LAND AND PROPERTY RIGHTS TRIBUNAL

Correction Notice: On January 14, 2022, on page 15 in the Order, Item 1. was revised to read June 30, 2022.

Citation: Newton Aviation Services Ltd. v Edmonton (City), 2022 ABLPRT 151

Date: 2022-01-11
File No. NM2021.0006 (Related File No. DC2014.0024)
Order No. LPRT2022/EX0151

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 the *Expropriation Act*, RSA 2000, Chapter E-13 (the "*Act*") and sections 7, 9, 10, 11, 12, 13, 15 and 17 of the *Expropriation Act Rules of Procedure and Practice*, AR 187/2001.

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

BETWEEN:

Newton Aviation Services Ltd.

Applicant ("Claimant")

and

The City of Edmonton

Respondent

BEFORE: Terri Mann, Presiding Member
(the "Panel")

ORDER

APPEARANCES

Written Submissions only were filed by:

For the Applicant (Claimant): Shauna N. Finlay, Reynolds Mirth Richards & Farmer LLP

For the Respondent: Steve J. Lutes, The City of Edmonton Law Branch

Introduction

[1] This Decision addresses the interim costs payable pursuant to a Claim and Application for Determination of Compensation under the *Expropriation Act*, RSA 2000, Chapter E-13 (the "*Act*") and the setting of a hearing date and deadlines for steps to be taken in the matter, for the proceedings related to an Application by Notice of Motion (the "Application") filed with the Tribunal by the Applicant (the "Claimant") on July 28, 2021.

Background

[2] The Claimant has applied to the Land and Property Rights Tribunal (the "Tribunal") for an Order that the Respondent, the City of Edmonton (the "Respondent" or the "Expropriating Authority"), be required to pay the interim costs of the Claimant, pursuant to s. 39 of the *Act.* These costs relate to work done by Kingston Ross Pasnak LLP ("KRP") for the purpose of determining the compensation payable by the Expropriating Authority, pursuant to ss. 51(1) and 53 of the *Act* and include past business losses and potential future losses occurring subsequent to the valuation date.

[3] Additionally, the Claimant has applied to the Tribunal for an Order setting a date for the hearing of the matter pursuant to *Rule* 7 of the *Expropriation Act Rules of Procedure and Practice* (the "*Rules*") and other timelines for steps to be taken prior to the hearing, *to wit,* requiring the Respondent to conduct any further questioning of the Claimant's Answers to Undertakings provided April 21, 2020 and the Third Supplemental Affidavit of Records, by July 30, 2020, requiring the Claimant to provide its expert report(s) to the Respondent eight weeks prior to the hearing, requiring the Respondent to provide its expert report(s) to the Claimant six weeks after the Respondent has provided its expert report(s) and requiring the parties to exchange all materials they intend to rely on at the hearing four weeks prior to the set hearing dates (the "Timelines for Steps").

[4] Finally, the Claimant seeks the costs of the Application.

[5] The parties agreed that the matter was to be considered by written submissions. No oral submissions were made.

[6] The parties provided the following, for the consideration of the Hearing Panel:

(a) Brief of the Claimant, filed August 23, 2021 and Reply Brief filed September 27, 2021;
(b) Affidavit of Daryn Newton, filed July 28, 2021;
(c) Affidavit of Misty Jakubowski, filed July 30, 2021;
(d) Affidavit of Misty Jakubowski, filed September 27, 2021;
(e) Brief of the Respondent, filed September 17, 2021; and
(f) Affidavit of Saquiah Kamal, filed September 27, 2021.

Factual Overview

[7] On or about February 27, 2013, the Respondent served a Notice of Intention to Expropriate on the Claimant, in respect of its leased premises, situated in the City Centre Airport, in Edmonton, Alberta.[1]

[8] On March 22, 2013, the Claimant served the Respondent with a Notice of Objection.

[9] On August 8, 2013, the Respondent served the Claimant with a Notice of Possession; the Claimant provided vacant possession, November 15, 2013.

[10] On October 14, 2013, the Respondent served the Claimant with a Notice of Proposed Payment, in the amount of $0.00.

[11] On August 22, 2014, the Claimant filed an Application for Determination of Compensation.

[12] On September 10, 2014, the Respondent filed a Reply to Application for Determination of Compensation.

[13] The Claimant retained KRP as its expert to quantify economic damages as a result of the expropriation and relocation of its leased premises; KRP prepared draft reports dated December 7, 2015 and April 13, 2017 (the "Draft Reports"), supplied to the Respondent. The Draft Reports stipulated their use as for discussion purposes only.

[14] On December 20, 2017 and June 8, 2018, the Claimant provided its Affidavit of Records and First Supplemental Affidavit of Records, respectively. On June 26, 2018, the Respondent requested additional documentation and on July 4, 2018, the Claimant provided the same, in the form of a Second Supplemental Affidavit of Records.

[15] KRP rendered invoices for work done May 31, 2013 to October 31, 2017, inclusive of the Draft Reports, totaling $134,829.22. On December 21, 2017, the Respondent paid $101,121.92 in interim costs for the invoices, representing a discount rate of 75%.

[16] On November 22 and December 20, 2018, the representative of the Claimant, Daryn Newton ("Newton"), was questioned. On December 5, 2019, the Respondent sent written questions for discovery; these questions, while initially objected to, were answered on or about June 5, 2020. Answers to undertakings were provided on March 27, 2019 and June 5, 2020 respectively.

[17] On October 30, 2018, a representative of the Respondent was examined.

[18] KRP rendered additional invoices, for work done February 28, 2018 to November 14, 2018. On August 29, 2019, the Respondent paid $80,788.14 in interim costs for these invoices, representing a discount rate of 75%.

[19] On September 25, 2019, Newton was examined on answers to undertakings.

[1] In particular, portions of the subject Lands were subleased to the Applicant, Newton Aviation Services Ltd., and used for the purpose of the Applicant's operation of its business, being aircraft maintenance.

[20] On December 5, 2019, the Respondent requested additional questions which, while initially objected to, were ultimately responded to, on or about June 5, 2020. On July 16, 2020, the Respondent requested an additional question, answered July 31, 2020 (collectively, the "Second Questioning").

[21] On April 28, 2020, the Claimant filed an application to set a hearing date.

[22] On May 19, 2020, the parties attended a Dispute Resolution Conference ("DRC") wherein certain deadlines were agreed to respecting the completion of questioning by the Respondent by July 30, 2020, and exchange of expert report(s). Additionally, mediation was scheduled for November of 2020; the Claimant adjourned its application to set a hearing date *sine die*.[2]

[23] On or about August 31, 2020, the Claimant provided to the Respondent a report authored by KRP dated August 31, 2020, together with an expert report authored by Brad Whalen. The report calculated damages based on three scenarios, involving consideration of different date/lease terms. On November 23, 2020, Boon Valuations & Claims Services Inc. authored a rebuttal report (the "Boon Report") supplied to the Claimant together with an expert report authored by Steven Peitz.

[24] On or about September 10, 2020 and September 24, 2020, the Respondent requested additional documentation from the Claimant and in particular, financial documentation for the Claimant for 2019. The Claimant initially objected, but subsequently responded with the requested information.

[25] On or about December 15, 2020, the Claimant provided to the Respondent a report, in rebuttal to the Boon Report, authored by KRP. This report made adjustments to the compensation estimates articulated in the August 31, 2020 report.

[26] On March 23, 2021, the City requested additional documentation from the Claimant. The Claimant initially objected, but subsequently responded with the requested information.

[27] KRP rendered additional invoices, for work done December 31, 2018 to December 31, 2020 (the "Disputed Invoices"). On June 25, 2021, the Respondent paid $92,739.38 in interim costs for the Disputed Invoices, representing a discount rate of approximately 50%.

[28] On July 21, 2021, Lutes corresponded with Tribunal administration requesting the policy of the Tribunal respecting the scheduling of a hearing for the matter. On July 23, 2021, Tribunal administration corresponded with the parties, stating, "the Tribunal's present practice is that dates for a hearing of an application for determination of compensation will not be provided until the parties demonstrate that the matter is ready for a hearing" (the "Tribunal Correspondence").

[29] On July 28, 2021, the Claimant brought the subject application.

Relevant Legislation

[2] Due to the untimely death of the mediator, the mediation was postponed, then cancelled.

[30] Section 39 of the *Act* reads as follows:

> **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.
>
> **(2)** The Tribunal may order by whom the costs are to be taxed and allowed.
>
> **(3)** When settlement has been made without a hearing and the owner and the expropriating authority are unable to agree on the costs payable by the expropriating authority, the Tribunal may determine the costs payable to the owner and subsections (1) and (2) apply.
>
> **(4)** On appeal by the expropriating authority, costs of the appeal shall be paid on the same basis as they are payable under subsection (1) and on appeal by the owner, the owner is entitled to the owner's costs when the appeal is successful and, when unsuccessful, the costs are in the discretion of the Court of Appeal.
>
> RSA 2000 cE-13 s39;2020 cL-2.3 s23

The Issues

1. Should the Tribunal direct the payment of interim costs for KRP under s. 39 of the *Act* and if so, what amount is appropriate?

2. Should the Tribunal set the matter down for a hearing, pursuant to *Rule* 7 of the *Rules* and set the Timelines for Steps to be taken, prior to the hearing of the matter?

3. Should the Tribunal determine costs of this Application by Notice of Motion?

Key Submissions on Behalf of the Claimant

Setting a Hearing date

[31] The Claimant submits that, pursuant to *Rule* 7 of the *Rules*[3], the Tribunal ought to set the matter down for hearing. A hearing date can be set in the absence of agreement of both parties, pursuant to *Rule* 7. The scheduling of a hearing date is appropriate because the claim has been ongoing for more than six years and the matter is ready to proceed to a hearing as all steps to prepare for the hearing are complete, *to wit,* copies of appraisal reports and germane documentary

[3] The Claimant relies on *Edmonton (City) v. Capital Region MRI Ltd*., 2020 ABLCB 3 ("*Capital Region*"), for the proposition that an application to set down a matter for a compensation hearing should be made pursuant to *Rule* 7.

evidence including experts reports have been exchanged and witnesses, both expert and ordinary, are identified.[4]

[32] The Claimant submits that it has been unable to schedule a Dispute Resolution Conference with the Respondent for the purpose of scheduling a hearing date. The Claimant further submits that it is not unwilling to attend a mediated resolution; however, and in any event, the setting of a hearing date does not preclude a mediated resolution, but would prevent the further delay of a final determination of compensation in this matter. Further, neither side can insist upon mediation as a pre-condition or alternative, to a hearing: see Mediation Guideline, Land and Property Rights Tribunal, at s. 3.

Direction of Interim Costs

[33] The Claimant seeks an Order directing payment of the Disputed Accounts at a discount rate of 75%. The Respondent has paid 50% of the Disputed Invoices, the Claimant seeks the sum which it asserts is outstanding, based on the differential or $48,718.69.[5]

[34] Section 39 of the *Act* specifically requires the expropriating authority pay for reasonable costs incurred for the purpose of determining compensation: it is inconsistent with the intent of the *Act* to allow costs to be unpaid until the hearing for the determination of compensation as this would present an unfair disadvantage and impair the Claimant's ability to exercise its rights under the *Act.* Interim costs are necessary to ensure that the person whose interest has been taken is able to exercise their rights under the *Act* and move forward on an equal footing with the expropriating authority: see *Golfscape International Corp. v. Alberta (Minister of Infrastructure & Transportation)*, 2010 CarswellAlta 2819 ("*Golfscape*"), at para. 49.

[35] The Claimant asserts past decisions of the Tribunal have commonly ordered interim costs at 75% of the costs being claimed as an appropriate amount to mitigate against any risk of overpayment and address concerns that warrant a reduction in costs: see *Golfscape* and *Northey v. Red Deer (City),* 2016 ABLCB 4, 2016 CarswellAlta 3552.

[36] The Claimant submits that the relevant considerations for determining the amount of interim costs that should be paid are the complexity of the claims involved, the risk of overpayment, and the *prima facie* reasonableness of the costs (the "Tripartite Test"): see *Haluszka v. Alberta (Infrastructure)*, 2019 ABLCB 2, 2019 CarswellAlta 1877 *("Haluszka"),* and *Instant Storage (Edmonton) Inc. v. Edmonton (City),* 2019 ABLCB 3, 2019 CarswellAlta 1878 ("*Instant Storage"*).

[37] The Claimant submits, firstly, that complexity of the subject matter is evidenced insofar as:

(a) the matter has involved multiple days of questioning and multiple additional written questions by the Respondent, over fifty undertakings, and multiple expert reports; and
(b) the Disputed Invoices reference the lengthy scope of information reviewed by KRP, which was required to be reviewed, analyzed, and incorporated into the reports.

[4] Submissions *specific to* the issue of the Timelines for Steps, were not advanced.
[5] The sum of the Disputed Invoices is $194,874.76, as approximately 50% or $97,439.38 has been paid, the differential based on a 50% discount rate is $48,718.69 (see Applicant's Written Brief, at para. 54).

[38] The Claimant argues that in *Instant Storage*, the Panel directed interim costs at a discount rate of 75%, in part to account for the complexity in the calculation of compensation and the subject matter, which likewise has complexity in the calculation of compensation, also merits a discount rate of 75%.

[39] The Claimant submits, secondly, that there is virtually no risk of overpayment. This is because the hearing for the Application for Determination of Compensation will require a number of witnesses and experts, including KRP. Therefore, any risk of overpayment can be largely addressed in recognition that ongoing fees will be incurred, which can be set off against any interim payment.

[40] Additionally, the Claimant submits that prior decisions by the Tribunal have found that a 75% discount rate for interim costs is sufficient to mitigate any risk of overpayment: see *Golfscape*.

[41] The Claimant submits, thirdly, that, while the ultimate determination of the reasonableness of the costs will be decided by the Tribunal at the hearing for the Application for Determination of Compensation, it is nonetheless appropriate to assess *prima facie* reasonableness at the interim costs stage and the costs claimed meet this test: see *Haluszka*.

[42] The Claimant submits that, pursuant to *Instant Storage* and *Nissen v. Calgary* (City), 1983 ABCA 307 ("*Nissen*"), a test as to whether costs are *prima facie* reasonable should involve consideration of whether the costs:

(a) reflect reasonable, economical and straightforward preparation and presentation as is necessary to properly present the owner's case;
(b) not include unnecessary work or other expenses or costs incurred through over-caution or over preparation; and
(c) not be the result of misconduct, omission or neglect by the owner.

[43] The Claimant submits that the costs claimed are *prima facie* reasonable because:

(a) KRP is a recognized expert in the area of calculation of business loss and related disturbance damage, which requires specialized expertise;
(b) the calculation of business losses and related economic damages is complicated, KRP reviewed and analyzed large amounts of documentation, thus entailing necessary cost, the Disputed Invoices detail the extent of work required to prepare the necessary reports;
(c) there is no evidence that KRP undertook unnecessary work or negligently prepared its reports; and
(d) there is no evidence of misconduct or negligence on the part of the Claimant in advancing its claim for compensation.

[44] Finally, the Claimant submits that if any of KRP's costs are excessive, which is not admitted but expressly denied, this is due to the Respondent's conduct and management of the matter in "ongoing and piecemeal requests for financial information and documents.": see Claimant's Written Brief, at para. 84.

[45] The Respondent engaged in multiple rounds of written questioning, which increased KRP's time and costs:

(a) most of the written questions, if not all, could have been asked in the 2018 questioning;
(b) some of the written questions related to a draft KRP report that was provided on a without prejudice basis;
(c) most, if not all, of the answers to the written questions would be answered in the expert reports exchanged prior to a hearing;
(d) the protocol of the written questioning involved "back and forth" communication between the parties for a number of months, which could have been avoided if questioning was completed in 2018: see Claimant's Written Brief, at para. 87.

[46] The Respondent's additional documentation requests also increased costs:

(a) most of the documentation requested in the Respondent's request for documentation on September 10, 2020 "could be found in the City's own production.": see Claimant's Written Brief, at para. 92. Also, the September 10, 2020 request for 2019 financial documentation, which was not used by KRP in preparing its August 31, 2020 report, was unnecessary and involved more time and work and therefore expense for KRP. The Respondent's September 24, 2020 request for additional information also involved more work and therefore expense for KRP; and
(b) by correspondence dated October 9, 2020, the Claimant advised the Respondent "… KRP would charge for their time to respond to … questions.": see Claimant's Written Brief, at para. 94. However, on March 23, 2021, the Respondent requested 2020 financial documentation, which was unnecessary and involved more time and work and therefore expense for KRP.

Key Submissions of the Respondent

Setting a Hearing date

[47] The Respondent acknowledges that the *Rules* allow a party to apply for an order setting a hearing date; however, it asserts that the granting of such an order is not guaranteed and, even if such an order is granted, it remains subject to the procedures and practices as determined by the Tribunal. The Tribunal, as a specialized administrative tribunal, is the master of its own procedure, subject to obligations of procedural fairness and natural justice: see *Prassad v. Canada (Minister of Employment & Immigration*) [1989], 1 SCR 560. *Capital Region*, relied upon by the Claimant, does not does not override the Tribunal's ability to develop its own internal procedures regarding scheduled hearings.

[48] The Respondent submits that it has no objection *per se* to the Tribunal setting the matter down for a hearing. However, it submits that that section 17 of the *Rules* states that any proceedings before the Tribunal must be in accordance with the procedures directed by the Tribunal and the Tribunal Correspondence provided clear and compelling reasons for its practice regarding scheduling matters for hearing. In this vein, the Respondent submits it is unable to state with certainty that it does not require further questioning of the Claimant and that if the Tribunal sets the matter down for a hearing, it "reserves all of its rights under the legislation, including the right to further questioning if necessary.": see Respondent's Written Brief at para. 43.[6] It further submits mediation has not yet occurred.

Direction of Interim Costs

[49] The Respondent has paid, to date, $274,649.44 in interim costs for KRP, on total billings of $442,807.37: see Respondent's Written Brief, at para. 31. It is of the position, overall, that costs are excessive and not *prima facie* reasonable.

[50] The Respondent acknowledges that it is obliged to pay reasonable costs, and that interim payment of costs may be necessary to "level the playing field". The Respondent does not oppose the jurisdiction of the Tribunal to make an award of interim costs. However, the Respondent submits that it is not the legislature's intent, nor the Tribunal's practice, to act uncritically as a "rubber stamp" for all costs a Claimant may see fit to incur and it submits that the central principles on the issue of the awarding of interim costs are enunciated in *Nissen.*

[51] The Respondent opposes the Claimant's application to increase the amount of reimbursement payable for interim costs, on the basis that the costs incurred by the Claimant are neither virtually certain to be payable, nor commensurate with the complexity of the matter, nor *prima facie* reasonable.

[52] As regards complexity, the Respondent submits the calculations performed by KRP are based on the assumption that "Newton had suffered and would continue to suffer a decrease in revenue … ." The Respondent asserts that, once the "initial groundwork analysis of the financial information was done … calculations should [have been] very easy to adjust by simply changing the assumed revenue reduction and by simply changing the assumed length of Newton's lease.": see Respondent's Written Brief, at para. 55.

[53] The Respondent asserts that the subject matter is distinguishable from *Instant Storage* as the expert costs incurred in the subject matter are quadruple the costs of those incurred by a similar expert in *Instant Storage*.[7] Also, unlike in the subject matter, in *Instant Storage,* a representative of MNP LLP, the expert retained by the claimant in that matter, had sworn that no further work could take place until the outstanding invoices had been paid.

[6] Further detail on this item is not provided; excluding this item, submissions *specific* to the Timelines for Steps were not advanced.
[7] The charges incurred by MNP LLP amounted to $110,859.13: see *Instant Storage*, at para. 1.

[54] As regards risk of overpayment, the Respondent submits that, given the large amount of fees charged to date, and considering anticipated additional work, there is a serious prospect that the Respondent will be unable to recover overpayment of fees if this matter proceeds to a hearing and the Tribunal awards an amount less than the fees. The Respondent notes that the Boon Report assessed damages of approximately $200,000.00 to $600,000.00. The Respondent has paid approximately $275,000.00 in interim costs, and the costs that have been billed by KRP to date are approximately $450,000.00. Therefore, if successful at hearing, the total costs will exceed the amount of the award and it will not be possible for the Respondent to offset any overpayment against the award to the Claimant.

[55] In response to the Claimant's argument that there is little risk of overpayment because there are ongoing fees, the Respondent argues that if current costs are unreasonable, in all likelihood, future costs will be unreasonable as well. Given that the costs prior to the hearing exceed a qualified expert's estimate of the amount owing to the Claimant, and the Claimant's implication that greater costs will be incurred in the future, there is "unreasonably high pressure on the City to settle the matter for what may amount to a tremendous windfall to the Claimant.": see Respondent's Written Brief, at paras. 62 and 63.

[56] Finally, the Respondent submits that the costs in the subject matter are not *prima facie* reasonable as they do not reflect reasonable, economical and straightforward preparation:

(a) the amounts billed by KRP are significantly higher than the amounts billed by other business valuation firms for similar services. In *Instant Storage*, a matter similar to the subject proceeding, expert valuation costs were one quarter of the costs in the subject matter.
(b) the Claimant obtained the Draft Reports before meeting with the Respondent, and well in advance of any questioning, the Draft Reports stipulated that they were to be for discussion purposes only; nonetheless, the Respondent reimbursed these costs at a discount rate of 75% in good faith, under the belief that the Claimant would be relying on them but was later advised the Claimant did not intend to rely on the Draft Reports. The Draft Reports were unnecessary and should be considered over-preparation.

[57] In response to the Claimant asserting that the Respondent may have increased costs due to its management of the matter, the Respondent asserts:

(a) allegations of misconduct unrelated to the question of costs "have no place in the present matter …": see Respondent's Written Brief, at para. 71;
(b) the written questions for discovery were done at the recommendation of counsel for the Claimant and very few of the written questions for discovery required reference to financial records and those that did, were simple. As well, to the extent that reference to financial records was necessary, the review could have been undertaken by an in-house bookkeeper, rather than KRP;
(c) much of KRP's costs pertain to the premature preparation of the Draft Reports; however, the Draft Reports were incomplete and premature and ultimately not relied upon; and

(d) costs of approximately $500,000.00 are excessive, for the work done, consisting of "some assistance in answering undertaking questions, and for providing one expert report and rebuttal for mediation.": see Respondent's Written Brief, at para. 75.

Findings and Analysis

Setting a Hearing Date and Timelines for Steps

[58] *Rule* 7 permits a party to apply to the Tribunal for an order appointing the time and place for a hearing in the matter.

[59] The Claimant submits that attempts to schedule a hearing date were made as early as December 3, 2019 in an attempt to move the matter forward but multiple attempts have not elicited a response to requests for hearing dates.

[60] The Panel finds that the policy of the Tribunal regarding the setting down of a hearing is as stipulated in the Tribunal Correspondence. The issue for this Panel is therefore, whether it has been demonstrated that the matter is ready to proceed to hearing.

[61] The Panel finds the "back and forth" of the parties render analysis of the progression of the claim and any fault for delay, challenging. However, the Panel finds that, certainly, given the passage of time[8], and the multiple questioning and requests for disclosure, that both questioning and disclosure ought to be either complete, or nearly complete, at this time[9]. Experts reports have been exchanged, and witnesses, both expert and ordinary, have been identified. A Litigation Plan, with prescribed deadlines for further steps, was agreed upon[10] and, final steps, such as formal exchange of a witness list and Will Say statements, as applicable, may yet be exchanged, but these items are minor and dates for the same may be set, once a hearing date is set. However, the Respondent, as delineated in paragraph 48, has stipulated it is unable to state with certainty that it does not require further questioning of the Claimant. Documentation in this respect was provided July 28, 2021, approximately six months have since elapsed and in the interests of fairness and moving the matter expediently to a hearing, the Panel directs that the Respondent advise whether questioning is required by February 28, 2022 and if so, complete questioning by April 11, 2022.

[62] The Respondent notes that the parties have not engaged in mediation. This does not serve to preclude the setting down of a hearing date: the Claimant has confirmed it does not oppose mediation proceedings but in any event, mediation is not a pre-condition to setting down a hearing date.

[63] Counsel for the Respondent submits that the Tribunal adhere to its policy that the Tribunal will not schedule a hearing for a matter unless and until the parties are in *agreement* that a matter is ready for a hearing. The Panel notes that agreement is not necessary; otherwise, *Rule* 7 would be redundant.

[8] The matter has been ongoing for approximately seven years.
[9] Subject to possible questioning on the additional limited documentation provided on or about July 28, 2021.
[10] The Panel is not informed as to whether all stipulated deadlines have been adhered to, to date but has not been advised to the contrary.

[64] The Panel finds that the Respondent has not provided a compelling reason as to why the matter is not ready to proceed to a hearing and there is ample evidence that the matter is due to be set down for hearing.

[65] The Panel finds that it has been demonstrated that the matter is ready to be set down for hearing, and directs a DRC be scheduled for the purpose of setting the dates, place, and deadlines for necessary steps[11] of the hearing of this matter, and that questioning is to be completed by the Respondent by April 11, 2022. As regards the remaining Timelines for Steps, including deadlines for the exchange of expert reports and exchange of all materials the parties intend to rely upon at the hearing, the Panel finds, in the absence of specific submissions on this item from either side, that these items may be addressed, in the normal course, in a DRC, which this Panel directs, to be scheduled on or before April 30, 2022. The Panel directs the dates for the hearing of this matter to be determined on or before June 30, 2022.

Setting of Interim Costs

[66] It is trite law that the starting point for the analysis of interim costs is the arguably almost mandatory nature of the requirement for payment and that compensation is meant to be full and fair: see *Thoreson v. Alberta (Minister of Infrastructure*), 2007 ABCA 272.

[67] Section 39 of the *Act* mandates the expropriating authority to pay reasonable costs incurred by the owner for the purpose of determining compensation payable, unless it is determined special circumstances exist to justify the reduction or denial of costs. The Tribunal in *Haluszka* looked at what is required in terms of reasonableness in this section:

> *The requirement 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.*
>
> *For the reasons stated above, the Panel finds that in order to determine "reasonable, legal, appraisal and other costs" pursuant to s. 39 of the Act it is necessary, as a pre-condition, to conduct a preliminary assessment of the reasonableness of the costs.*

[68] The Claimant bears the onus of establishing the costs are *prima facie* reasonable: see *Ravvin Holdings Ltd. v. Calgary (City),* 1990 44 LCR 198; appeal partially dismissed (1992) ABCA 262 (CanLII), 48 LCR 81 (ABCA).

[11] This statement does not preclude a virtual hearing.

[69] In applying the Tripartite Test, the Panel first considered the complexity of the matter. The Panel finds that the calculation of damages for business losses and disturbance damages may be a complex exercise, particularly given the unique nature of the subject business, being aviation maintenance services and the uncertainty regarding the multiple leases with different end dates that the Claimant noted, in its Written Brief, that were considered in the financial reports. In his correspondence of September 24, 2021, Randy Popik of KRP (the "KRP Correspondence"), stated that the damages calculations are complicated because Newton Aviation Services Ltd. was not at a mature stage as at the time of the expropriation and the expropriation had an impact on both growth and competitive advantage related to the Edmonton Municipal Airport location of the lease. The Panel finds this credible.

[70] Upon reviewing the chronology, it is evident that the matter has involved multiple rounds of questioning both oral and written, multiple requests for document production, over fifty undertakings, and multiple expert reports. Approximately seven years have elapsed since the filing of the Application for Determination of Compensation. Although these items and in particular, the passage of time, are not, of themselves, a proxy for complexity, collectively, the Panel finds that moderate complexity has been established.

[71] As regards the risk of overpayment, the Claimant submits that interim costs can be addressed by the fact that ongoing fees will be incurred which can be used to set off against any interim payment made in the event any costs are ultimately found to be unreasonable. The Respondent disagrees and notes there ought to be concern for overpayment given the quantum of the claim and the quantum of costs expended to date. In response, it is argued that the compensation award "should not, and, statutorily does not, impact or have any bearing on the ultimate amount that Newton will receive for expert fees.": see Claimant's Reply Brief, at para. 11. As a practical exercise, the Panel must give consideration to the quantum of an award as a necessary step in the consideration of the risk of overpayment.

[72] In the absence of a hearing, this Panel is not able to gauge the merit of the Claimant's claim. However, the Panel notes the report dated August 31, 2020 authored by KRP calculated disturbance damages for increased costs in the range of $1,121,584 to $2,992,712; disturbance damages for inefficiency related to location in the range of $144,001 to $352,906 and business loss in the range of $414,608 to $1,555,460. These sums were adjusted in the Rebuttal Report, to the ranges of $1,040,263 to $2,575,877, $144,001 to $352,906, and $467,913 to $1,826,024. As the Panel understands, the Boon Report calculated compensation in the range of $184,840 to $592,125, based on different scenarios incorporating different lease terms.

[73] In the KRP Correspondence, Popik argues that if the Claimant is successful, the total costs will be far less than the amount of the award, which he asserted underscored the necessity of the KRP reports in properly quantifying the value necessary to indemnify Newton for the expropriation.

[74] The Panel notes that there is a large variance between the positions of the parties and the claim sought by the Claimant is significant, in monetary scope. The Claimant has stated that KRP is expected to be in attendance at the hearing; it is anticipated KRP will need to present evidence on its reports, and may assist counsel in preparing for cross-examination of the opposing expert. As such, there will be future costs accruing.

[75] Past Tribunal decisions have found that a discount rate of 75% for interim costs is sufficient to mitigate any risk of overpayment. The Panel finds that the risk of overpayment is mitigated by a discount rate of 75%.

[76] As to whether the costs are *prima facie* reasonable, the Respondent argues that the costs in this matter far exceed costs incurred in similar matters: see, for example, the Affidavit of Saquiah Kamal sworn September 27, 2021 wherein it is stated that "the amounts billed by KRP … are significantly higher than the amounts billed by other business valuation firms for similar services." In response, in the KRP Correspondence, Popik states, "KRP has been adverse [to] the City … on multiple expropriation matters and our fees have been paid, without adjustment, in all other matters.", an argument that the Panel understands to mean that the costs that have been incurred are not excessive but commensurate with like matters.

[77] Both sides rely on *Instant Storage*, albeit for different items.

[78] In *Instant Storage*, the Panel applied a 75% discount rate. The Claimant urges this Panel to apply the same discount rate, arguing its similarity to the present matter for this point, insofar as the Tribunal stated, at para. 28, "The calculation of compensation relating to the business loss claims requires specialized knowledge. … [requiring] a review and analysis of corporate financial data, as well as knowledge of a claimant's business plans, and a variety of other factors including economic, industry and market information."

[79] The Respondent takes issue with the costs requested, arguing it is more than four times the amount incurred in *Instant Storage.* However, this comparison does not assist the Panel greatly in determining whether KRP's costs are *prima facie* reasonable as the particulars of *Instant Storage* may be different (the Panel is not apprised of the particulars of the financial analysis performed in *Instant Storage* and the likeness or dissimilarity of the business in *Instant Storage* in relation to the subject business). In this respect, the Panel notes the proposed offer by the Expropriating Authority was $0.00; it will be necessary for the Claimant to establish all elements of its case.

[80] In the KRP Correspondence, Popik states that each expropriation matter is "unique and separate, comparing a completely unrelated business such as "Instant Storage" to a complex, high risk, highly regulated and specialized industry such as aircraft maintenance is inappropriate as these industries do not have comparable traits". Further, Popik submits that the costs incurred in the present matter are similar to other matters in which he has been involved, which have had similar lengthy proceedings. As noted in paragraph 79, it is difficult for this Panel to compare the costs in *Instant Storage* with the costs incurred in the subject matter with little detail, but the Panel gives some weight to Popik's assertion because of his valuation expertise. Further, the Panel finds Popik's argument that KRP has been involved "for a significant period of time (dating back to May of 2013)" and "[f]ees … are a function of the length of time that the matter has remained outstanding" is credible as it finds it is commonsensical that the length of time and the "back and forth" demonstrated by the materials filed in this matter would ostensibly have increased costs in this matter.

[81] The Panel reviewed the KRP accounts, attached to the Affidavit of Misty Jakubowski sworn July 28, 2021. There is no evidence before the Panel the costs of KRP are the result of any

misconduct, omission or neglect of the Claimant or KRP, and this was not alleged by the Respondent.

[82] Finally, as the Panel understands, the Respondent requests that the Panel take into consideration that it paid, on good faith, the Draft Reports at a 75% discount rate, however, the Draft Reports were obtained from KRP before meeting with the Expropriating Authority (in advance of any questioning) and are not being relied upon. In its response, the Claimant submits the Draft Reports were provided on a without prejudice basis at an early stage in the proceedings for resolution purposes, which were ultimately not fruitful; further, the Claimant submits that the "City made use of these reports in its questioning of Newton's principal and in preparations for such questioning.": see Claimant's Written Reply, at para. 8.

[83] The Panel notes that the Respondent agreed to pay for the Draft Reports at a 75% discount rate, whilst apprised the Draft Reports were provided for discussion purposes only, presumably for the purpose of attempting resolution. Further, in the KRP Correspondence, Randy Popik stated that preparation of draft reports is "common and necessary" and "specifically contemplated in the Canadian Institute of Chartered Business Valuators (CICBV) Practice Standards and Practice Bulletins." The Panel finds this persuasive and finds that the payment of the Draft Reports by the Respondent does not disentitle the Claimant from interim costs incurred subsequently.

[84] The Claimant asserts that if costs are excessive, which is not admitted but denied, then the Respondent's conduct and management of the matter has increased the costs. In this respect, the Claimant argues that the Respondent increased the costs of KRP by its own actions, for example, in failing to conduct questioning in an efficient manner such that 2018 questioning continued to 2019 and in continuing to request additional financial and other documentation that was not necessary, either because it was already in the possession of the Respondent or not germane; and in asserting such requests in a piecemeal manner.

[85] The Panel notes that the subject proceeding has had significant "back and forth" but does not assign fault or responsibility of either party on this issue; there is no doubt however that the multiple rounds of questioning and multiple rounds of documentation requests would, by necessity, entail additional time and cost. The Panel does not find the argument that costs could have been decreased by the usage of a bookkeeper, in the absence of credible evidence by a valuation expert to the effect that this would have been an appropriate and prudent practice, persuasive.

Order

1. In consideration of the above factors, the Tribunal grants the Application in that it directs that the hearing dates for this matter be set on or before June 30, 2022. The Tribunal refers the setting of deadlines for Answers to Undertakings provided on April 21, 2020 and the Third Supplemental Affidavit of Records, the provision of the Claimant's expert report(s) to the Respondent prior to the hearing, and the Respondent's expert report(s) to the Claimant, and a deadline for requiring the parties to exchange all materials they intend to rely on at the hearing to be set at a DRC as these items were not specifically addressed by either party, and may be set in the normal course, at the DRC, to be held by April 30, 2022. However, the Panel is mindful of *Rule* 5.28 of the *Alberta Rules of Court*, Alta Reg. 124/2010, and in the interests of fairness, and

to expedite the matter, directs that the Respondent advise whether questioning is required by February 28, 2022, and if so, complete questioning by April 11, 2022.

2. Additionally, the Application is granted as regards interim costs, and the Respondent is ordered to pay the interim costs of KRP in the amount of $48,718.69, being the approximate differential between the 75% discount rate sought and the 50% discount rate paid on the Disputed Invoices, net of GST.

3. The issue of costs payable for this Application by Notice of Motion shall be dealt with in the determination of costs payable, arising from the hearing of the Application for Determination of Compensation.

Dated at the City of Edmonton in the Province of Alberta this 11th day of January, 2022.

LAND AND PROPERTY RIGHTS TRIBUNAL

Terri Mann, Member