Court of King's Bench of Alberta

Citation: 1724732 Alberta Ltd. v Lexin Resources Ltd., 2025 ABKB 239

Date: 20250416
Docket: 2303 06772
Registry: Edmonton

Between:

1724732 Alberta Ltd.

Appellant

- and -

Lexin Resources Ltd.

Respondent

Decision of the
Honourable Madam Justice S.E. Richardson
Appeal from decisions of Land and Property Rights Tribunal
dated May 10, 2017 and May 19, 2021

Introduction

[1] The Appellant appeals two decisions relating to compensation orders made under the *Surface Rights Act*, RSA 2000, c. S-24 [the *Act*] in relation to industrial lands just outside Calgary.

[2] The Appellant claims that in each of the two decisions, the Land and Property Rights Tribunal [the Tribunal] fell into error in the assessment of the value of the land in question and in the capitalization rate applied to the compensation formula. He suggests that the Court can either set the compensation amount on the basis of the record before the Tribunal and the new evidence submitted on the appeal or return the matter to the Tribunal for reconsideration.

[3] The Respondent corporation [Lexin] declared bankruptcy in 2020 and has been struck from the corporate registry. In such cases, where compensation is owed to a landholder, s 36(6) of the *Act* allows the Tribunal to direct the Alberta government to pay out of the General Revenue Fund the compensation to which the landholder is entitled. Counsel for the Appellant advised the Court appointed receiver for Lexin of the within appeal and obtained confirmation

from the receiver that the Respondent "has no intention of attending [the] hearing and, to that end, takes no position." Hence, the Respondent did not attend the appeal. Counsel for the Tribunal attended as a courtesy to the Court and advised that the Tribunal took no position on the appeal of either the 2017 (2017 ABSRB 473) or the 2021 decision (2021 ABSRB 1220). As well, Counsel for the Tribunal advised that they took no position on any subsequent costs application.

[4] For the reasons set out below, the 2017 decision is affirmed, and the appeal is granted in relation to the 2021 decision.

Background

[5] William Walter is the President of the Appellant corporation 1724732 Alberta Ltd. [172]. In 2013, 172 purchased an 80 acre parcel of farmland in Rocky View County. The Appellant saw an opportunity to develop this industrial land into a commercial development. The land came with rezoning possibility, and it bordered the Calgary city limits and Glenmore Trail, a major thoroughfare to the east of Calgary. At the time, there was speculation that Calgary may annex the entire area in order to build a ring road. The Appellant's intention was to improve the property, apply for subdivision approval, then sell smaller portions of the land for a profit.

[6] The land was encumbered by two surface rights leases from the 1990s. When the Appellant purchased the land, the surface rights leases were granted to Lexin. The Respondent maintained three well sites close together on a portion of this land.

[7] The purchase price of the land was $5,500,000. Mr. Walter put up $1,500,000 of his own funds, and borrowed the remaining $4,000,000 from Private Capital Mortgage Ltd. [the lender] This loan carried an 11% interest rate.

[8] The Appellant wanted to subdivide the 80 acre parcel into four 20 acre lots. One of these lots had two well sites that were operated by Lexin. At the time, the well sites were active, and the Appellant received compensation from Lexin for access to their well sites as provided for under the *Act*.

[9] As part of the subdivision application, the county required the Appellant to design, engineer and build an industrial grade roadway between the four subdivided lots, build acceleration and deceleration lanes from Glenmore Trail onto the lands, install streetlighting, electrical, natural gas and telephone grids.

[10] As well, once the subdivision plan was approved, the Appellant had to design, engineer and build an access road so that Lexin had access to its well sites from all four planned 20 acre parcels.

[11] The costs to design, engineer and install this infrastructure was $2,500,000. These funds were also borrowed from the lender at an interest rate of 11%.

[12] The Appellant had now borrowed $6,500,000 and contributed $1,500,000 of his own funds to this project.

[13] The county approved the subdivision of the lands, and three of the four 20-acre parcels were sold and further developed by other parties. The one lot that was not sold is still owned by the Appellant and is the lot on which the Respondent well sites are located.

[14] Given the risk of the Appellant's venture, the lender required one lot to be conditionally sold as part of the Appellant's initial financing agreement. All four 20-acre parcels were listed with a commercial realtor at the same time.

[15] In addition to the financing requirement that one 20 acre parcel had to be conditionally sold before the lender would advance the funds for the project, Mr. Walter testified that in order to service the $6.5 million debt at 11% he had to sell three of the four 20 acre parcels with dispatch.

[16] Lot 1 was the first parcel sold by the Appellant. This lot bordered Glenmore Trail and has a wetland within its boundaries. As a result, the wetland is governed by the *Water Act*, RSA 2000, c. W-3, which preludes the use or disturbance of this portion of Lot 1. This lot was sold for $165,000 per acre shortly after the Appellant acquired the lands.

[17] Lot 4 was the second parcel that was sold $145,022 per acre. This lot was sold in 2015 and is now rented to Lafarge, an international construction company.

[18] The Appellant testified that both Lot 1 and Lot 4 were sold at a discount from their market value as he needed to secure the funds from these sales in order to obtain financing for the entire project.

[19] Lot 2 was the third lot sold by the Appellant, in 2015 for $178,881 per acre. It was sold to a trucking company who started leasing the land to ProFormance Group. ProFormance group recently purchased lot 2 and they currently own all of Lot 1 and Lot 2.

[20] Lot 3 remains owned by the Appellant. This is the lot that has the two well sites, with three separate wells. Each well site comes with a surface lease/right of entry in favour of the Respondent.

[21] In 2016, Lexin was showing signs of economic fragility such that the Alberta Energy Regulator ordered them into bankruptcy. A receiver was appointed, and stays were imposed on all Lexin wells including the well sites on Lot 3. The result was that the Appellant was prohibited from doing anything with the entire Lot 3, and all compensation pursuant to the *Act* ceased.

[22] Once an operator is placed into bankruptcy, the Orphan Well Association (OWA) assumes responsibility for the well sites from the operator. In the case of Lot 3, there was a well site on the west side of the lot, and two on the east side of the lot.

[23] The west well site was eventually capped and the surface reclaimed; work done by the OWA. This took two years to complete. Once completed, the surface lease was terminated, and the Appellant landowner was able to lease this portion of Lot 3. Currently this land is leased to Spruce Hollow Heavy Haul.

[24] The east well site contains two wells. One of the well sites on this section has been capped. However, the work at the second well site is more challenging. The OWA has attempted to seal this second well on four separate occasions, with all attempts to date unsuccessful. This well continues to leak sour gas. The Appellant is unable to use the east part of Lot 3 until the OWA has completed their work, and reclamation of the area around the well site has been completed.

[25] The Appellant believed that when the OWA started their work remediating the Lot 3 well sites, that this endeavour would be completed in 2021/2022. While the west well site has been

capped, and one of the east well sites has been capped there is no time frame for completion of the remediation work on the remaining well site. There is no work being undertaken by the OWA to complete this task presently, and there is no time frame for this work to be undertaken.

Legislative Scheme

[26] The *Act* addresses the inherent friction between landowners and the operators who enjoy surface lease rights or right of entry onto a landowner's property. Landowners are entitled to compensation for the limits placed on their ownership of the land by the statutory rights of operators. The purpose of the *Act* is to balance the rights of landholders with mineral development and resource extraction.

[27] Where the landowner and the operator disagree as to the amount of compensation payable to the landowner under the *Act*, the parties may refer the dispute to the Land and Property Rights Tribunal for a hearing.

[28] There was a legislative change in 2021 that impacts this appeal. In 2020, the Alberta Government introduced legislation that amalgamed a number of different boards and tribunals. On June 2, 2021, the new legislation was proclaimed. The previous Surface Rights Board for Alberta was reconstituted as the Land and Property Rights Tribunal. The only substantive change in the newly enacted legislation that impacts this appeal relates to the standard of review and will be addressed below.

[29] Section 27 of the *Act* establishes a five-year period for a review of the rate of compensation to landowners. Given the notice requirements in the *Act*, compensation hearings usually occur within the middle of this five-year period. The five-year review is a future looking analysis of the compensation rate. An appeal from a tribunal decision is a *de novo* hearing pursuant to s 26(1) of the *Act*. As a *de novo* hearing, an appeal from a tribunal decision can receive evidence from any time within this five-year period, including from the time period after the tribunal hearing and decision. This is the case in this appeal and the new evidence will be detailed below.

[30] When an operator is bankrupt, as is the case with the Respondent, they are no longer able to make compensation payments to the landowner. In this situation, s 36(6) of the *Act* is engaged and the Tribunal may direct that the Minister responsible for the *Act* to pay out of the General Revenue Fund the amount of money to which the landowner is entitled under the compensation regime established by the *Act*. This is the case in the present appeal. It is immaterial both to the compensation assessment and to this appeal that compensation is payable by the Minister instead of by the Respondent: ***Bateman v Alberta (Surface Rights Board)***, 2023 ABKB 640, para 75.

The Appeal

[31] Section 26(6) of the *Act* grants a statutory right of appeal to the Court of King's Bench from a decision of the Tribunal. Accordingly, in addition to the certified record of proceedings from the 2017 and 2021 decisions, the Appellant called three witnesses on this appeal.

[32] William Walter, the principal of 172, testified as to his history of ownership of the lands in question, his work and obligations in readying the lands for subdivision consideration, and his frustration with the Orphan Well Association and the current status of that parcel of the lands which he still owns.

[33] William Hagel also testified. He was the lending specialist who advanced the funds to purchase the land and undertake the work to prepare the lands for subdivision consideration.

[34] Finally, Brian Gettel testified. Mr. Gettel was qualified by the Court as an expert in land appraisals in Alberta and compensation calculations under the *Act* and entitled to give opinion evidence in that field. Mr. Gettel provided evidence on the value of the lands and the capitalization rate for the property in the 2021 hearing while his associate provided this evidence in the 2017 hearing.

[35] Mr. Gettel's testimony remained within his area of expertise for the most part. He did stray outside the area when he testified to having conducted his own research on past decisions of the Tribunal in relation to the capitalization rate for industrial land and he concluded that in his review of Tribunal decisions during the time frame in question, the Tribunal usually applied a rate of 10%. This portion of his evidence is of little value given the broad type of land and the province wide geographic area that the Tribunal oversees. As well, legal research undertaken by a witness is of limited weight. I recognize that this information did inform a portion of his expert report, and no discount will be applied to his opinion for including this information. However, his testimony that during this time frame, the Tribunal in other, unnamed cases, applied a 10% capitalization rate as a bald assertion lacks any persuasive value on this appeal.

[36] Mr. Hagel, the lender, testified that Mr. Walter "would be expecting to recoup 20-30-40% of his investment". Yet Mr. Walter never testified as such, and there was no evidentiary basis for this statement. I am disregarding it.

[37] As a *de novo* hearing, an appeal from a Tribunal decision can receive evidence from any time within this 5 year period, including from the time period after the Tribunal hearing, evidence that was not available at the Tribunal hearing.

[38] On this appeal, the Court received documentary evidence that postdated the initial compensation hearings but remained within the five-year statutory time frame for each decision. This new evidence will be detailed below.

Standard of Review

[39] Historically, decisions of the Surface Rights Board have been reviewed on a reasonableness standard: ***Imperial Oil Resources Ltd. v 826167 Alberta Ltd.***, 2007 ABCA 131 at para 18, and ***Serink v ATCO Electric Ltd.***, 2017 ABQB 327, at para 327. This standard of review has been applied notwithstanding that appeals from the Surface Rights Board are *de novo* hearings, with new evidence permitted.

[40] The standard of review in this appeal is complicated by the fact that there are two decisions of the Tribunal under appeal, and between these two decision dates, the Alberta Government changed the enabling legislation for the Tribunal. The new *Land and Property Rights Tribunal Act*, RSA 2020, c. L-2.3 (the *LPRTA*) was proclaimed June 2, 2021.

[41] As well, in 2019, the Supreme Court of Canada released ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 (***Vavilov***). ***Vavilov*** established that the presumptive standard of review for appeals of administrative tribunal decisions is reasonableness. However, this presumptive standard can be rebutted by a clear indication of legislative intent: ***Vavilov***, para 10 and 16.

[42] Section 19 of the *LPRTA* states that on an application for judicial review or on an appeal of a decision or order of the Tribunal, the standard of review to be applied is reasonableness.

[43] The *LPRTA* also contains a transition provision: s 21(c). This section dictates that appeals commenced but not completed before the *LPRTA* came into force on June 2, 2021 are governed by existing legislation.

[44] The appeal of the 2021 Tribunal decision was filed June 17, 2021, so the appeal of this decision is governed by s 19 of the *LPRTA* and a reasonableness standard of review is applied.

[45] The appeal of the 2017 decision was filed on June 5, 2017, therefore s 21(c) of the *LPRTA* is engaged and the appellate standard of review is applied. The appellate standard of review is either correctness or palpable and overriding error: ***Housen v Nikolaisen (Housen),*** 2002 SCC 33.

[46] In order to ascertain the precise standard of review to the issues in the appeal of the 2017 Tribunal decision, the Court must first consider ***Vavilov,*** then determine whether the errors claimed in the 2017 decision are errors of law, errors of fact or errors of mixed law and fact. Once this is determined, the proper appellate standard of review can be determined.

[47] The Supreme Court in ***Vavilov*** established that where enabling legislation is silent on a standard of review for a tribunal, the appellate standard of review applies: see paras 17, 36-37. Questions of law, including jurisdiction and statutory interpretation attract a correctness standard of review under this framework: see ***Vavilov***, para 17, ***Housen,*** at para 10, 19, 26-37. Where the appeal rests on questions of fact, or questions of mixed fact and law where the legal principle is not readily extricable, the appellate standard of review is palpable and overriding error: ***Vavilov***, para 37.

[48] The palpable and overriding standard of review has been expressed as an error that is obvious and can be plainly seen and that affected the result. The palpable and overriding error standard is a high one. It prohibits an appellate court from setting aside a factual finding if there was some evidence on which Tribunal could have relied to reach that finding: ***Housen***, at para. 1.

[49] The Appellant asserts that the choice of the return on investment formula to determine compensation by the Tribunal is a legal question, given that other compensation methods were available. There is no dispute on this choice of formula. The Appellant argues that the quantification of the value of the land and the capitalization rate applied to the return on investment formula, are factual findings. Accordingly, the Appellant claims that the error in the 2017 decision is a question of mixed fact and law. I agree. This attracts the appellate standard of review of palpable and overriding error.

[50] In 2021 the Tribunal likewise chose the return on investment option to calculate the compensation due to the Appellant, and again, no issue is taken with this choice. The Appellant claims that the decision of the Tribunal on the value of the land in question, and the capitalization rate used for the return on investment calculation were both unreasonable.

Issues

1. Did the Tribunal err in the determination of the market value of the lands in 2017 and/or in 2021?

2. Did the Tribunal err in the determination of the capitalization rate in 2017 and/or in 2021?
3. What costs are payable on this appeal?

Did the Tribunal err in the 2017 decision?

[51] The hearing took place in November 2016 with a decision in May 2017. The five-year time period for this decision is 2015 to 2019. The 2017 decision related only to the west well site lands on Lot 3, and the access road that went through Lot 1 and Lot 3.

[52] The Appellant sought a market value on the Lot 3 of $150,000 per acre and the Tribunal agreed with this value. The Appellant sought a market value of $180,000 per acre for Lot 1. The Tribunal disagreed and fixed a market value of $165,000 per acre for Lot 1.

[53] The Appellant sought a capitalization rate of 8% and the Tribunal decided to apply a rate of 2.5%.

[54] The Tribunal heard from three witnesses: the Appellant, the lender, and Ryan Archer, an appraiser.

[55] The Tribunal accepted the Appellant's evidence that he wanted to sell both Lot 1 (access road) and Lot 3 but he was unable to do so as a result of the well site on the west side of Lot 3.

[56] The Tribunal agreed with the Appellant that the proper method to determine compensation was the return on investment approach. This approach requires estimating the market value of the property but for the well site, multiplying this number by the land taken for the well site /access road, and finally, determining the applicable yield rate and multiplying it to this sum. The resulting calculation determines the compensation due to the landholder.

[57] The appraiser valued Lot 3 at $150,000 per acre. In agreeing with this market value, the Tribunal's assessment was necessarily brief: it considered the value of Lot 4, the closest and most comparable to Lot 3, as sold in 2015 (two years earlier) at $144,022 per acre. The Tribunal stated that "since this value per acre is close to Archer's valuation, the Panel accepts Archer's valuation ($150,000 per acre) as reasonable".

[58] The Tribunal's decision to fix the market value of Lot 1 at $165,000 per acre, notwithstanding Mr. Archer's appraisal evidence, was based on the price that the Appellant fixed for the sale of Lot 1 ($165,000 per acre). In fixing this value for the land, the Tribunal noted the sale price of Lot 2 ($179,881 per acre) and Mr. Archer's appraisal ($180,000 per acre) but commented that "the Panel has most confidence in the [Appellant's] agreed selling price of $165,000 per acre, notwithstanding that this sale was not consummated. After all, the [Appellant] was willing to sell Lot 1 for that value per acre."

[59] The Appellant asserts that this decision betrays palpable and overriding error. This suggestion seems to be based on the weight of the combination of the sale price of Lot 2 and the appraiser's evidence.

[60] I disagree. The Tribunal's decision is anchored in the evidence and does not demonstrate any misapprehension of that evidence. The Tribunal was required to choose between competing valuations for Lot 1. In so doing, they placed the heaviest weight on the price that the Appellant was willing to part with the land. In the face of higher valuations by appraisal and of adjacent

parcels of land, there is no obvious error in fixing the value of the land at the value that the landowner had the property listed for sale.

[61] In terms of the capitalization rate, the Appellant sought 8% and the Tribunal fixed 2.5%.

[62] In rejecting the Appellant's suggested capitalization rate, the Tribunal articulated the evidence on this point, being the opinion of the appraiser and the evidence of the lender that the interest rate attached to the private financing to the Appellant for the purchase and development of the subject lands was 11%.

[63] The Tribunal then itemized a number of reasons for rejecting this evidence as insufficient to support the requested rate: reasons anchored in the evidence and the absence of evidence, the statutory regime of the *Act* and the purpose of compensation under the *Act*.

[64] In rejecting the Appellant's position on the capitalization rate, the Tribunal turned to other recent decisions where a capitalization rate in 2015 was determined. Noting that ***Penn West Petroleum Ltd. v. Parkland Industrial Estates Ltd.,*** (2015 ABSRB 42) determined a capitalization rate in 2015 of 2.5% and noting it was based on the prime lending rate at the time and not an arbitrary number. The Tribunal went on to say "In the absence of more persuasive evidence on the [Appellant's] opportunity cost/return of capital, and in the absence of pursuance evidence of significant risk…2.5%" was applied.

[65] The Appellant asserts that this decision betrays palpable and overriding error given the evidence that that Lafarge was renting Lot 4 as of 2016, on a long term lease, at a yield of 6.83 % and that this fact alone is sufficient to conclude that the 2.5% applied by the Tribunal demonstrates palpable and overriding error. I disagree

[66] The Tribunal was tasked with fixing a capitalization rate for a specific period of time. While the Lafarge lease was relevant, it was not determinative. The Lafarge lease was also a long term lease, on a more industrially attractive location. The Tribunal in fixing the capitalization rate at 2.5% relied on the existing prime lending rate as well as its recent jurisprudence on this issue. This choice does not display palpable and overriding error.

Was the 2021 decision unreasonable?

[67] At the 2021 hearing, the Tribunal heard from the Appellant, the lender and Mr. Gettel, an appraiser. At this hearing, the only land still owned by the Appellant was Lot 3. The surface leases remained, and the OWA was still undertaking or planning to undertake work to seal the wells on the west and east sites of Lot 3.

[68] The Appellant argued that the land value for Lot 3 should be $200,000 per acre. The Tribunal disagreed and fixed the west well site land value at $170,000 per acre and the east well site at $150,000 per acre.

[69] As well, the Appellant sought a capitalization rate of 6.62% arguing that was a reasonable rate of return that best reflected the actual opportunity cost to the landowner of the two well sites on Lot 3.

[70] The Appellant argues that despite the fact that the Tribunal used the proper method to assess compensation, their analysis was unreasonable in that they ignored relevant evidence, misapprehended and mischaracterized other relevant evidence as well as made internally inconsistent conclusions on the level of risk assumed by the landowner. In all of this, the

Appellant argues the Tribunal's decision is not justified and lacks transparency and intelligibility and therefore is unreasonable. I agree.

[71] At the time of the Tribunal hearing, Lot 3 was for sale for $225,000 per acre. This property had been for sale for a while, and the Appellant had just increased the sale price in 2021 from $175,000 per acre to account for the recent development on Lots 1, 2 and 4, as well as the anticipation that in 2021/2022 the OWA would complete their work on the well sites in Lot 3 and the Appellant could then undertake the reclamation work and sell the property. The OWA was able to complete their work on the west site, but work has stalled on the east well site and, as of the date of this appeal, no work was being undertaken by the OWA at this property.

[72] In the 2021 decision, the Tribunal rejected the opinion evidence of Mr. Gettel when he applied a +15% adjustment to Lot 1 as compared to Lot 3 which decision resulted in the Tribunal fixing the market value of Lot 3 at $170,000 per acre, instead of the $200,000 requested by the Appellant. In rejecting this evidence the Tribunal stated they "disagreed with the adjustment for low lying areas noting that it was only applied to one of the three comparable sales in the development. The evidence indicates that all lots in the subdivision are required to have their own drainage ponds to manage surface water runoff and provide fire suppression. Accordingly, the Panel feels that the +15% adjustment to Lot 1 lacks supporting evidence." (para 66) In concluding thus, the Tribunal misapprehended or mischaracterized the evidence as to the low lying area in Lot 1.

[73] The low-lying area in Lot 1 was not equivalent to the drainage ponds required in the other subdivision lots. There was unique feature to the low lying area in Lot 1, as it is a wetland as defined by the *Water Act*, RSA 2000 c.W-3. As such, the statutory regime precludes using this area for any purpose and requires that this wetland be left undisturbed.

[74] This evidence was before the Tribunal. There is no recognition of this distinguishing feature of the wetland area in Lot 1. There is no acknowledgement that the wetland area in Lot 1 is subject of statutory constraints on its usage. The Tribunal's conclusion that there is a lack of supporting evidence for the adjustment sought for the value of Lot 1 (which value ultimately affected the market value of Lot 3) fails to address this distinction, and fails to explain why the distinction is irrelevant to the valuation and fails to acknowledge that there was evidence before the Tribunal supporting the +15% adjustment to Lot 1 for the wetland. In mischaracterizing or misapprehending the evidence of the low lying area in Lot 1 (as a comparable to Lot 3) and using this erroneous finding to reject the appraisal evidence Mr. Gettel, the Tribunal's decision was unreasonable.

[75] On the issue of assessing the market value of Lot 3, Gettel testified that there was a major market movement higher in 2014 for industrial property it the area. The Tribunal concluded that "there was no evidence detailing economic factors, how they affected market prices, or how these elements supported the time adjustments [Gettel] applied to [the market value of adjacent] Lots 2 and 4" (para 62).

[76] This is not entirely correct, as the evidence demonstrated the Appellant executed the sale agreements for Lot 2 ($179,881/acre) and Lot 4 ($145,022/acre) in 2013 in order to secure financing for the entire 80 acre redevelopment project. The sale prices were negotiated in 2013, although the sales themselves did not occur until 2015. Lot 1 was resold in 2020 for $212,629 per acre, substantially more that the 2013 prices that were negotiated on Lot 2 and Lot 4.

[77] There was also evidence that the Appellant discounted the 2013 negotiated sale prices as he required those lots sold in order to secure financing. So the sale price differential on a per acre basis between the Lot 2 and Lot 4 (sold before 2014) and Lot 1 (resold in 2020) optically provide some evidence, even in the absence of any explanation, for an increase between 2013 and 2020.

[78] The Gettel Report that was before the Tribunal is 53 pages exclusive of appendices. The report references the impact of economic factors and how they affected market activity and valuation. The report includes a section on economic conditions in Calgary and Rocky View County between 2011 and 2020, with annual notations on real gross domestic product, population growth, oil and natural gas prices, job creation, unemployment rates, building permit statistics, housing starts, residential, commercial and industrial vacancy rates. Fully two pages of narrative is dedicated to an exploration of market area analysis.

[79] The Tribunal was not required to accept the evidence of Mr. Gettel. However, in ignoring this evidence in favour of a conclusion that there was "there was no evidence detailing economic factors, how they affected market prices, or how these elements supported" the appraisal, the Tribunal's decision lacks justification and is thereby unreasonable.

[80] The Appellant also argued that the Tribunal ignored the evidence in the appraiser's report of the three comparable tracts of land that were not owned by the Appellant. I disagree. The Tribunal did consider these unrelated lands and concluded that they were "more distant and not as comparable to the Land." (para 59). This conclusion was open to the Tribunal and the reasons given for rejecting this evidence are sufficient.

[81] The Appellant argues that the Tribunal's decision to apply a capitalization rate that "might have been earned as rental income or alternatively, as income earned from low-risk investments" (para 70) is unreasonable. I agree. This conclusion is unreasonable for a number of reasons.

[82] The Tribunal stated that the 'financing arrangements of the landowner should not affect the rate of return and therefore the determination of the compensation under s 27." (para 72). However, the Appellant was not asking for a rate of return commensurate with his 11% private financing. Nor was the 11% private financing interest rate factored into Mr. Gettel's opinion of the capitalization rate that should be applied. The Appellant was seeking a rate of 6.62% which did not take into account the interest rate on his financing agreement. By importing a position that was not advanced by the Appellant and assuming a connection to the evidence that was lacking, the Tribunal rendered a decision that was not justifiable.

[83] As well, the Tribunal's analysis of the appropriate rate is internally inconsistent such that it lacks transparency, and this is further indication of the unreasonableness of the decision.

[84] The unexplained inconsistency in the decision arises from the comment that the Tribunal "accepted the logic in the Gettel report" in using the investment approach to compensation and noted that the capitalization rate should reflect "a rate of return that best captures the cost of forgoing other ***similar investment possibilities***." (emphasis added, para 58). The Tribunal continues "Given this is industrial land on the verge of development, the Panel's position is that the losses attributed to the surface leases are a function of the market value of the land (but for the well leases) and the rate of return on an investment with a ***similar level of risk***." (emphasis added, para 69).

[85] The Tribunal goes on to conclude that the rate of return should be "income which might have been earned as rental income or alternatively, as income earned from low-risk investments." (para 70).

[86] There is nothing in the decision of the Tribunal that explains why they assessed the Appellant's investment risk as "low – risk". In fact, the evidence before the Tribunal was the opposite; that this investment was higher risk. Mr. Hagel's evidence before the Tribunal was that banks usually forego financing for raw land development, forcing developers to the secondary/private lending market where interest rates were higher. Mr. Hagel further testified that private investment for the type of development that the Appellant undertook was higher risk investment and that accounted for the 11% lending rate on the project. Mr. Hagel also testified before the Tribunal, and on this appeal, that even private lenders seek to have their initial investment of loaned funds returned with one year of lending to account for the higher risk of the development and subdevelopment of raw land.

[87] The decision to pivot from an analysis of risk level for "similar investment possibilities" and investments with a "similar level of risk", to applying a capitalization rate for low-risk investments is unreasonable on this record. There is no justification for applying a "low risk" rate when the all the evidence before the Tribunal was that this investment was a higher risk investment.

[88] The decision to apply a capitalization rate for low-risk investment is further unreasonable because the Tribunal stated that there was "insufficient evidence to support Lot 3 gaining rental earnings and achieving rates in the range of 6.75%" (para 71). This statement ignored the evidence before the Tribunal that on the adjacent Lot 4, Lafarge was in a long term lease since 2016 with a lease rate of 6.83%. In declining to address this evidence or explain why it was insufficient, the decision is rendered unreasonable as it is unjustifiable on this record.

The new evidence

[89] The 2021 decision having been found to be unreasonable; I will now turn to the new evidence submitted at the appeal. The time frame captured by the 2021 Tribunal decision is 2020 to 2024.

[90] The Appellant argues that the Court can return the 2021 decision to the Tribunal to reconsider their decision and consider the new evidence that was presented on this appeal, or the Court can determine the compensation payable to the Appellant on the basis of the record of proceedings in the 2017 and 2020 hearings, along with the new evidence presented on this appeal.

[91] The statutory regime and factual foundation relating to compensation orders under the *Act* requires specialized and unique knowledge. The Tribunal is staffed with individuals who possess specialized knowledge and industry specific expertise. They also administer legislation which has the unique purpose of balancing the property rights of landowners with the rights of companies who have government approval to engage in resource extraction. As well Tribunal members have knowledge of a discrete body of jurisprudence from prior Tribunal decisions and from the Courts. In the ordinary course, this is a case whereby the 2021 decision would be returned to the Tribunal for reconsideration. However, the Court will undertake the determination of compensation for 2020 to 2024 for the following reasons. First, this litigation has been ongoing for a considerable period of time and the Appellant has gone to considerable

expense on this appeal presenting the new evidence. To return this to the Tribunal would further delay his compensation and engage additional expense. Second, counsel for the Tribunal indicated that they take no position on this appeal. The interests of justice warrant the efficiency of a final determination on compensation owing to the Appellant for the period 2020 to 2024.

[92] The Appellant produced a purchase agreement in relation to Lot 3 and two offers to lease in relation to adjacent lots, all dealing with third parties.

[93] Lot 3 has been for sale for several years. The offer to purchase Lot 3 was dated June 10, 2022 and was for the entire 20 acre parcel. The purchase price was $6,100,000, or $305,000 per acre. The offer was subject to financing. The purchaser was unable to secure financing for the purchase because a reclamation certification was not available as the OWA had not been able to seal one of the wells on this parcel of land. The Appellant offers this unconsummated purchase contract as evidence as to the market value of the land in Lot 3 but for the well site.

[94] The Appellant also offers a commercial offer to lease agreement dated October 12, 2022 for Lot 3. This lease is currently in place. The tenant is Spruce Hollow Heavy Haul Ltd, the owner of a neighbouring parcel of land in this subdivision. The lease agreement runs from January 1, 2023 to December 31, 2027 and relates to the west side of Lot 3. This lease agreement attracts an annual escalating rental rate of $130,680 to $169,884. At these lease rates, Mr. Gettel fixed the yield on this lease at 9.73%.

[95] Finally, the Appellant presented a further lease agree, dated May 11, 2023 for the east side of Lot 3. This lease is currently in place and extends from June 1, 2023 to May 31, 2025. This lease provides for an annual basic rent for this land of $168,000, which calculates out to a rental rate of 8.20%.

[96] Mr. Gettel provided an updated appraisal and testified on this appeal. His opinion was that the land value had increased since he testified at the 2021 hearing. He fixed the market value of Lot 3 at its 2024 assessed value: $345,000 per acre. He took into account the new leases detailed above, with lease rate trends and fixed the yield for the west side of Lot 3 at 9.73% and the east side at 8.20%.

[97] Despite this evidence of elevated values of both market value and capitalization rates for Lot 3, the Appellant maintains that the appropriate compensation for the 2020-2024 period is a land value of $200,000 and a capitalization rate of 6.62%. The Appellant characterizes these figures as conservative and reasonable given the evidence and the purpose and scheme of the *Act*. I agree. Compensation for 2020 to 2024 will remain with the return on investment formula but be recalculated using a land value of $200,000 per acre and a capitalization rate of 6.62% for both the east and west lands in Lot 3.

[98] Because the Respondent is bankrupt, pursuant to s 36(6) of the *Act*, the Minister is directed to pay the Appellant the compensation that is due the Appellant under this new calculation.

Costs

[99] The Appellant does not dispute the costs awards in either the 2017 or the 2021 Tribunal decisions. They rely upon s 26(9)(b)(i) of the *Act* and claim full solicitor client costs of this appeal. Counsel for the Tribunal took no position on the costs issue on this appeal.

[100] Section 26(9)(b)(i) of the *Act* states the costs of an appeal under this section when the appeal is by the owner or occupant, if the appeal is successful, are payable by the operator on the basis of the lawyer's charges to the client. From ***Cabre Exploration Ltd. v Arndt***, 1988 ABCA 212 to ***Bateman v Alberta (Surface Rights Board)***, 2023 ABKB 640 there is a long line of jurisprudence concluding that landowners who incur the costs of litigating their statutory entitlement to compensation are not ordinary litigants. Full indemnity costs are warranted in this particular type of litigation as to conclude otherwise would significantly erode the amount of compensation to which landowners are entitled. There is no mitigation of this assessment in cases where the Minister has a statutory obligation to step into the shoes of the operator and pay costs to a landowner who is successful on an appeal.

[101] Counsel for the Appellant submitted a bill of costs for $41,273.14. This amount includes all the appeal costs, including obtaining an updated expert report, travel expenses for the landowner and Mr. Hagel, to attend and testify at the appeal, and legal fees for what was scheduled for a three day hearing (although it concluded in two days). Receipts were provided for all these expenses.

[102] In other similar appeals, the Courts have awarded solicitor-client costs to successful landowners, subject to the legal fees being reviewed by an Assessment Officer. I am declining to engage this additional step. The Appellant has expended enough time and resources in support of his attempt for fair compensation under the *Act*. The material presented on the costs submission is sufficient for the Court to conclude that the fees claimed above are reasonable.

[103] I note that the fees claimed in this appeal are actually lower than those claimed before the Tribunal at the 2021 hearing. In that hearing, the Tribunal reduced the legal fees by 25% to account for their conclusion that there were elements of the legal fees that could have been assigned to junior staff to reduce the overall cost. In the present appeal, counsel began to assign more routine tasks to junior lawyers at lower hourly rates. It is partly a result of this efficiency that the legal fees claimed for this appeal are actually less than those claimed in the 2021 Tribunal hearing.

[104] Despite the fact that the Appellant was only partially successful on this appeal, with the 2017 decision being undisturbed, while the 2021 decision was found to be unreasonable, costs are payable at the full amount submitted by the Appellant for the following reasons. The two decisions under appeal related to the same property and the same claimed errors by the Tribunal. The new evidence and the same witnesses on the appeal applied equally to the 2017 decision and the 2021 decision. Counsel approached the appeal of these two decisions efficiently, consolidating them early on, thus limiting the expense of advancing two separate appeals. Finally, having reviewed the material before the Tribunal in 2017 and 2021, this appeal was not prolonged as a result of the fact that two decisions were under appeal.

[105] The Appellant is awarded full solicitor client costs claimed of $41,273.14. Pursuant to s 36(6) of the *Act*, the Minister is directed to pay this to the Appellant.

Conclusion

[106] The 2017 decision of the tribunal is affirmed.

[107] The 2021 decision of the tribunal is unreasonable, and that decision is overturned. Considering the evidence before the Tribunal in that hearing, along with the new evidence

presented on this appeal, the Appellant is entitled to compensation for the lands subject to that review on the basis of the investment method chosen by the Tribunal with a land value of $200,000 per acre and a capitalization rate of 6.7%. Pursuant to s 36(6) of the *Act*, because the lease holder is bankrupt, the Minister is directed to pay this compensation to the Appellant.

[108] Costs are payable to the Appellant for this appeal in the amount of $41,273.14.

Heard on the 9th and 10th day of October, 2024, and Costs submissions in writing received February 10, 2025
Dated at the City of Edmonton, Alberta this 16th day of April, 2025.

S.E. Richardson
J.C.K.B.A.

Appearances:

Keith Wilson, K.C.
for the Appellant

Shannon Boyer
for the Land and Property Rights Tribunal