



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Al Klippert Ltd. v Calgary (City), 2022 ABLPRT 1224

Date: 2022-08-25

File No. NM2021.0007 (Related File No. DC2010.0033)

Order No. LPRT2022/EX1224

The Land Compensation Board (“LCB”) is continued under the name Land and Property Rights Tribunal (“Tribunal”), and any reference to Land Compensation Board or Board is a reference to the Tribunal.

In the matter of a proceeding commenced under sections 35 and 39 of the *Expropriation Act*, RSA 2000, Chapter E-13 (the “*Act*”).

And in the matter of an Application by Notice of Motion.

BETWEEN:

Al Klippert Ltd.

Applicant

and

The City of Calgary.

Respondent

BEFORE: Line Lacasse, Presiding Member
(the “Panel”)

ORDER

APPEARANCES

Written Submissions only were filed by:

For the Applicant: Robert J. Simpson, Q.C. and Samantha Stokes, Rose LLP

For the Respondent: David J. Lewis, Law, Legal Services, The City of Calgary

Introduction

[1] This decision addresses the interim costs payable under section 39 of the *Expropriation Act* RSA 2000, Chapter E-13 as amended (the “*Act*”) for the proceedings related to an Application by Notice of Motion of the Applicant, Al Klippert Ltd. (“Klippert” or the “Claimant”) filed with the Tribunal on October 1, 2021.

Documents

[2] The Panel was appointed to make a decision on interim costs following a written hearing process. The following documentation was provided to the Panel for the purpose of this written hearing:

- (a) Notice of Motion filed October 1, 2021, File No. NM2021.0007;
- (b) Affidavit of Dylan Rayburn sworn October 1, 2021;
- (c) Supplemental Affidavit of Dylan Rayburn sworn October 28, 2021;
- (d) Brief of the Claimant filed November 4, 2021;
- (e) Authorities of the Claimant filed November 4, 2021;
- (f) Transcripts of questioning on Affidavit of Dylan Rayburn sworn October 1, 2021, filed October 22, 2021;
- (g) Brief of the Respondent filed November 22, 2021;
- (h) Authorities of the Respondent filed November 22, 2021;
- (i) Reply Brief of the Claimant filed November 26, 2021; and
- (j) Authorities to the Reply Brief of the Claimant filed November 26, 2021.

Background

[3] The Claimant, Al Klippert Ltd., applied to the Land and Property Rights Tribunal (the “Tribunal”) for an order that The City of Calgary (“The City”) pay the interim costs of the Claimant. These costs are asserted to relate to the reasonable legal and other costs incurred by Klippert for the purpose of determining the compensation payable by The City pursuant to section 39 of the *Act*.

[4] The interim costs claim is with respect to the expropriation by The City of lands described as 4025-53rd street NW, Calgary Alberta, legally described as SE-35-24-2-W5 owned by Klippert.

[5] The City paid a proposed payment of \$3,942,000. Klippert claims the market value of the expropriated property is \$28,100,000. The issue between the parties is what the highest and best use of the land is for the determination of market value.

[6] Klippert's Application for Determination of Compensation (Related File No. DC2010.0033) was heard by a Panel of the Tribunal over a period of three weeks commencing on May 31, 2021, with an additional half-day hearing on September 14, 2021. During the evidentiary portion of the hearing, the Panel heard sixteen witnesses. Klippert has filed its written argument and The City has filed its reply. Surrebuttal of the Claimant was filed on November 30, 2021, but the costs of the surrebuttal are not included in this application.

[7] Klippert's present Notice of Motion is for an order requesting The City make a fourth interim costs (“Fourth Interim Costs”) payment to Klippert.

[8] The Claimant also seeks the costs of this Application by Notice of Motion.

[9] Klippert has previously made three requests to The City to pay interim costs with The City agreeing to pay fifty percent of the costs claimed as follows:

Date	Interim Costs Claims	Payment
April 21, 2017	\$1,046,958.80	\$500,000.00
February 26, 2019	\$541,681.00	\$270,840.78
March 16, 2021	\$347,730.19	\$173,869.09
TOTAL:	\$1,936,369.99	\$944,709.87

[10] On September 16, 2021, Klippert made a request to The City for a Forth Interim Costs payment of \$600,711.31 in relation to the preparation for and the conduct of the evidentiary hearing to determine the market value of the expropriated land. The City refused to pay the Forth Interim Costs claimed.

[11] Klippert's Notice of Motion claims interim costs for a total of \$749,677.31 consisting of:

- (a) \$ 600,711.31 for costs incurred for the evidentiary portion of the hearing commencing on May 31, 2021, with an extra day on September 14, 2021 for a total of 15 and 1/2 days; and
- (b) \$148, 966.00 for the preparation of the written argument by Rose LLP.

[12] Klippert has paid all of the costs of the expropriation with the exception of \$256,615 owed to Rose LLP for legal work.

[13] To date, The City has paid \$944,709.87 of the total costs of \$2,686,047.30 Klippert claims in relation the expropriation of its property.

Issues

1. What interim costs does the Panel have the authority to order?
2. Should all the invoices for costs be reviewed to determine the reasonableness of the claim?
3. What standard applies to the review of costs on an interim costs application?
4. Are the costs of the Fourth Interim Costs claim prima facie reasonable or reasonably necessary to advance the claim for compensation?
5. What should the Panel award as payment of the Fourth Interim Costs claim?
6. Should the Panel determine costs of this Application by Notice of Motion?

Position of the Parties

Position of the Claimant

[14] Klippert submits that pursuant to section 35 and 39 of the *Expropriation Act*, RSA 2000, c. E-13 Klippert is entitled to interim costs as the purpose of section 39 of the *Act* is to grant the owner complete compensation for out-of-pocket expenses. [*Nissen v Calgary (City)*, 1983 ABCA 307 ("Nissen")]

[15] Klippert relies on the *Riebel v. Alberta*, 1999 CarswellAlta 1535, 68 L.C.R. 282 ("*Riebel*"),

Golfscope International Corp. v. Alberta (Minister of Infrastructure & Transportation) 2010 CarswellAlta 2819, 100 L.C.R. 187 (“*Golfscope*”), and *Haluszka v. Alberta (Infrastructure)*, 2020 CarswellAlta 2665, 2020 ABLCB 9 (“*Haluszka 3*”) decisions of this Tribunal for the principle that, in ordering interim costs, the Tribunal seeks to strike a balance between the claimant’s ability to retain counsel and other experts, and the risk of over payment at the end.

[16] Klippert submits that only the Forth Interim Costs claim should be considered and it is prima facie reasonable. The costs have been incurred as a result of preparation and conduct of the hearing as well as the preparation of the final argument.

[17] Klippert argues that its costs are reasonable and therefore there is no risk of overcompensation. It says the risk of overcompensation is avoided by awarding costs on a percentage less than the actual costs. Here there is a low risk of overcompensation because the compensation proceedings will continue and there is already a “cushion” of \$991,660.12 arising from The City paying only fifty percent of the three prior interim costs claims.

Position of the Respondent

[18] The City does not dispute that section 39(1) of the *Expropriation Act* gives the Tribunal the authority to award interim costs. Rather, The City’s position is as follows:

- (a) Klippert has not proven that the costs being sought, in the context of all costs incurred, are reasonable.
- (b) The costs incurred by Klippert to date are excessive, which is due in part to the failings of Klippert’s experts.
- (c) The invoices setting out the costs are grossly inadequate such that it is impossible to tell if the costs are reasonable.
- (d) Klippert has not conducted any due diligence to ensure the invoices are reasonable.
- (e) There is very little legal work left to be done, such that any payment will result in a strong possibility of an overcompensation that will not be recoverable by The City.

[19] The City argues that the Panel must look at all the costs claimed to date to have a full understanding of the Klippert request. It says the onus is on Klippert to show the costs were reasonable and Klippert has not proven that the invoices attached to the four interim costs requests were prima facie reasonable.

Analysis

What interim costs does the Panel have the authority to order?

[20] The present application is made pursuant to ss. 35 (1), 35(2) and 39(1) of the *Act* that read as follows:

35(1) the owner may obtain an independent appraisal of the owner’s interest that has been expropriated and the expropriating authority shall pay the reasonable cost of the appraisal.

(2) The owner may obtain advice from any solicitor of the owner’s choice as to whether to accept the proposed payment in full settlement of compensation, and the expropriating authority shall pay the owner’s reasonable legal costs of that advice.

39(1) The reasonable legal, appraisal and other costs actually incurred by the owner for the purpose of determining the compensation payable shall be paid by the expropriating authority, unless the Tribunal determines that special circumstances exist to justify the reduction or denial of costs. [“s. 39 costs”]

[21] The parties do not dispute the authority of the Tribunal to order the payment of interim costs. In *Riebel* at para. 7, the Tribunal considered the intent of the *Act* to find it had authority under s.39 of the *Act* to order the payment of interim costs. The purpose of interim costs is to level the playing field.

The Board is of the opinion that the intent of the Act in recognizing the owner’s right to hire their own experts is to make the playing field level. Some expropriations take years to complete with the result that owners must carry the costs over a long period of time. Without interim costs the Claimants may not be in a position to exercise their rights under the Act. The Board finds that it has jurisdiction to award interim costs and will proceed with the application.

[22] The Tribunal’s authority to order interim costs was also considered in *Golfscope* at paras. 48 and 49. The Board cited *Riebel* with approval:

The Board Member agrees that the purpose of these provisions is to “make the playing field level”. To allow the expropriating authority with its resources to wait until all issues have been determined before paying would put a Claimant at an unfair disadvantage which cannot have been the intent of the Legislation.

Therefore, after considering the virtual certainty that costs will be payable by the Respondent, and the purpose of providing funds to allow a Claimant to advance its case on an equal footing to the expropriating authority, the Board Member finds that he has the jurisdiction to award interim costs.

[23] The Alberta Court of Appeal provided guidance on section 39 costs in *Nissen* at paras. 7 and 8. The Court said that the Board in *Abasand Holdings Ltd. v. Minister of Transportation* (1979) 17 L.C.R. 207 correctly stated the purpose of the legislature was to grant the owner complete compensation for his out-of-pocket expenses. Further:

If an expropriated owner is to be compensated, all his expenses in connection with the expropriation must also be compensated. He is entitled to make enquiries before accepting any offer, and to put the expropriator to a hearing on compensation. Therefore, compensation for the expropriation must include compensation for these expenses. These include solicitors’ fees.

[24] In *Haluzska 3* at para. 34, the Tribunal summarized the authorities on costs as follows:

In conclusion, an owner is entitled to recover from the expropriating authority the reasonable legal, appraisal and other costs actually incurred by the owner for the purpose of determining the compensation payable. But the expropriating authority is entitled to ask that such costs be taxed

to make sure that they are reasonably and properly incurred and to determine whether special circumstances exist to justify the reduction or denial of costs.

[25] Therefore, the Panel finds it has the authority to award interim costs that are reasonably incurred unless special circumstances justify a reduction.

Should all the invoices for costs be reviewed to determine the reasonableness of the claim?

[26] In the context of interim costs the Board, in *Haluszka v. Alberta (Infrastructure)*, 2019 ABLCB 2 (“*Haluszka 1*”), said that reasonableness is assessed using a flexible approach:

[46] The requirements in section 39 that costs must be reasonable indicates that the interim costs must be *prima facie* reasonable to be awarded. A flexible test of *prima facie* reasonableness is better able to advance the broad purpose of levelling the playing field between the parties.

[27] The City argues that the interim costs claimed by Klippert are not reasonable in the context of all the costs claimed to date. The City refers this Panel to a number of invoices included in the previous interim costs claimed by Klippert and invites this Panel to do a review of the invoices of some of the experts and their legal counsel supporting the claims.

[28] The City claims the invoices are deficient, lack details and do not allow The City or the Tribunal to determine if the costs were reasonably incurred and, in any event, the costs are excessive. The City claims that in light of all the invoices to date, an additional award for interim costs would entail a real risk of over payment given the amount already paid, plus an additional payment of \$749,677.31 and the fact that very little work is left to be used as potential set-off.

[29] The City relies on *Haluszka v. Alberta (Infrastructure)*, 2020 ABLCB 1 (“*Haluszka 2*”). The City says the Board reviewed the accounts and made some findings of irregularities, denied a further Order for interim costs on the basis that they may not be reasonable and “given the costs incurred to date, and the nature of the claims advanced, the risk of overpayment militates against a further award of costs.”

[30] Klippert submits that the Fourth Interim Costs claim is the only matter before this Panel. It says it is not appropriate to “bootstrap the Previous Interim Costs Payments to the current application to demonstrate the purported unreasonableness of the current application.” Klippert says The City had an opportunity to review the previous claims before it paid them and could have raised concerns at that time. It concludes there is no real possibility of overcompensation given that the three previous interim payments were reduced by fifty percent and the possibility of set-off with future costs.

[31] Klippert submits that *Haluszka 2* is easily distinguishable from the present case because the facts are very different: the invoices included charges for items totally unrelated to the expropriation, the claimant conceded that there had been duplication of efforts and file management, the Panel reviewed each of the claims advanced by the Claimants and noted that many were baseless or did not have evidence to support them, which created a real risk of overcompensation. Further, *Haluszka 2* does not stand for the proposition that previous accounts should be reviewed.

[32] The City does not provide authorities to support its contention that, on a series of interim costs applications, this Tribunal should revisit the previous interim costs payments. That being said, the total interim costs paid versus the total costs claimed can be a factor in assessing the likelihood of overcompensation.

[33] In *Haluzska 2*, where considering the overall costs claims, the Tribunal found that allowing additional interim costs at that stage would pose a real risk of overcompensation given the total amount that had already been paid and given the special circumstances of that case.

[34] Similarly, in *Haluzska 3*, the Tribunal considered the first two interim costs payments of respectively seventy-five and zero percent (with disbursements) and decided that on a third interim costs application an additional thirty-five percent of the costs claimed on the third interim costs application was warranted.

[35] In making these two decisions, the Tribunal limited its review to the costs claimed on the additional interim costs application before the Tribunal and did not proceed to an analysis of invoices filed with the previous costs claims.

[36] Similarly, in this decision, the Panel finds that reasonableness of the interim costs should be based on the review of the Fourth Interim Costs claim only, however these costs will be considered in the context of the total of the interim costs already paid to assess the risk of overcompensation.

What standard applies to the review of costs on an interim costs application?

[37] The City is advocating an in-depth review of some of the invoices to determine the reasonableness of the interim costs claimed up to this point. The City is requesting the Panel undertake a detailed review of the reasonableness of all the costs incurred from the beginning of the expropriation proceedings.

[38] Klippert submits that while a review of the invoices may be appropriate, the review should be limited to the invoices of the Fourth Interim Costs claim and should be less stringent than that conducted by a taxation panel.

[39] The Panel is referred to *Montana Alberta Tie Ltd. v Swanson*, 2013 ABSRB 549 (CanLII) where the Surface Rights Board considered a request for a second payment of interim costs, awarded fifty percent of the costs claimed and stated:

The panel in the first interim costs decision did not undertake a detailed analysis of the legal invoice as they would in a final costs review; they placed little emphasis on examining each line item on the legal expense sheet provided. Instead, that panel recognized that “almost always, if not always” some costs would be awarded to the parties and reduced interim costs to 50% of the amount requested in the meantime. A half reduction was done as a reasonable safeguard “... to avoid a later finding that the costs sought were not reasonable and incidental to the proceedings.” It was implied that a more thorough cost analysis to determine the reasonableness of the expenses would happen in the final costs decision. As a result, this Panel will also apply the same less stringent analysis when determining whether interim costs should be granted in view of Rule 31.

[40] In *Golfscape* at para 59, on an interim costs application, the Tribunal said:

Both counsel agreed that it would not be appropriate to attempt to tax the interim costs at this stage. Nevertheless, due to the uncertainties of the success of the claims advanced and the concerns expressed about duplication, the Board Member finds that it is reasonable that the right to

taxation under Section 39(2) of the *Act* be reserved until the final determination of all claims has taken place.

[41] Applying the reasoning above, the Panel finds it appropriate to limit her assessment to the prima facie reasonableness of the invoices, leaving the final determination to the taxation panel.

Are the costs of the Fourth Interim Costs claim prima facie reasonable or reasonably necessary to advance the claim for compensation?

[42] Klippert says that all the invoices submitted as part of the Fourth Interim Costs claim easily clear the threshold of prima facie reasonableness. They are attached to the Affidavit of Dylan Rayburn sworn on October 1, 2021 and his Supplemental Affidavit sworn on October 28, 2021.

[43] The City says that Klippert did not conduct any due diligence to ensure the invoices are reasonable and submits a review of some of the invoices, including some of the invoices related to the previous interim costs claims is warranted.

[44] The City relies on *Ghitter v. Calgary (City)* 1985, CarswellAlta 852 (“*Ghitter*”) citing *Smegal v. Oshawa* (1972) 3 L.C.R. 18 at p. 26 (“*Smegal*”) for the proposition that while an owner may agree to a high rate with its experts and lawyers, the expropriating authority will only have to pay costs that are found to be reasonable.

[45] The following invoices are attached to the Affidavit of Dylan Rayburn:

- (1) McIntosh Lalani Engineering Ltd., invoice for the period of May 30, 2021 to June 26, 2021, for \$5,775.00.
- (2) B & A Planning Group, invoice dated June 30, 2021 (no. 51957) for \$18,444.87.
- (3) Watt Consulting Group, invoices totaling \$35,471.00, which consists of 3 separate invoices dated respectively May 31, 2021 for \$7374.73, June 30, 2021 for \$27,744.73 and July 31, 2021 for \$351.54.
- (4) George J. Reti & Co., Appraiser, invoice dated June 21, 2021 for \$44,357.00.
- (5) LGN Consulting Engineering Ltd., invoice dated June 8, 2021 for \$3,425.63.
- (6) Rose LLP, 7 monthly invoices from February 2, 2021 to August 31, 2021 with invoices for May and July respectively \$145,504.56 and \$201,621.74. Invoice 15166 dated June 30, 2021 includes disbursements for court reporter services of \$16,819.76 and supporting invoices.
- (7) Cirrus Environmental, invoice dated July 26, 2021 for the period of May 3 to June 11, 2021 for a total of \$35,215.69.
- (8) InfraSUR, invoice dated September 1, 2021 for the period of May to June 2021 for a total of \$30,907.62.

[46] The following invoices are attached to the Supplemental Affidavit of Dylan Rayburn:

- (1) Rose LLP monthly invoices for September and October 2021 for respectively \$60,582.26 and \$88,383.74 with a \$513.85 disbursement for court reporting services.

[47] The Panel is referred to some of the invoices going back to the first interim costs claim. As stated above, the only relevant invoices for this interim costs claim are those directly related to the Fourth Interim Costs claim attached to Dylan Rayburn’s Affidavit and Supplemental Affidavit.

[48] The City claims that all expert invoices were lacking in detail because they did not specify when work was done and how much time was spent on each task. With regards to the Fourth Interim Costs claim, the insufficiency of details applies to the following expert reports:

- (1) McIntosh Lalani Engineering Ltd. for the period of May 30, 2021 to June 26, 2021, for \$5,775.00.
- (2) B & A Planning Group, invoice dated June 30, 2021 (no. 51957) for \$18,444.87.
- (3) Cirrus Environmental, invoice dated July 26, 2021 for the period of May 3 to June 11, 2021 for a total of \$35,215.69.
- (4) InfraSUR, invoice dated September 1, 2021 for the period of May to June 2021 for a total of \$30,907.62.

[49] While this issue was raised with respect to the previous DA Watt invoices, it was not specifically raised with respect to the invoice attached to the Fourth Interim Costs claim.

[50] The Panel has reviewed the invoices related to the Fourth Interim Costs claim and finds that while they may be lacking in some details such as time per task, they contain enough details to assess the prima facie reasonableness of the costs, which is the appropriate standard on an interim application. Tasks, people, dates and rates are identified. In some instances, for example in the InfraSUR invoice, more details were annexed to the invoice.

[51] The Panel finds the invoices are generally for the period leading to the preparation and attendance at the hearing which took place in May and June 2021 with an extra day in September 2021. Rose LLP invoices go back to February 2021 but the bulk of the fees invoiced are in May and June, which corresponds to the hearing dates. The additional invoices attached to the Supplemental Affidavit are generally with regards to preparation and in relation to this interim application. While the Rose LLP invoice erroneously included an item not related to this matter and a 3% fee, these are insufficient to render the whole legal invoice prima facie unreasonable.

[52] The City does not take issue with the number of hours spent by any of the experts or by legal counsel specifically in relation to this Fourth Interim Costs claim. It does, however, argue that the appraiser's rate of \$600.00/hour was unreasonable.

[53] The Panel finds that it is on the high side for appraisers and prima facie unreasonable. It is relatively higher than other experts' costs and in the Panel's view, higher than the fees usually charged by appraisers that commonly appear before this Tribunal. The Panel will take that into account when deciding the amount of costs allowed on this application. However, it will be for the taxation panel to make a final determination of what The City should ultimately pay as appraisal costs. The *Ghitter* and *Smegal* decisions are of no assistance here since they do not deal with interim costs applications: *Ghitter* simply says that costs cannot be paid directly to a lawyer and *Smegal* is in fact a taxation case from Ontario.

[54] While this Panel agrees that some invoices may be lacking in detail or have higher than average hourly rates, the Panel finds there is enough information in them to conclude that they are related to the hearing and its preparation. It appears that the majority of the costs incurred were in connection with the hearing and the evidence that would be presented. Whether all the evidence was reasonably necessary to advance the claim for compensation and whether some rates were excessive is a matter for the taxation panel to decide.

[55] The Panel is mindful of the statement in *Haluszka 3*, where the Tribunal recognized that the taxation panel will be better equipped to make such an assessment as it will have "... the context to be able to determine whether an item in the bill of costs is reasonably and properly incurred and whether an item in a bill of costs is improper, unnecessary, excessive or a mistake."

[56] In the present case, the parties have agreed to defer the final determination of costs until after the Panel's determination on compensation. The City has indicated that it “will be vigorously contesting Klippert’s entitlement to its full set of costs”

[57] The Panel finds itself in a situation analogous to the situation in *Golfscope* where on an interim costs application, the Board said that even when it was impossible to determine if legal costs were reasonable and reasonably necessary for the advancement of the claim for compensation, and even if there were some concerns with the accounts, it found it more appropriate to award a percentage of the fees claimed to avoid overcompensation, in that case equal to seventy percent of the claim, than to refuse to award interim costs altogether.

[58] Here, even if some of the invoices may be lacking in clarity as The City says or there are some concerns with some invoices including a rate that is prima facie unreasonable, the Panel finds that awarding a percentage of interim costs rather than a denial of interim costs better achieves the purpose of levelling the playing field. Allowing a percentage also prevents overcompensation having regards to the interim costs already paid. To allow The City to wait until all issues have been determined before paying for costs would put Klippert at an unfair disadvantage which cannot have been the intent of the legislation.

What should the Panel award as payment of the Fourth Interim Costs claim?

[59] In deciding whether to award interim costs, the Panel must consider a number of factors. One of them is the risk of overcompensation. The Panel is guided by the following statements in *Northey v. Red Deer (City)*, 2016 ABLCB 4:

The Board must determine what amount is reasonable to allow the Claimants to advance their case on an equal footing to the Expropriating Authority. In considering this, the Board also must be conscious of the risk of overcompensation.

and in *Haluszka* 3:

Orders for interim costs are discretionary; are made to help level the playing field between claimants and the expropriating authority; require a balance between a concern for claimants’ ability to retain counsel and experts and the risk of over-compensation. The balance is achieved by establishing a safeguard to avoid interim payments that exceed a final taxed account. That, in turn, requires that an order for interim costs be some percentage less than the legal, appraisal, and other costs actually incurred by the claimant.

[60] The *Haluszka* series of decisions on interim costs is informative because it deals with a situation where multiple claims for interim costs were made.

[61] In *Haluszka 1*, the Board was not prepared to make a finding that the accounts were so unreasonable as to disallow interim costs altogether. But the Board stated there were concerns raised by the expropriating authority that would give rise to scrutiny by the compensation panel. There was a risk of overcompensation. The Board said that the relevant factors militated towards a discount greater than the twenty-five percent discount rate applied in *Golfscope* and *Northey* and towards the fifty percent discount rate applied in *Montana*.

[62] In *Haluszka 2*, the Board found there were special circumstances justifying the denial of interim costs. The panel reviewed the claims and evidence in support of those claims and determined that, given

the nature, progress and status of the matter, the costs incurred may be construed as excessive. The Board noted that several of the claims were baseless or did not have evidence to support them which created a real risk of overcompensation. In terms of progress, little advancement to a hearing had been made.

[63] In *Haluszka 3*, the Board decided on a third claim for interim costs and found it was fair to award costs of approximately thirty-five percent of the interim costs claimed.

[64] In summary, an award of interim costs is discretionary. Its aim is to achieve a balance between the ability to retain counsel and experts and the risk of over-compensation. The balance is established by having a safeguard to avoid interim costs payments that exceed a final taxed account. This requires the Panel to consider the overall interim costs claimed and the payments to date and other factors such as the future work to be done which may set off some of the costs. It also suggests that an order for interim costs be some percentage less than the legal, appraisal, and other costs actually incurred by Klippert.

[65] Klippert argues the risk of overcompensation is mitigated by the “cushion” of fifty percent of incurred and unpaid interim costs by The City on the previous interim costs claims, and the additional work to be completed such as the surrebuttal and taxation. Klippert also says the risk of overcompensation may be mitigated by ordering the payment of a percentage of the Fourth Interim Costs claim.

[66] The City argues there is very little legal work left to be done such that any payment will result in a strong possibility of an overcompensation that will not be recoverable by The City. The City further says that the overall costs so far are excessive.

[67] The Panel finds that some of the costs incurred may be set off against the legal work left to be done but considers that most of the costs have already been incurred since the hearing is completed. However, The City made it clear that it would vigorously contest the overall costs and Klippert will have no choice but to respond and incur additional costs.

[68] Other costs, such as surrebuttal are not included in this Fourth Interim Costs claim and may generate additional costs. Further, on the previous interim costs claims, The City paid fifty percent of the claimed interim costs. Klippert points to that “cushion” as a safeguard against overcompensation.

[69] On this point, the Panel notes The City reserved its right to raise the reasonableness of all the costs at the final determination on costs with the possibility that not all of them will be allowed. The City has pointed out that it intends to contest the costs related to some of the expert reports.

[70] The Panel has considered the complexity of the file. Many experts on both sides testified over a period of more than 15 days. This points to a level of complexity for this matter.

[71] The Panel also found above that while the invoices of the Fourth Interim Costs claim could be more detailed, there is enough information to find them prima facie reasonably incurred for the advancement of the compensation claim knowing that Klippert will have the final onus to prove at taxation that they were reasonable and reasonably necessary for the advancement of the claim for compensation.

[72] The total amount of costs claimed to date is \$2,686,047.30. It is anticipated that, though not necessarily significant, more legal fees related to taxation and surrebuttal will be incurred and there is a possibility of setting off some of the costs with future costs and against the balance of the fifty percent partial payment of previous interim costs claims.

[73] However, the Panel has considered the overall amount of costs claimed and the payments already made, the small amount of future work to be done and the prima facie reasonableness of the fees for

appraisal and has some concerns with overcompensation which will be addressed by allowing a percentage rather than the full amount of the costs claimed on this Fourth Interim Costs claim.

[74] Having considered the factors above related to the complexity of the file, the total amount of costs paid relative to the amount claimed, the prima facie reasonableness of the costs claimed on the application and the possibility of set off against future work and past unpaid costs, and the risk of overcompensation, the Panel considers that it should use its discretion to reduce the award of interim costs to fifty percent for a total of \$366,165.00.

[75] The City does not take exception to the disbursements for court reporting services. Invoice 15166 dated June 30, 2021 includes disbursements for reporter services of \$16,819.76 and the Rose LLP invoice attached to the Supplemental Affidavit includes a disbursement for reporter services of \$513.85 for a total of \$17,333.61.

[76] In consideration of the above, the Tribunal directs that the payment of interim costs should be without prejudice to The City's right to apply to the Tribunal for taxation under section 39(2) of the Act and have the amount credited to the sum ultimately allowed by the Tribunal.

Order

1. The Panel has the authority to award interim costs that are reasonably incurred.
2. The Panel finds that the reasonableness of the interim costs should be based on the review of the Fourth Interim Costs claim only, while keeping in mind the interim costs already paid to assess the risk of overcompensation.
3. The Panel finds the review of interim costs is not taxation. At the interim costs stage, reasonableness is assessed on a prima facie basis.
4. The Panel finds there is enough evidence to show that the majority of the costs incurred were in connection with the hearing and the evidence that was presented. Whether all the evidence was reasonably necessary to advance the claim for compensation is a matter that the taxation panel will have to decide. The Panel decides that awarding a percentage of interim costs rather than a denial of interim costs better achieves the purpose of levelling the playing field.
5. The Panel awards \$366,165.00, which is approximately fifty percent of the Fourth Interim Costs claimed. The Panel also awards as disbursements the sum of \$17,333.61 for the costs of transcripts.
6. The issue of costs payable for this Application by Notice of Motion shall be included in the determination of costs payable in the Application for Determination of Compensation with respect to DC2010.0033.

Dated at the City of Calgary in the Province of Alberta this 25th day of August, 2022.

LAND AND PROPERTY RIGHTS TRIBUNAL



Line Lacasse, Member