



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Hangar 11 Corp. v Edmonton (City), 2023 ABLPRT 264
Date: 2023-05-03
File No. NM2021.0001 (Related File Nos. DC2014.0051; DC2014.0049; and DC2014.0003)
Order No. LPRT2023/EX0264

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 regarding a proceeding commenced under the *Expropriation Act*, RSA 2000, Chapter E-13 (the “*Act*”) and the *Expropriation Act Rules of Procedure and Practice*, AR 187/2001.

And in the matter of Costs regarding an Amended Application by Notice of Motion.

BETWEEN:

Hangar 11 Corp.	Applicant (Claimant)
and	
Venture Leasing Corp.	Party listed as Respondent
and	
Instant Storage (Edmonton) Inc.	Party listed as Respondent
and	
The City of Edmonton	Respondent

BEFORE: Timothy S. Meagher, Presiding Member
(the “Panel”)

ORDER

APPEARANCES:

Written Submissions only were filed by:

Counsel for the Applicant (Hangar 11 Corp.):
Counsel for the Respondent (The City of Edmonton)
No Submissions were filed for Venture Leasing Corp.
No Submissions were filed for Instant Storage (Edmonton) Inc.

Robert Gillespie
Gordon A. Buck and Steve J. Lutes

INTRODUCTION

[1] This is a decision about costs for a procedural application by Hangar 11 Corp. (“Hangar 11”).

[2] Hangar 11, Instant Storage (Edmonton) Inc. (“Instant”), and Venture Leasing Corp. (“Venture”) each filed an Application for Determination of Compensation (“ADC”) for the expropriation by the City of Edmonton (the “City”) of their interests in land known as the Edmonton City Centre Airport. Instant filed an Amended ADC to correct an error in the Descriptive Plan for the land description and Instant’s Amended ADC was set for an eight-day hearing starting on September 20, 2021. Instant and Venture were represented by the same lawyer.

[3] By way of an Amended Application by Notice of Motion (the “Application”) filed by Hangar 11 on March 19, 2021, Hangar 11 sought a procedural order for the following relief in Venture’s ADC and Instant’s Amended ADC, broadly speaking:

- a. To have the three ADCs combined;
- b. To make submissions about Venture’s and Instant’s claims;
- c. To be added as a claimant in Venture’s and Instant’s ADCs;
- d. A declaration that it has an interest in compensation payable to Venture and Instant; and
- e. A direction under s. 40 of the *Act* that any award of compensation be payable into court.

[4] In support of its application for the procedural order, Hangar 11 provided an affidavit sworn by Michael Harold, an officer and agent of Hangar 11. Harold swore that Instant converted revenue from Hangar 11’s land into corporate bank accounts controlled by individuals affiliated with Hangar 11 and Instant. Harold deposed further that he had seen an early draft copy of Instant’s “expropriation claim” which claimed compensation based on revenue that belonged to Hangar 11.

[5] The City did not oppose an order that certain of Hangar 11’s claims (referred to as the “Discrete Business Loss Claims”) be heard and adjudicated in Instant’s ADC provided that such an order would not result in an adjournment of Instant’s ADC hearing. The City filed an affidavit with evidence that the Hangar 11 ADC was not ready for a hearing date to be set given its premature stage in the litigation.

[6] Hangar 11’s application was opposed by Instant for the following reasons: Instant’s Amended ADC was ready for hearing while Hangar 11’s was not; the delay in making the application; the matters did not have common questions of fact; the outcome of one hearing would not affect the other; some of the requested relief was outside the Tribunal’s jurisdiction.

[7] Venture made no submissions.

[8] The Panel denied Hangar 11’s Application in its entirety. Hangar 11, the City, and Instant were asked to make submissions about costs: specifically, are costs of the Application payable, and if so, by whom to whom?

ISSUES

- [9] These are the issues for determination:
- a. Are costs of the Application payable?
 - b. Who is entitled to costs?
 - c. Who is responsible for paying costs?

DECISION

[10] The parties shall bear their own costs of the Application.

REASONS

[11] According to the City's affidavit, Hangar 11 raised the issue of combining the ADCs in March of 2019 when it notified the City that it claimed an interest in any compensation that the Tribunal determines is payable by the City to Instant and that Hangar 11 intended to bring an application to combine Instant's ADC with Hangar 11's.

[12] The City's response advised Hangar 11 that it objected to a combination of the ADCs. In its view, any compensation payable to Hangar 11 would be decided in Hangar 11's ADC hearing and compensation due to Instant would be determined in its Amended ADC hearing. There was no need to combine the matters.

[13] Hangar 11's explanation back to the City was that it had become aware that Instant had made a claim in its Amended ADC for lost revenues from a parking lot and from leased office space. Hangar 11 said it had authorized Instant to use part of its building for its self-storage business but did not authorize it to lease office space to, and receive revenue from, others. Instant was not entitled to collect parking lot revenue.

[14] Harold's affidavit explains that Hangar 11 had a lease with the Edmonton Regional Airports Authority (the "Authority"), and a license from the Authority allowing it to provide paid parking to the public on the leased land. In his affidavit, he presents a history of dealings between Hangar 11, Instant, other corporate entities and various individuals. He implicates Instant in wrongful conversion of \$1,500,000.

[15] Harold swears that he had seen an early draft of Instant's expropriation claim and found that it sought compensation for loss of revenue from Hangar 11's facility that it was not entitled to.

[16] Hangar 11 took the position that any compensation awarded by the Tribunal should be paid into court pending the outcome of the litigation between it and Instant. According to Hangar 11, paying the funds into court would also keep the litigation between Hangar 11 and Instant and avoid a situation in which Hangar 11 has a claim against the City for ignoring its notice.

[17] There was no evidence from Instant about the basis for its claim. Its Amended ADC claims compensation as sub-tenant and occupier of the land expropriated by the City.

The Parties Submissions in this Application for Costs

[18] **Hangar 11** submits that it is entitled to costs from the City. It relies on s. 39(1) of the *Act*:

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.

[19] Hangar 11 makes two submissions in support of its application for costs. First, it submits that the Application was procedurally necessary to determine whether its ADC should be heard with Instant's and Venture's ADCs. A combined hearing would result in substantially less costs to the City and avoid a duplication of Tribunal hearings. Further, the Application was necessary to assist the City in understanding the interrelationship of the parties' claims for compensation.

[20] Hangar 11's second submission is that there is a dearth of law about s. 40 of the *Act* and s. 14 of *Expropriation Act Rules of Procedure and Practice*, AR 187/2001 (the "*Rules*").

[21] Hangar 11 relies on the decision of *Marks v. Westlock (Town)*,¹ which decided that the fact that an application was unsuccessful is not, alone, sufficient to deny costs, and does not amount to "special circumstances."

[22] **The City** submits that each party should bear their own costs. In the alternative, if it is decided that Instant and Venture are awarded costs, those costs should be paid by Hangar 11. In the further alternative, any costs ordered to be paid by the City should be substantially reduced.

[23] The City submits that the Application was not brought for "the purpose of determining compensation payable." Rather, it was brought to advance Hangar 11's interest in a corporate dispute with Instant and Venture. Accordingly, the Application falls outside the ambit of s. 39. In the alternative, the fact that the Application was made to further Hangar 11's interest in its dispute with Instant and Venture amounts to special circumstances that justify the denial of costs.

[24] The City denies that the Application was necessary to assist it, or the Tribunal, to understand the interrelationship of the claims by Hangar 11, Instant, and Venture.

[25] The City says it was a necessary, but disinterested, respondent to the Application that was really an attempt by Hangar 11 to advance its own interests in its dispute with Instant and Venture. It would be unfair to penalize the City in costs for an unsuccessful application brought by one claimant against another.

[26] Instant did not make any submissions about costs.

ANALYSIS

[27] As stated by Hangar 11, the issue of costs in an expropriation matter is addressed in s. 39 of the *Act*. The leading case on an award of costs in expropriation matters and the application of s. 39 is *Nissen v. Calgary (City)*² in which the Court affirmed an earlier Tribunal finding that the purpose of the legislature in passing this legislation was to grant the owner complete compensation for out-of-pocket expenses including solicitors' fees. However, the Court recognized the possibility that an owner may not act reasonably, knowing that someone else will have to pay legal fees. According to the Court, the power to regulate such potential abuse is given to the Tribunal in s. 39(1) in these words:

... unless the Tribunal determines that special circumstances exist to justify the reduction or denial of costs.

¹ 2005 CanLII 78461 (AB LCB)

² 1983 ABCA 307 (CanLII)

[28] The Court decided that the criteria for determination of special circumstances are set out in rule 635(2) of the *Alberta Rules of Court*:

- (2) The taxing officer may refuse to allow the costs of all or any part of proceedings that were
 - (a) improper, vexatious, prolix or unnecessary, or
 - (b) taken through over-caution, negligence or mistake.

[29] Rule 635 has since been replaced by Rule 10.41(3)(b) which states that costs may be disallowed if they are “improper, unnecessary, excessive or a mistake.”

[30] In this case, as directed by the Court of Appeal, the Panel looks to the *Rules of Court*, and particularly Rule 10.41 (3)(b) for guidance about whether special circumstances exist. In the Panel’s opinion special circumstances so exist to deny Hangar 11’s costs; that is, the Application was unnecessary.

[31] The Panel agrees with the submissions made by Instant that it and Hangar 11 had distinct business losses that each would have to prove. It was up to the City to challenge either claimant’s evidence if they claimed compensation they were not entitled to. But Hangar 11 would be entitled to the compensation it could prove it was entitled to regardless of any award to Instant. If there was a benefit to combining the ADCs it was to the City’s benefit. But the City was opposed to the combination.

[32] The Panel was not convinced that Hangar 11’s claim was jeopardized by the failure to combine the ADCs. The Application served no purpose for Hangar 11 and was opposed by Instant and the City.

[33] Hangar 11 submits there is a dearth of law relating to s. 40 of the *Act* and s. 14 of the *Rules*. The Panel is not persuaded that the dearth of case law about the applicable legislation assists Hangar 11 in its claim for costs. It appears to the Panel that consideration of s. 40 in the circumstances of this case show that an application was unnecessary. As with the argument about being added to Instant’s ADC, Hangar 11 would not have a claim on an award of compensation to Instant. Hangar 11 would still have the ability to prove its claim and to obtain compensation from the City. As stated in the decision on the merits, the purpose of s. 40 appears to be for situations of a partial taking where interested parties in the action could not agree on an apportionment of the compensation: the example given was of a mortgagor and mortgagee.

[34] Similarly, regarding the *Rules*, the application was unnecessary. The fact that there is a dearth of case law interpreting the section does not assist Hangar 11 in its application for costs.

[35] The Panel acknowledges and agrees with the decision in *Marks v. Westlock (Town)*.³ But the decision to deny costs in this case is not made because the Application was unsuccessful, but rather because there are special circumstances to deny costs; that is, the Application by Hangar 11 was unnecessary.

[36] The Panel does not accept the City’s argument that the procedural application was brought to advance Hangar 11’s interest in a corporate dispute with Instant and Venture. That is speculative.

[37] Instant did not seek, nor made submissions about, costs. Instant shall also bear its own costs. Venture did not participate in the Application and was not invited to make submissions about costs.

³ 2005 CanLII 78461 (AB LCB)

ORDER

1. The parties shall bear their own costs of the Application.

Dated at the City of Calgary in the Province of Alberta this 3rd day of May, 2023.

LAND AND PROPERTY RIGHTS TRIBUNAL

Tim Meagher Digitally signed by Tim Meagher
Date: 2023.05.03 10:31:13
-06'00'

Timothy S. Meagher, Member