



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Demosthenes Steakhouse and Pizza Ltd. (Flamingo Restaurant & Lounge) v
Edmonton (City), 2023 ABLPRT 12

Date: 2023-01-11

File No. NM2022.0007 (Related File No. DC2020.0037)

Order No. LPRT2023/EX0012

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 the *Expropriation Act Rules of Procedure and Practice*, AR 187/2001.

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

BETWEEN:

Demosthenes Steakhouse and Pizza Ltd. o/a Flamingo Restaurant & Lounge,
Christine Tsoukalas,
Maria Tsoukalas,
Pantelis Tsoukalas, and
Seraphim Tsoukalas

Applicants

and

The City of Edmonton

Respondent

BEFORE: Terri Mann, Presiding Member
(the “Panel”)

ORDER

APPEARANCES

For the Applicants (Claimants): Paul Barrette, Prowse Chowne LLP

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

Introduction

[1] This Decision addresses 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 Applicants (the “Claimants”) on August 17, 2022, and the costs of the within matter, in relation to a Claim and Amended Application for Determination of Compensation (“Amended ADC”) under the *Expropriation Act*, RSA 2000, Chapter E-13 (the “Act”).

Background

[2] The Claimants have applied to the Land and Property Rights Tribunal (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*, setting a hearing date pursuant to *Rule 7* on or after March 1, 2023, requiring the Respondent to provide its final expert report(s) prior to the hearing in accordance with *Rule 9* or alternatively, by a set date prior to the hearing, and setting a time for a rebuttal expert’s report. The Claimants further seek the costs of the Application.

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

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

- (a) Brief of the Claimants, filed September 29, 2022, and Reply Brief filed October 21, 2022;
- (b) Affidavit of Kristen Holt, filed August 17, 2022; and
- (c) Brief of the Respondent, filed October 13, 2022.

Factual Overview

[5] On June 30, 2020, the Claimants served the Respondent with an Application for Determination of Compensation.

[6] On April 27, 2022, the Claimants served the Respondent with an Amended Application for Determination of Compensation.

[7] On or about October 16, 2020, the Claimants served its Affidavit of Records on the Respondent, enclosing records including three (3) experts’ reports. On or about August 31, 2021, the Respondent served its Affidavit of Records on the Claimants.

[8] On March 19, 2021, counsel for the Claimants, Paul Barrette (“Barrette”), corresponded with counsel for the Respondent, Steve Lutes (“Lutes”), stating that the Respondent was in receipt of the Claimants’ expert report(s) since October 16, 2020, the Claimants were “...ready for a hearing” and requesting whether there would be reports forthcoming from the Respondent and if so, a date for receipt thereof.

[9] On October 5, 2021, Pantelis Tsoukalas, corporate representative of the corporate Claimant, underwent Questioning for Discovery and on October 13, 2021, Answers to Undertakings were provided to the Respondent.

[10] On October 13, 2021, Barrette corresponded with Lutes, requesting the anticipated date of receipt of the Respondent’s expert report. On October 27, 2021, Barrette again corresponded with Lutes, requesting

the anticipated date of receipt of the Respondent's expert report.

[11] On November 1, 2021, Lutes responded, "...Not sure when we are going to receive any expert reports." On the same day, Barrette corresponded with Lutes, and queried as to whether "...there is an expert on retainer" and requested an anticipated timeline for the Respondent's receipt, review, and finalization of its expert's report.

[12] On December 9, 2021, Barrette again corresponded with Lutes, stipulating he was following up on his November 1, 2021 correspondence, which had not had a response.

[13] On January 5, 2022, Barrette corresponded with Lutes, advising he had instructions to make an application to set a hearing date and towards that end, was commencing drafting of the Notice of Motion; he requested the Respondents' position as to the setting of a litigation plan to avoid resort to an application.

[14] On January 11, 2022, Lutes corresponded with Barrette, advising of "staffing problems" and advising "an application will not be necessary"; the said correspondence did not stipulate whether the Respondent was amenable to the proposed litigation plan.

[15] On April 25, 2022, the parties attended a DRC, at the request of the Claimants. The parties agreed to timelines including:

- (a) by May 31, 2022, the Respondent would advise if further Questioning of the Claimants is required and if so, determine dates for Questioning (the Claimants confirmed they did not plan to conduct a Questioning of the Respondents);
- (b) by May 31, 2022, the Respondent would provide its expert report;
- (c) by July 29, 2022, the Claimants would provide their reply or rebuttal expert report to the Respondent;
- (d) by August 31, 2022, the Respondent would provide its rebuttal expert report to the Claimants.

[16] On May 24, 2022, Lutes corresponded with Barrette, advising the Respondent had "parted ways" with its expert, and was retaining a new expert. On May 31, 2022, Barrette followed up with Lutes, querying as to whether the Respondent had retained a "replacement expert" and if so, whether timelines could be provided for receipt of a report. On June 2, 2022, Lutes corresponded with Barrette, stating, "I believe we have found another expert...."

[17] On June 13, 2022, Barrette corresponded with Lutes, requesting whether the Respondent was moving ahead with its expert and stating, "Can you please provide a timeline for delivery of a report?" and instructions were to "move ahead with a motion to set at least timelines leading up to a hearing date and potentially the date itself." Barrette requested as to whether Lutes would consent to an order and stipulating his side was "willing to agree to reasonable timelines" for steps including the date by which the City's expert report would be served, setting exchange of *Rule 9* documents one month prior to a hearing date, and the hearing date itself. On July 18, 2022, Barrette sent a follow-up correspondence to Lutes stating he had not received a response to his June 13, 2022 correspondence and stipulating his side had nearly completed a motion for the relief sought, and requested whether the Respondent would consent to an order, as requested. On August 15, 2022, Lutes corresponded with Barrette, stating he had no estimated timeline for his expert's report, and was not amenable to a consent order to set timelines for litigation steps.

Issues

1. 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?
 - a. Should the Tribunal order exchange of information pursuant to *Rule 9* of the *Rules*?
2. Should the Tribunal award costs of the Application?

Key Submissions on Behalf of the Claimants***Setting a Hearing date and timelines for Litigation Steps***

[18] The Claimants are of the position that, pursuant to *Rule 7*, the Tribunal ought to set the matter down for a 6-day¹ hearing on or after March 1, 2023. The Claimants are further of the position that the Tribunal should direct the provision or exchange of materials prior to the hearing including expert reports, in accordance with *Rule 9* of the *Rules* or alternatively, the Tribunal should impose timelines on the Respondent in readiness for the hearing of the matter.

[19] In its Rebuttal, and in response to the Respondent's Written Submissions proposing a hearing date after May 1, 2023, the Claimants submit the scheduling of a hearing on or after May 1, 2023 is acceptable if it can be set with certainty and either:

- (a) *Rule 9* should govern all timelines for disclosure prior to the hearing; or
- (b) the process ordered from the Application should allow the Claimants time for any revisions to their report or rebuttal deemed necessary after receipt of the Respondent's expert report in mid-December² (i.e. February 15, 2023).

[20] In support of the Application, the Claimants submit their side is ready for a hearing, pending provision of the Respondent's expert report:³

- (a) both sides have exchanged affidavits of records;
- (b) the Claimants served their expert reports on the Respondent October 16, 2020;
- (c) Questioning is complete;
- (d) the Claimants have requested the Respondent's expert report unsuccessfully on multiple occasions (March 31, 2021, October 13, 2021, October 27, 2021, November 1, 2021 and December 9, 2021); there being no reports produced from the Respondent to respond to, the Claimants are ready to proceed with the hearing of the matter.

¹ The Claimants submit that the 6 days is calculated as follows: for the Claimants, three expert and four ordinary witnesses (estimated three days); for the Respondent, two expert and one ordinary witness (estimated two days); and one day for argument.

² The Respondent, in its Written Submissions, submitted that it expected to receive its expert report in mid-December, as per the advice of its expert. However, see para. 30.

³ The Claimants argue, however, that there being no reports from the Respondent, the Applicants are ready to proceed with a hearing of the matter (see paragraph 23 of the Claimants' Written Brief).

[21] The Claimants argue that the Respondent's inaction is causing delay of a final determination of compensation in the matter.

[22] On April 25, 2022, the parties attended a DRC, at the Claimants' request, wherein timelines were agreed to, including a deadline for provision of the Respondent's expert report, by May 31, 2022. The deadline was missed. Subsequently, on June 13th and July 18th, the Claimants requested the Respondent provide a new date or timeline as to provision of an expert's report. On August 15, 2022, the Respondent advised it did not have an estimated timeline. No updates on this issue have been provided, to September 29, 2022.⁴

[23] The Claimants rely on *Rule 7* of the *Rules* which permit a party to apply to the Tribunal by notice of motion for an order setting the time and place for the hearing. *Rule 7* does not require agreement from both parties to set the hearing date: see *Newton Aviation Services Ltd. v Edmonton (City)* 2022 ABLPRT 151.

[24] The Claimants are of the position that the legislative scheme, including the *Rules*, must be strictly construed in favour of the Claimants' right to have compensation determined, including the provisions governing the authority of the Board (now Tribunal): see *Edmonton (City) v Capital Region MRI Ltd.* 2020 ABLCB 3 ("*Capital Region MRF*").

[25] The Claimants are further of the position that a *Rule 9* document exchange provides the most efficient mode for conducting a hearing and the Claimants request that the parties produce their final expert reports, prior to a hearing, in accordance with *Rule 9* or alternatively, by a set date prior to the hearing, providing sufficient time for the Claimants to make any revisions or provide surrebuttal reports prior to the hearing.

[26] In response to the Respondent's submissions that it was diligent about seeking and procuring an expert's report and the Application was unnecessary, the Claimants argue:

- (a) the catalyst for the Respondent to seek a second expert after parting ways with its first expert, was the Claimants' repeated queries in this regard, and, in particular, its request for a DRC which set a deadline for provision of the Respondent's expert's report (which was missed); and
- (b) the Claimants began requesting an estimate of a timeline for provision of the Respondent's expert report on March 31, 2021 and to date, have been awaiting updates; emails provided, ostensibly in response to this query were "not updates" but non-committal, and the Tribunal process has been "...the only mechanism by which the City has provided a timeline for deliverables."

Direction as to Costs

[27] Finally, the Claimants argue entitlement to costs of the Application under section 39 of the *Act* on the basis that the circumstances merited a Notice of Motion.

Key Submissions of the Respondent

Setting a Hearing date and timelines for Litigation Steps

[28] The Respondent submits it has no objection to the Tribunal setting the matter down for a hearing and takes no position regarding the number of dates required for the hearing; however, it asserts that it is not the Tribunal's practice to schedule a hearing until the parties demonstrate that a matter is ready for hearing,

⁴ See paragraph 16 of the Claimants' Written Brief.

to facilitate an efficient and effective hearing, and to reduce the probability that hearings will be adjourned. Section 17 of the *Rules* states that any proceedings before the Tribunal must be in accordance with the procedures directed by the Tribunal. In this vein, the Respondent submits it is "...not able to state that it is ready to proceed to a hearing." Should the Tribunal set the matter for a hearing, however, the Respondent submits the hearing should not take place prior to May 1, 2023, to permit adequate time for production of any expert materials and further questioning, if necessary.

[29] The Respondent acknowledges *Rule 7* of the *Rules* permits a party to apply for an order setting a hearing date; however, 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. Further, the Tribunal, as a specialized administrative tribunal, is the master of its own procedure, subject to obligations of procedural fairness and natural justice: see *Prasad v. Canada (Minister of Employment & Immigration)* [1989], 1 SCR 560. *Capital Region MRI*, relied on by the Claimants, does not override the Tribunal's ability to develop its own internal procedures regarding scheduling hearings.

[30] The Respondent submits it parted ways with its expert in May 2022, and required time to find a new expert, seek approval to retain the expert, do a conflict check, draft, and execute retainer documents, and provide the expert with the Claimants' materials. The new expert which was retained was unable to provide an estimate for delivery of its report at the time that Claimants' counsel was seeking this information and the Claimants were advised as such on August 15, 2022; the Respondent's Brief indicated that a report could be made available early to mid-December, 2022; however, on January 10, 2023, Barrette corresponded with the Tribunal, advising that the Respondent advised on December 20, 2022 it had received a revised timeline from its expert and expects to be in a position to provide its report by "the beginning of February" (the "New Expert Timeline").

[31] Finally, the Respondent submits preparation of its expert's report and the possibility of further questioning are required as part of its due diligence in responding to the Claimants' claim and it is unable to ascertain, at this time, whether it requires further questioning of the Claimants. Should the Tribunal set the matter down for a hearing, it reserves all of its rights under the legislation, including the right to further questioning if necessary.

Direction as to Costs

[32] The Respondent argues the Application was both unnecessary and premature; the Claimants were apprised that the timeline for delivery of the Respondent's expert report is not within the control of the former, and the Claimants knew or ought to have known, it is not the Tribunal's practice to schedule a hearing until all parties are ready to proceed to a hearing; notwithstanding, the Claimants brought the Application two days after counsel for the Respondent advised counsel for the Claimants its expert "...could not yet provide the information the Applicants were seeking." As a result, the Tribunal should deny the Claimants' application for costs.

Findings and Analysis

Setting a Hearing Date and Timelines for Steps

[33] *Rule 7* permits a party to apply by notice of motion for an order appointing the time and place for a hearing. The Panel finds that the policy of the Tribunal as regarding the setting down of a hearing involves an assessment of the parties' readiness to proceed to a hearing. The Panel further finds that, in the present circumstances, the parties have exchanged Affidavits of Records and the Respondent is in receipt of the Claimants' expert reports. The Respondent has not provided its expert report(s) to the Claimants or advised whether it requires further questioning of any of the Claimants, whilst asserting these steps are necessary for

its due diligence. The Panel accepts that these steps are indeed necessary for due diligence and that the matter is not ready for a hearing immediately. However, this is not the end of the analysis as, if so, a Claimant would be without remedy in the face of a Respondent who dragged its feet in the progress of an action, and *Rule 7* would be somewhat redundant.

[34] The Panel notes:

- (a) the Claimants served their expert reports on the Respondent on October 16, 2020, approximately two years prior to the Application filing date;
- (b) in an ostensible effort to avoid the Application, counsel for the Claimants requested counsel for the Respondent to agree to a consent order to affix timelines for steps in the litigation, but this was not agreed to;
- (c) since March, 2021, counsel for the Respondent has been requested on multiple occasions for an anticipated timeline for provision of its expert report but has not provided same;
- (d) timelines prescribed in the DRC and in particular, the deadline for provision of the Respondent's expert report, were not adhered to.

[35] Given the foregoing, the Panel finds it is appropriate to set the matter down for hearing and set timelines in the matter, to ensure the progression of the matter in fairness to both parties ("Timelines for Steps"). As regarding the scheduling of a hearing, the Claimants request a hearing date on or after March 1, 2023, or alternatively May 1, 2023, with the proviso that a date certain be set and either *Rule 9* should govern all timelines for disclosure or an alternative process directed by the Tribunal.⁵ The Respondent takes no position regarding deadlines for steps, but requests, should a hearing date be set, it be a date after May 1, 2023.

[36] As regards Timelines for Steps, the Panel directs provision of the Respondent's expert report by February 10, 2023, and a DRC to be held, by March 17, 2023, at which time, the Respondent to advise as to whether further Questioning will be necessary, and the parties to agree on a date for that Questioning, on or before April 7, 2023. Further, should rebuttal and surrebuttal expert reports be deemed necessary, the same to be exchanged by May 12th and May 26, 2023, respectively. Finally, the Panel directs a date for a hearing of the matter be determined on or before September 16, 2023⁶, with the date for *Rule 9* documents to be exchanged and filed with the Tribunal set for one month prior to the hearing date; failing which a further DRC shall be held, at which a date certain for the hearing shall be set.

Costs

[37] The Panel directs costs payable for the Application to the Claimants, such determination to be dealt with in the determination of costs payable, at the hearing of the Amended ADC.

Order

1. In consideration of the above factors, the Tribunal grants the Application and directs a date for the hearing of the matter to be determined on or before September 16, 2023, with the date for *Rule 9* documents to be exchanged and filed with the Tribunal set for one month prior to the

⁵ These dates were provided prior to the December 20, 2022 New Expert Timeline.

⁶ The Respondent did not take issue with the Claimants' proposed 6 days for the length of the hearing; the Panel directs that the length of the hearing to be canvassed and confirmed at the DRC.

hearing date. The Tribunal refers the setting of deadlines, in the interests of fairness, and to expedite the matter, as follows:

- a. provision of the Respondent's expert report by February 10, 2023;
 - b. a DRC to be held by March 17, 2023, at which time, the Respondent to advise as to whether further Questioning will be necessary and the parties to agree on a date for that Questioning, to be held on or before April 7, 2023;
 - c. rebuttal and surrebuttal expert report(s), if applicable, to be exchanged by May 12 and 26, 2023 respectively.
2. Costs payable for this Application are payable to the Claimants, the determination of such costs to be dealt with in the determination of costs payable, arising from the hearing of the Amended Application for Determination of Compensation.

Dated at the City of Edmonton in the Province of Alberta this 11th day of January, 2023.

LAND AND PROPERTY RIGHTS TRIBUNAL



Terri Mann, Member