. Second: To the extent that the achievement of the expropriating authority's objectives is integral to the question before me, per the language of s. 6(2) of the *Act*, what if any use can I make of evidence about impacts on Objectors that are *incidental to* the taking, to the extent the taking is fair, sound and reasonably necessary in the achievement of the expropriating authority's objectives?

126. To cut to the chase: In this particular Inquiry, I consider both of these questions to be open for my consideration as part of evaluating whether the proposed partial taking is fair, sound and reasonably necessary. In particular, these questions frame the process of balancing public interests in the Project being realized, with the Objectors' private interests as "owners" within the meaning of s. 1(k) of the *Act*.

127. I am not certain that these principles have application in other Inquiries, as they are specific to the factual and historical matrix in evidence before me on *this* Inquiry. In any event, that question is not before me and I need not determine it.

B. The Impugned Evidence is relevant and material to my opinion on the merits

128. The COE is correct in noting that quantification of business and other economic losses and associated financial impacts are not matters within my jurisdiction to determine, particularly as matters of compensation. However, it is neither fair nor accurate to say I can take no notice, and make no consideration of economic and other harms that all experts area are likely, if not reasonably certain, to follow an intended taking. Indeed, the COE has rightly conceded: Expropriations suck (for the landowner).

129. Foreseeable business losses, and particularly a reasonably foreseeable termination of the ability to continue operating a currently viable business, are in scope. They are matters within my jurisdiction where the evidence before me requires me to consider the balancing of public and private interests at play in an intended taking. This is such an instance.

130. Specifically, within the authority delegated to me by the Legislature is my jurisdiction to inquire whether that balancing of interests tips in favour of the public good, or against it.

Where the former holds true, the intended taking is sanctified as fair, sound and reasonably necessary. The opposite occurs in inquiries where, the balancing skews so inequitably against one or more affected landowners that the taking is rendered unfair, or unsound, or both. The latter holds true here.

131. Notably, the Impugned Objectors' Evidence assisted me in reaching this conclusion, as did the rebuttal evidence of Ms. Oberg. It was common ground among the array of objected-to Objector experts and the COE's own rebuttal expert that the YMI Property and the various owners having registered and other interests in it are apt to be impacted by the intended taking and its role in the achievement of the COE's objectives, irrespective of its reduced size from the earlier intended taking.

132. Further, were I to have excluded the Impugned Objectors' Evidence (but for the CTM opinion of Mr. Jonasson and the Urban Systems memorandum stamped by Ms. Eng), I struggle to see how any meaningful consideration of the issues put into play by s. 6(2) of the *Act* could have been achieved. The division of jurisdiction proposed by the expropriating authority is so surgical as to rob the *Act* of its remedial intent.

133. The Impugned Objectors' Evidence went, in part, to how impacts of the Project and its various incidentals, all of which have been agreed to be reasonably necessary in the achievement of the COE's objectives, are likely to be felt by the holders of those private interests. A balancing of those foreseeable ills with the equally foreseeable good of a safer, more efficient and otherwise desirable urban transportation network does not tip in favour of the partial taking on the fairness front.

134. I have found that the YMI hotel site, currently branded as a Ramada, is not a typical destination land use hotel. Rather, I was persuaded by Mr. Somji's testimony that the hotel benefits on a measurable basis – albeit marred by some imprecision – from greater "walk-in" or "drive by" traffic than is presumed by the ITE trip tables. In having rejected the suggestion that I ought to treat the hotel strictly as a destination business, it follows that there will be, predictably, some material impact on its operations and potential viability. The financing secured against this property imposes substantial risk on the owners, including Mr. Somji.

135. In the context of this finding, and in light of my earlier findings, including that Husky and PetroJaffer are likely to suffer material, and possibly insurmountable effects from the partial taking, I am of the opinion that the Impugned Objectors' Evidence has been relevant to my consideration of the statutory test and factored into my ultimate assessment of whether the intended taking is fair and sound in the achievement of the expropriating authority's objectives.

C. DS Classic has standing to object at the Inquiry

136. I have determined that all four Objectors – namely, YMI, PetroJaffer, Husky and DS Classic – qualify as an "owner" within the meaning of s. 1(k) of the *Act*. There was no contest in

this regard for each of YMI, Husky and PetroJaffer. With respect to DS Classic, it is my opinion that:

a. There is a legal distinction to be drawn between having an interest in the YMI Property and having an interest in the portion of the YMI Property identified as the intended taking within the NOITE.

b. I am unable to conclusively determine whether DS Classic has an *actual* interest in the small portion of the YMI Property that forms the intended taking.

c. As noted, my factual finding is that the DS Classic signage may currently be located on, or in proximity to, the lands subject to the NOITE, but the evidence left me with some doubt as to its exact location presently.

d. I find as a matter of law that the determination of the *bona fides* of that caveat, and the extent of any interest and damages, if any, flowing from the interest so registered, are all beyond the scope of my jurisdiction. If I am mistaken in that regard, I confess that I do not have adequate unequivocal evidence before me to satisfy myself that I can make such a determination.

e. Regardless of whether DS Classic registered its caveat before or after the COE's execution of the NOITE (January 2021) or its registration of the NOITE on title to the YMI Property (May 2021), the COE knew that DS Classic:

    i. was in possession or occupation of some portion of the YMI Property, *per* s. 1(k)(iii) of the *Act*; and

    ii. was, at minimum, "any other person" known to the expropriating authority to have an interest in the YMI Property, *per* s. 1(k)(iv) of the *Act*, as evidenced by the COE having served DS Classic with notice of the COE-approved vehicular traffic access closures on the YMI Property that form part of the Project.

137. Most importantly, I am of the opinion that neither the actual present location of the DS Classic street-side sign, nor the late registration of a caveat pertaining to the leasehold interest of DS Classic deprives DS Classic of status as "a person who is shown by the records of the land titles office as having a particular estate or an interest in or on the land", *per* s. 1(k)(ii) for the purposes of being "any owner whose land would be affected by the expropriation of the land concerned in the inquiry" and "any person who appears to have a material interest in the outcome of the expropriation" and, thereby, is most certainly "a party" whom I may add to the Inquiry.

138. I have found that DS Classic has a registered interest on title to the YMI Property at the time of this Inquiry, I am not in a position to determine, on the evidence before me, whether the DS Classic caveat is valid. For the purposes of this Inquiry, DS Classic falls

within at least one definition of "owner" set out in s. 1(k) of the *Act*. I need make no further determination to acknowledge its standing to object in this proceeding.

D. The intended taking is not fair in the achievement of the COE's objectives

139. I agree with the submissions of the Objectors Husky and DS Classic where they suggested:

> At this stage, the question is: what is going to happen. In determining that and providing a recommendation, the Inquiry officer is entitled to look at the effects of what the City has proposed to do and determine whether the balance struck between the public objective and the private impacts is fair. In considering that question, it is important to consider what those impacts are – not for the purpose of determining compensation – but for the purpose of determining whether there is a better balance that can be struck in what is going to happen now.

1. Substantive fairness

140. Simply put, it makes no sense to suggest that by taking less land, and, going further, to suggest that the land intended to be taken excludes lands (whether by effect or by design) on which changes are to occur that give rise to significant, potentially irremediable impact on one or more of the Objectors' businesses, means one cannot take into account those impacts in balancing the public and private interests at play in the subject taking. In any event, that argument cannot stand in the face of agreed facts, namely, that the taking is one part of a greater whole that is reasonably necessary to the achievement of the expropriating authority's objectives, and that the Project for which the intended taking – however great or small – is for the public interest.

141. It is true that there would be no balancing to be undertaken if I accepted the elimination of an entire set of interests from being "at play" in this Inquiry. Such is not the purview of remedial legislation. I am empowered to engage that balancing exercise and, in doing so, am unable to find that the proposed partial taking is fair in all of the circumstances.

142. To suggest a slippery slope or vast compensation claims will inevitably follow betrays the ill logic of the COE's argument against such a balancing. After all, matters of compensation are outside my jurisdiction. I cannot base a determination of whether the proposed taking is fair on whether or not it might be costly to the expropriating authority.

143. Even if that were the yardstick, I must balance a foreseeable risk that one or more businesses will likely perish as a function of the Project's construction with a suggestion that compensating the owners of those businesses (and maybe others) could be costly to the public purse. It seems to me, this is the very essence of the limited relief available to landowners whose otherwise inalienable rights are alienated through public, involuntary acquisition of their lands.

144. My opinion stands: the proposed taking is not fair in the achievement of the objectives of this expropriating authority.

2. Procedural fairness

145. YMI and PetroJaffer urged me to find that this expropriation is not merely substantively unfair, but procedurally so. In particular, YMI alleges that after the COE invited stakeholder participation, the COE ultimately ignored all such participation. They binned it, in short.

146. Admittedly, I am not persuaded that I have before me sufficient factual or legal foundation to make a finding that the expropriation itself has evolved in a procedurally unfair manner, or violated the *audi alteram partem* principle (i.e., "hear the other side").

147. However, I do find particularly persuasive a point aptly made by these Objectors. Specifically, they recited a passage from the 1967 Ontario Law Reform Commission report, which read, in part [emphasis mine]:

> "Another very important consideration is that all governmental activity, whether on a provincial or local level, should aim to retain the confidence of its citizens and their respect for its fairness. The position of quasi-public bodies acting under government authority is not different in principle… Every attempt, moreover, should be made to cause a minimum of disturbance in the life of the citizen."[5]

148. I invite City Council to be mindful of the above passage when considering my recommendations as set out in this Inquiry Report.

E. The intended taking is not sound in the achievement of the COE's objectives

149. I found no compelling or substantive reason within my jurisdiction to explain or justify the change between the original intended taking of the entire YMI Property and the reduced taking now being proposed. While I may draw inferences, I find a shortage of evidence on which to ground a finding in this regard.

150. The absence of sound reasons for surgically dissecting the YMI Property and then seeking to rely on that dissection as a basis to exclude Objectors' evidence and/or reject their arguments is, in and of itself, unsound.

151. To the extent it invites an inference that the only reason is to make landowners fight for every remedy to which they may be entitled under the *Act*, or other legislation, if applicable, I find it is also unsound.

[5] Report on the basis for compensation on expropriation.-- : Ontario Law Reform Commission : Free Download, Borrow, and Streaming : Internet Archive

152. I am further persuaded by the Objectors' arguments that there is an imbalance between their proportionate suffering and the relatively stable public good to be realized upon the achievement of the objectives of the expropriating authority in this instance, the COE. The public good is not decreased with the diminished taking, yet neither is the consequential harm resulting from the achievement of the COE's public-good objectives. Indeed, the harm is foreseeable either way, as is the public good.

153. Accordingly, it is my opinion and recommendation that City Council pursue the obvious, fair and sound balancing of public and private interests in a two step process.

154. First, I recommend that COE Council acknowledge that while this intended taking is not fair or sound in the achievement of the objectives of the expropriating authority, it is in both public and private interests to nevertheless permit the work contemplated in the NOITE to proceed, and the partial taking be completed to avoid delaying the scheduled advancement of the Project.

155. Second, I recommend that City Council forthwith commence a subsequent, or companion, process for the voluntary acquisition or expropriation of the entire YMI Property. While it is conceivable that doing so may forego the need for YMI's application currently scheduled to be heard by the Land and Property Rights Tribunal in November 2021, that question clearly lies beyond my scope of jurisdiction.

F. The intended taking is reasonably necessary

156. It was agreed among the COE and the Objectors that the intended taking is reasonably necessary in the achievement of the expropriating authority's objectives, which includes construction of the Project. I agree. This portion of the statutory test is met.

G. The Objectors are entitled to their reasonable costs of this Inquiry

157. The Legislature recognized in s. 15(1) of the *Act* the conspicuous imbalance of power between the parties to an expropriation Inquiry and, in doing so, provided that an Inquiry Officer must find special circumstances to exist that justify a reduction or denial of costs to an objecting owner. In all other instances, an owner's reasonable costs of the Inquiry are payable by the expropriating authority.

158. I have not found special circumstances. I found all four Objectors had standing as owners within the meaning of s. 1(k) and deem the same to apply with respect to s. 15(10). The Objectors may submit their reasonable costs in connection with this Inquiry to the COE for payment.

H. Concluding Remarks

159. I extend sincere thanks to all counsel for their professionalism throughout, as well as for their skillful and thoughtful advocacy and representation.

Dated at the City of Edmonton, in the Province of Alberta, this 5th day of July, 2021

Sharon Roberts
Inquiry Officer

Appendix "A" – Chronology prepared by Counsel for YMI and PetroJaffer

In June 2012 the City held an open house to announce the start of the Yellowhead project.

In October 2012 Corporate counsel for YMI contacted the City of Edmonton to advise of YMI's concerns overall and requesting a business impact study.

In November 2012 the City of Edmonton responded refusing to undertake the study.

Between June 2012 and September 2013 public consultation consisting of two public meetings, eleven stakeholder interviews and five stakeholder input group workshops took place.

YMI through Mr. Alim Somji participated in all workshops.

The interview with YMI took place August 20, 2012.

In the workshops and interview YMI expressed its concerns and stated it is not a destination hotel.

In June 2013 Nizar Somji wrote Mayor Mandel (copying Rob Gibbard) advising it was crucial to YMI that access to the lands on which the Yellowhead is situated remains as-is. (It is notable that access appears to be being used in a general sense regarding the 149 St. intersection, not the specific access closures discussed in this hearing).

In June 26, 2013 a report and presentation was made to City Council recommending among other things the closure of the 149 Street intersection and the purchase of the entirety of the YMI property. The land acquisition budget was $70M -$85M on the preferred option.

In October 2015 the Yellowhead Trail – 149 Street Concept plan was presented to City of Edmonton Transportation Committee. 218It recommended intersection closure. It also provided a land acquisition budget of $148 Million which included funding the purchase of the entirety of the YMI property.

The June 2017 Yellowhead Trail/149 Street concept planning report again recommended and budgeted for the taking of the entirety of the YMI property.

In 2018 Kris Lima became Director/Yellowhead Trail Portfolio.

In October 2020 YMI received a courtesy letter indicating the partial taking.

On January 18, 2021 the City of Edmonton passed an access closure bylaw.

In April 2021 a Notice of Intention to Expropriate was served on YMI.