IN THE MATTER OF the Expropriation Act, being Chapter E-13 of the Revised Statutes of Alberta, 2000, and amendments thereto ("**Act**");

AND IN THE MATTER OF the intended expropriation by the City of Edmonton of the lands described under Certificate of Title number 992 303 040 + 1 as:

DESCRIPTIVE PLAN 9220135
BLOCK 6A
LOT 2
CONTAINING 216.54 HECTARES (535.08 ACRES) MORE OR LESS

EXCEPTING THEREOUT:		HECTARES	(ACRES) MORE OR LESS
A) PLAN 9925701	- ROAD	0.003	0.01

EXCEPTING THEREOUT ALL MINES AND MINERALS (the "**Airport Lands**");

AND IN THE MATTER OF the Notices of Objection to the said intended expropriation filed by the Objectors by their counsel;

AND IN THE MATTER OF an Inquiry in respect thereof pursuant to the provisions of the said Act by Graham McLennan as Inquiry Officer appointed by Clara Cerminara, Barrister and Solicitor, to conduct the said Inquiry;

REPORT OF INQUIRY OFFICER
GRAHAM McLENNAN

January 21, 2013

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Table of Contents

INTRODUCTION **1**

SUMMARY OF THE EVIDENCE **1**

Exhibits 1

SUMMARY OF ARGUMENT **6**

Objectors 6
Mr. Wakefield 6
Mr. Agrios 8
Ms. McNaughtan 9

SUBMISSIONS ON BEHALF OF THE EXPROPRIATING AUTHORITY **10**

REPLY SUBMISSIONS OF OBJECTORS **13**
Mr. Wakefield 13
Mr. Agrios 13
Ms. McNaughtan 14

FINDINGS OF THE INQUIRY OFFICER ON PRELIMINARY OBJECTIONS **14**

a) Lack of Jurisdiction 14
b) Conflicts/Reasonable Apprehension of Bias 16

COSTS **18**

INTRODUCTION

R. Graham McLennan was appointed Inquiry Officer on December 18, 2012. Soon after R. Graham's appointment counsel for Zeebest Plastics of Canada Inc., 745284 Alberta Ltd., Hamilton Aviation Ltd., McEwen's Aviation Services Inc., McEwen's Fuels & Fertilizers Inc., Air Spray (1967) Ltd., 1222663 Alberta Ltd., Edmonton Flying Club, Airco Aircraft Charters Ltd., Global Remote Sensing Inc. and Mifaco Inc., the Objectors ("**Objectors**"), advised they had two preliminary objections to R. Graham McLennan's appointment:

(a) R. Graham McLennan has no jurisdiction as his appointment was not in compliance with the mandatory provisions of Section 15 of the Act; and

(b) alleged conflicts of interest / reasonable apprehension of bias.

In correspondence and conference calls with counsel for all parties, it was agreed that the Inquiry would commence on January 17, 2013 at 2 p.m. to hear submissions and evidence with respect to these two preliminary objections. Further, and if necessary, the hearing would continue commencing January 29, 2013. The scheduling of continuation of the Inquiry hearing dates commencing January 29, 2013 was without prejudice to the position of the Objectors that the Inquiry Officer is without jurisdiction. It was also agreed by counsel for the Objectors that one Inquiry Officer would hear all.

Counsel for the Province of Alberta, Sean McDonough, was notified of the proceedings. Mr. Wakefield informed the Inquiry Officer that Mr. McDonough has advised he would not be in attendance.

The hearing commenced with consideration of these preliminary objections on Thursday, January 17, 2013 at 2 p.m. This report addresses the preliminary objections.

SUMMARY OF THE EVIDENCE

Exhibits

All exhibits were entered by the Expropriating Authority, the City of Edmonton, ("**City**") or the Objectors by consent. They are listed in Appendix I to this report.

In addition, a summary of facts were contained in the Written Submissions delivered by the City. These were accepted as accurate by counsel for the Objectors.

A summary of the salient facts from the above sources are as follows:

1. The City is the fee simple owner of the property municipally known as the Edmonton City Centre Airport and/or municipally known as the Edmonton Municipal Airport (referred to herein as the Airport Lands).

2. On October 10, 2012, the City registered its Notice of Intention to Expropriate against the title to the Airport Lands, as registration number 122 330 933, pursuant to the requirements of the Act.

3. On November 1, 2012, Reynolds Mirth Richards & Farmer LLP, solicitor on behalf of Global Remote Sensing Inc., Airco Aircraft Charters Ltd., and Mifaco Inc. served a Notice of Objection to the expropriation on the City pursuant to the Act.

4. On November 5, 2012, Fraser Milner Casgrain LLP, solicitor on behalf of McEwan's Aviation Services, Inc., and McEwan's Fuel & Fertilizers Inc., served a Notice of Objection to the expropriation on the City pursuant to the Act.

5. On November 5, 2012, Jack N. Agrios Prof. Corp., solicitor on behalf of Hamilton Aviation Ltd., Air Spray (1967) Ltd., and 1222663 Alberta Ltd. served a Notice of Objection to the expropriation on the City pursuant to the Act.

6. On November 2, 2012, and then on November 6, 2012 the City notified the Minister as represented by the Executive Director, Civil Law, Alberta Justice of receipt of the Objections pursuant to the Act.

7. On November 15, 2012, Larry P. Carr, Q.C. was appointed as Inquiry Officer pursuant to Section 15(2) of the Act.

8. On November 29, 2012, a Notice of Extension was registered on title extending the time for registration of the certificate of approval by 30 days, as registration number 122 395 020.

9. On December 6, 2012, an Originating Application was filed by counsel for the Objectors, seeking a declaration prohibiting Larry Carr from acting as Inquiry Officer in the matter of the proposed expropriations by the City, based on a reasonable apprehension of bias on the part of Larry Carr, as a result of statements made by him at a scheduled meeting with legal counsel.

10. On December 13, 2012, the Honourable Justice Hillier granted the Application of the Objectors ordering that Larry Carr be recused and prohibited from proceeding with an Inquiry. In his oral decision, Justice Hillier stated as follows at page 16:

> In summary, having assessed the legal issues and the scope of evidence in dispute, the Court hereby determined that the circumstances do give rise to a reasonable apprehension of bias as to which the inquiry officer must be recused and prohibited from dealing further with this case.
>
> Although it may be anticipated from the representations of the delegate of the Deputy Minister that a new inquiry officer will be appointed forthwith under section 15(2) of the *Expropriation Act*, the Court confines its order to the remedy that Mr. Carr is recused from this appointment.

11. On December 18, 2012, R. Graham McLennan was appointed as Inquiry Officer to conduct an Inquiry in respect of the said intended expropriation pursuant to the Act.

12. On December 27, 2012 a Notice of Extension was registered on title extending the time for registration of the certificate of approval by 30 days, as registration number 122 422 172.

13. On December 28, 2012, counsel for the Objectors requested, via email, that R. Graham McLennan, recuse himself as the Inquiry Officer in this matter. Counsel for the Objectors indicated that, "the grounds on which our submissions will be based are twofold: 1. Conflicts of interest; and 2. Absence of jurisdiction by reason of your appointment outside the statutory time limit provided in the Act."

14. As agreed amongst the parties, the Inquiry Officer provided to all parties a summary of any involvement McLennan Ross LLP had in connection with clients, or former clients, who have had matters that related to the municipal airport closure and any related expropriation proceedings. These were provided in letters dated January 10, 2013 and January 14, 2013 marked as Exhibits 1 and 2.

15. Mr. Agrios, counsel for some of the Objectors, entered into evidence an email from Kevin Ozubko of McLennan Ross LLP to the Edmonton Flying Club dated October 19, 2012, noting that Graham McLennan is very experienced in expropriation matters. The email was marked as Exhibit 3. Mr. Agrios confirmed that there is no assertion that the Inquiry Officer had any personal involvement in any matter for the Edmonton Flying Club, simply that Mr. Ozubko sent this email. Included as part of Exhibit 3 was a letter enclosing the Notice of Intention to Expropriate delivered to the Edmonton Flying Club care of Kevin Ozubko, at McLennan Ross LLP.

16. Mr. Agrios also entered into evidence, without objection, copies of the Statement of Defence of Edmonton Regional Airports Authority ("**ERAA**") and the Amended Statement of Defence of the City of Edmonton in Action No. 1103 11120, marked as Exhibit 4 and 5 respectively. The Plaintiffs in this action are Edmonton Flying Club and 1222663 Alberta Ltd.

17. By agreement of the parties, the Objectors represented by Ms. McNaughtan entered into evidence, an email from Airco Aircraft Charters Ltd. ("**Airco**") dated January 14, 2013, which was marked as Exhibit 6. This email notes that McLennan Ross LLP represented Airco in a contemplated action against ERAA; they incurred approximately $25,000.00 in fees; and that the file was transferred to the Reynolds Mirth firm. Ms. McNaughtan confirmed the transfer occurred in September of 2009.

18. By agreement of the parties, a letter from the Edmonton Flying Club dated January 16, 2013 addressed to Jack Agrios was entered as Exhibit 7. This letter objects to R. Graham McLennan proceeding as "the adjudicator for the proposed expropriation of the Edmonton city airports lands." Further, it notes that McLennan Ross LLP has been

counsel for the Edmonton Flying Club for years and has assisted with respect to the Lease between the Edmonton Flying Club and the City regarding the Airport Lands.

The Inquiry Officer outlined the standard process followed when the Deputy Minister's designate makes inquiries regarding appointment of an Inquiry Officer. Namely, a representative from Alberta Justice inquires with respect to any issues which may arise from the names of the Objectors; McLennan Ross LLP responds to whether they are aware of any such issues and a decision is made by Alberta Justice with respect to the appointment of an Inquiry Officer in light of this information. Further, in this specific instance, McLennan Ross LLP did respond to the inquiry from a representative of Alberta Justice that McLennan Ross LLP has been corporate counsel to the Edmonton Flying Club for a number of years (although other lawyers are handling City expropriation matters), and that there was at least one client of McLennan Ross LLP that is a leaseholder at the Airport Lands, who was not objecting to expropriation proceedings, but who was in discussions with the City regarding compensation. With this information disclosed, Alberta Justice appointed Graham McLennan as the Inquiry Officer.

Without concluding whether there were any conflicts, McLennan Ross LLP put in place conflict screens after the issues were identified.

There was no evidence of there not being Inquiry Officers in Alberta other than Larry Carr and Graham McLennan who would be able to be appointed for these intended expropriations.

There was no evidence led as to the practical consequences of the Inquiry Officer concluding that he had no jurisdiction to proceed with this Inquiry.

SUMMARY OF ARGUMENT

Objectors

Mr. Wakefield

Mr. Wakefield submitted in both his written and oral presentation that he was addressing the lack of jurisdiction issue and that Mr. Agrios would be making submissions on behalf of all Objectors on the issue of conflict of interest/reasonable apprehension of bias.

As a preliminary point, Mr. Wakefield advised that he would not be proceeding with the argument that the Inquiry Officer could state a case to the Court of Queen's Bench for a ruling. Ultimately, the City and the Objectors agreed that this process would likely only be available to a tribunal or Court determining questions of compensation under the Act. Further, counsel for all parties appeared to agree that the Inquiry Officer should decide these preliminary objections, (the City's supplemental Written Submissions on the ***ATA*** and ***ATCO*** cases affirmed this agreement that the Inquiry Officer should make these jurisdictional determinations).

Mr. Wakefield reviewed the ***Bulmer*** case found at Tab 3 of his Written Submissions. Specifically, he drew the Inquiry Officer's attention to pages 6, 14 and 16. He argued that this case establishes that mandatory requirements for various steps under the Act, if not complied with, result in a lack of jurisdiction. Accordingly, all subsequent steps taken are a nullity. In addition, he submitted that this case stands for the proposition that legislation which addresses expropriation of land should be strictly construed against the expropriating authorities and in favour of the private land owners.

Mr. Wakefield also noted that other cases such as ***Costello*** (Tab 4) *and* ***Horton*** (Tab 5) are further authority for the above propositions.

Mr. Wakefield then addressed the ***Balgerran Farm Ltd.*** case, (Tab 6). This case was an example of a failure to comply with the mandatory advertising provisions of the Act. This resulted in proceedings being declared invalid by Justice Girgulis. The reasons expressly follow the decision of ***Rosen v. The City of Edmonton***.

Mr. Wakefield reviewed the ***Rosen*** decision, or such portions of that decision as could be located. He submitted that the ***Rosen*** case is directly applicable to the circumstances of this case. Although the time period for appointment of an Inquiry Officer has changed since the 1974 *Expropriation Act*, the same mandatory language is found. Further, the 1974 *Expropriation Act* is, in all relevant respects, the same as the current Act. The conclusion in ***Rosen*** was that the appointment of an Inquiry Officer outside the time period mandated by the Act resulted in the process being without jurisdiction and therefore a nullity.

Mr. Wakefield made reference to the applicability of the *Rules of Court* to these proceedings. In summary, the *Rules of Court* are not applicable to a hearing by an Inquiry Officer.

Mr. Wakefield also made reference to the ***Tymchak*** decision of the Alberta Court of Appeal. He submitted that this case clearly supports the principle that there must be adherence to the mandatory timeline set forth in legislation and there is no discretion, even in the Court, to overlook or excuse failures to meet such mandatory statutory timelines. The remedy is for the legislature to alter the statute, if so desired.

Mr. Wakefield also took the opportunity to comment on the Written Submission received from the City. He noted that the doctrine of necessity may be applicable to trump some procedural unfairness situations, however it is not applicable to mandatory statutory timelines. The law in that regard is found in ***Rosen***, not the cases that deal with the doctrine of necessity. In any event, he submitted that there is no evidence of necessity before the Inquiry Officer. That is, there is no evidence that some other Inquiry Officer could not have been appointed and by necessity it would have to be R. Graham McLennan or Mr. Carr.

Mr. Wakefield also submitted that:

(a) Section 20 of the *Interpretation Act* only applies to steps or appointments made within the mandatory statutory time limits; and

(b) The Inquiry Officer should not proceed with the balance of this hearing because it is likely part of a process which is without jurisdiction and

therefore a nullity. He referred again to the ***Bulmer*** decision in this regard.

Mr. Agrios

Mr. Agrios noted that the Objectors for whom he acts adopt the submissions of Mr. Wakefield with respect to the proper interpretation of Section 15 and the alleged lack of jurisdiction that flows from the untimely appointment of the Inquiry Officer.

Mr. Agrios reviewed the relevant facts. He noted that the leases between the City and the Objectors are central to the litigation which is ongoing between most of the Objectors and the City and the ERAA. He noted that McLennan Ross lawyers had direct involvement in the Lease between the Edmonton Flying Club and the City concerning the Airport Lands. He submitted that Stephen Livingstone of McLennan Ross LLP is representing Shell as a Defendant in one of the related lawsuits commenced by the Morning Star Group of Companies. He submitted that Karen Platten of McLennan Ross LLP represents the Wheaton Family Trust and Don Wheaton Jr. is a Director of the Edmonton Flying Club. Counsel for the City objected to Mr. Agrios' submissions of fact, where there is no evidence before the Inquiry Officer. Further, Mr. Agrios noted that McLennan Ross LLP acts for companies controlled by the Klemke family, who have a Lease with the City on the Airport Lands and which are being expropriated. Finally, Mr. Agrios noted that sometime prior to September of 2009, McLennan Ross represented Airco. After Airco left McLennan Ross they commenced an action against ERAA, and subsequently amended to add the City as a Defendant. The consultation with McLennan Ross prior to September of 2009 addressed the general issue of the City's intention to close the municipal airport.

Mr. Agrios rhetorically asked why the Objectors are taking issue with the appointment of R. Graham McLennan as an Inquiry Officer, when from the evidence it appears that the City would more likely be the party to raise a reasonable apprehension of bias. Mr. Agrios noted that where there is a possible apprehension of bias, the Judge or tribunal may, in an effort to demonstrate no appearance of bias, tend to favor an opposing party. In this case, to demonstrate no appearance of bias the Inquiry Officer may, unconsciously, favor the City.

Accordingly, whatever side may have the reasonable apprehension of bias, either side can properly take issue with the Judge or tribunal hearing the matter. Mr. Agrios relayed an anecdote involving the late Justice David MacDonald to illustrate this point.

Mr. Agrios submitted that in determining whether the intended expropriation is fair, sound and reasonably necessary, a central issue is going to be the Leases between the Objectors and the City relating to the Airport Lands. The Objectors, he submitted, consider these Leases to be a significant aspect of their case.

Ms. McNaughtan

Ms. McNaughtan noted that she concurs with and adopts the submissions of Mr. Wakefield and Mr. Agrios. She submitted that The Law Society of Alberta Code of Conduct, properly interpreted, should prohibit the Inquiry Officer from proceeding with this matter. She noted that, regarding current clients, a law firm cannot both represent the client and act adverse to the client even if the subject matter of the files are unrelated. In such circumstances, the current clients must consent to any such arrangement.

Ms. McNaughtan also referred to the commentary on the rule prohibiting a lawyer from acting for more than one side or both sides to an issue (Tab D, pg. 4 of the City's Written Submissions). The commentary noted that where a lawyer is acting as an arbitrator or mediator in disputes between clients or former clients, this is only permitted where:

(a) the parties consent;

(b) it is in the parties' best interest that the lawyer act as mediator or arbitrator; and

(c) the parties acknowledge that the lawyer will not be representing either party and that no confidentiality will apply to material information in the lawyer's possession.

Ms. McNaughtan noted that the clients or former clients of McLennan Ross LLP do not consent to R. Graham McLennan acting as Inquiry Officer. Further, although this is not a mediation or arbitration, the function of the Inquiry Officer is analogous to those functions.

Ms. McNaughtan noted that case law provided by the City concerning the recusal of Judges is not particularly apposite. Judges do not have clients and Judges are not bound by The Law Society of Alberta Rules of Professional Conduct.

Ms. McNaughtan further submitted, in particular reference to Airco, that the essence of McLennan Ross LLP's representation of Airco in 2009 related to the closure of the municipal airport. However, Ms. McNaughtan acknowledged that she does not know if the subject of expropriation was addressed by McLennan Ross LLP in representing Airco in 2009. Further, that the Leases between the Objectors and the City would be central to the Inquiry Officer's hearing because the Objectors would take the position that the conduct of the City should be seen as unfair given the circumstances and terms of these Leases.

SUBMISSIONS ON BEHALF OF THE EXPROPRIATING AUTHORITY, THE CITY OF EDMONTON

Ms. Veronika Ferenc-Berry and Ms. Debie Piecowye alternated making submissions. The following is a summary of their joint effort.

It was noted that the parties to the existing litigation over closure of the municipal airport do not include some of the Objectors. It was submitted that Global Remote Sensing Inc., Mifaco Inc., McEwen's Aviation Services Inc. and McEwen's Fuels and Fertilizers Inc. are not parties to any of the existing litigation with ERAA or the City. Given that they are not parties to the litigation, nor clients or former clients of McLennan Ross, it was submitted that there is no grounds for alleging a conflict or reasonable apprehension of bias.

It was noted that R. Graham McLennan had no personal involvement in any of the matters in which McLennan Ross LLP was involved relating to municipal airport issues, except for the minor involvement in the Klemke corporate matter.

It was submitted that the case law with respect to disqualification or recusal of a Judge is relevant to these circumstances. ***R. v. Roberts*** (Tab C of the City's Written Submissions) and other similar cases were instructive. They establish the burden of proof is on the Objectors who are alleging conflict or reasonable apprehension of bias. The test for reasonable apprehension of bias in ***Roberts*** was stated by the S.C.C. to be:

> The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly."

It was submitted that this is primarily a factual question and therefore the specific facts are important. It was noted that McLennan Ross LLP had done a conflict search and had conflict screens put in place after the potential issues were raised by the Objectors.

It was submitted that the Inquiry Officer has a very limited scope of inquiry. Simply whether the intended expropriation is sound, fair and reasonably necessary. Further, that given this scope of the inquiry a reasonable person would conclude that there is no conflict presented on the facts identified by the Objectors.

Further, the existing litigation between the Objectors and the City/ERAA certainly addresses the Leases on the Airport Lands. However, the existence of those Leases is not in issue in litigation, nor in this proceeding. Further, the validity, the contents, or terms of those Leases are not relevant issues for consideration by the Inquiry Officer.

It was also noted that there are existing judicial review applications brought by the Objectors which challenge:

(a) The City Council's decision to expropriate the Objector's Leasehold interests on the Airport Lands; and

(b) City Council's decision to adopt the Area Redevelopment Plan for the Airport Lands.

(Counsel for the Objectors acknowledged these judicial review applications were extant).

It was submitted that Section 15 of the Act has been complied with and there has been a correct application of the timelines for the appointment of R. Graham McLennan as an Inquiry Officer. Further that Section 20 of the *Interpretation Act* would aid in any alleged defect because it permits the replacement of persons appointed pursuant to a statute. Mr. Carr was appointed within the 15 days required under the Section 15(2) of the Act, and R. Graham McLennan was simply a replacement.

On a judicial review application brought by the Objectors, Justice Hillier concluded that a reasonable apprehension of bias existed and that Mr. Carr could therefore not proceed as Inquiry Officer. Reference was made to page 8 of the transcript of the proceedings before Justice Hillier where general remarks were made about possible consequences of Justice Hillier's decision.

Further, it was submitted that the objectives or purpose of the Act must be considered. It was submitted that the objectives included allowing inquiry hearings to proceed and allowing Objectors to present their position at Inquiry Officer hearings.

References were made to the ***Rizzo*** case (Tab 14 of the City's Written Submissions) and the ***ATA*** case submitted on behalf of the City. Specifically, reference was made to paragraph 57 of ***Rizzo*** and paragraph 68 of the ***ATA*** decisions in support of the proposition that there should be a purposeful application of the Expropriation and Interpretation Acts. Further, that the Inquiry Officer has jurisdiction to decide these preliminary objections relating to whether the appointment has been done in accordance with the Act.

It was submitted that common sense would dictate that if one inquiry officer cannot proceed, then another should be able to take his or her place. This is consistent with Section 20 of the *Interpretation Act*. Further, in reference to the ***Rosen*** case, if there is no lack of authority or defect in the appointment of inquiry officer, the proceedings are not a nullity and the hearing should proceed. This is what should occur in this case.

Counsel for the City was provided an opportunity to make submissions on the ***Graumans*** case, which was submitted to the Inquiry Officer by Mr. Agrios. With the indulgence of all counsel, these submissions were made by email on Friday, January 18, 2013. It was submitted that the ***Graumans*** case is distinguishable because; the adjudicator acted against one of the parties to the proceeding; the impact of adjudicator's decision was more significant than that of an Inquiry Officer; and the pecuniary interest to McLennan Ross LLP is unknown.

REPLY SUBMISSIONS OF OBJECTORS

Mr. Wakefield

Mr. Wakefield reiterated that the ***Rosen*** case stands for the proposition that everything which occurs after a step which is taken without jurisdiction, is a nullity. Further, as Rumpole of the Bailey noted, the law has nothing to do with common sense. He noted that reference to Justice Hillier's remarks are *obiter* and of no significance to these proceedings. Further, that Section 20 of the *Interpretation Act* simply does not get around the consequences that the law dictates in ***Rosen***, and the line of cases thereafter.

Mr. Wakefield explained that the McEwen clients he represents as Objectors are not parties to the litigation because one entity has no interest in the Airport Lands and the other has a sublease through Hamilton Aviation, who is a party to the litigation.

Mr. Agrios

Mr. Agrios reiterated that the expropriating authority must strictly comply with the governing legislation. Further, that although there is a multitude of actions and litigation ongoing, the central feature of all of them is the lease arrangements between the various parties, including the Objectors and the City regarding the Airport Lands. Lawyers at McLennan Ross LLP have been involved in these leases, or at least the lease between the Edmonton Flying Club and the City.

Sheila McNaughton

Ms. McNaughton noted that conflict screens are not relevant to current clients. She submitted that current clients must provide their written consent as required by the Law Society of Alberta Code of Professional Conduct.

Ms. McNaughton also submitted that the Objectors' interpretation of Section 15 of the Act is reasonable and that the City's interpretation of Section 15 of the Act is not reasonable. Furthermore, the ***Rosen*** case and other authorities submitted on behalf of the Objectors clearly demonstrate this.

R. Graham McLennan raised points for consideration. Firstly, the impact on the City if the appointment is without jurisdiction or the Inquiry Officer cannot otherwise continue to act. There was no clarity on the impact in responses from counsel. Secondly, R. Graham McLennan sought any submissions the City may have on the ***Graumans*** case. As noted, leave was given to permit counsel for the City to make brief submissions by email on this case. Thirdly, R. Graham McLennan asked counsel for the City for any comments they may have on the Code of Professional Conduct of the Law Society of Alberta which addresses a lawyer acting as a mediator or arbitrator between clients or former clients. The only submission on this point from the City was that the City expects R. Graham McLennan to comply with the Code of Professional Conduct.

FINDINGS OF THE INQUIRY OFFICER, R. GRAHAM MCLENNAN, ON PRELIMINARY OBJECTIONS

a) Lack of Jurisdiction

The relevant facts are as agreed to by the parties in the Statement of Facts provided by the City, as well as the exhibits marked during the hearing. These facts clearly establish that:

1) The Minister as represented by the Executive Director, Civil Law, Alberta Justice was notified of all the Objections by November 6, 2012.

2) R. Graham McLennan was appointed Inquiry Officer on December 18, 2012.

Section 15(2) of the Act is mandatory in requiring the Deputy Minister or his designate to appoint an Inquiry Officer within 15 days after receiving notice that the approving authority has received an objection. Further, in considering other provisions of the Act such as: Section 16(1) dealing with a report within 30 days; Section 23 dealing with extensions; the overall thrust of the Act is to require Expropriating Authorities, the Minister, and Inquiry Officers to deal with objections and land owners in a timely manner. The language regarding appointments and extensions are mandatory and clearly evidence an intention by the legislature that these matters be dealt with in an expeditious manner.

The case law, including ***Rossen*** and ***Bulmer***, clearly establishes that:

a) The Act is to be interpreted strictly and in favour of the land owner;

b) Mandatory timelines in the Act, including the appointment of an Inquiry Officer must be adhered to;

c) The failure to adhere to the mandatory statutory timelines results in a loss of jurisdiction and the proceedings are a nullity.

Section 20 of the *Interpretation Act*, referenced by the City, does not appear to have any applicability to these circumstances. Section 20 appears to apply only to situations where the mandatory timelines have been complied with, but the designated tribunal or officer needs to be replaced. Further, the authorities referenced by the City, including the ***ATA*** decision and the ***ATCO*** decision do not appear to contradict the authority provided by counsel for the Objectors. In particular, the S.C.C. in ***ATA*** noted that no principle of statutory interpretation required a presumption that an extension must be granted before expiry of the 90 day time limit that was at issue in that case. In contradistinction, the Act clearly requires extensions to be granted within specific time periods. In particular, Section 23(1) of the Act requires the Deputy Minister, or his designate, prior to the expiration of the 120 day period referred to in section 20 to, amongst other things, extend the time for appointing an Inquiry Officer by an additional 5 days. Although we appear to be within an 120 day period referred to in section 20 of the Act

(although counsel did not address section 20 or section 23 of the Act), there is no ability to extend the time for the appointment of an Inquiry Officer for more than 5 days. Therefore, R. Graham McLennan's appointment would have had to have been made within 20 days of November 6, 2012, at the latest.

Accordingly, it is R. Graham McLennan's conclusion that his appointment is not in accordance with the mandatory provisions of the Act. The result, according to the law provided to me, is that the Inquiry Officer is without jurisdiction and that these proceedings are a nullity.

b) Conflicts/Reasonable Apprehension of Bias

Given R. Graham McLennan's determination above that he is without jurisdiction, the question of conflict/reasonable apprehension of bias need not be decided. However, as the parties appear to be particularly litigious, R. Graham McLennan will comment on this issue in case further proceedings are taken.

It is important to understand the role of the Inquiry Officer. The Inquiry Officer makes no determination of legal rights. The Inquiry Officer does not inquire into the stated objectives of the Expropriating Authority. The stated objectives of the Expropriating Authority are a given and the Inquiry Officer simply considers whether, in light of those objectives, the proposed expropriation is fair, sound and reasonably necessary. The Inquiry Officer's report is simply provided to the Expropriating Authority, the Objectors, and the Minister or his designate. There is no requirement to read the report. However, the Inquiry Officer's report does not determine the legal rights of any party involved. Of course, the Inquiry Officer hopes that his report is of some informative value to those who reviewed the same.

The stated objective of the City is the intended expropriation of the Objector's interests in the Airport Lands for the implementation of the City Centre Area Redevelopment Plan and construction pursuant thereto. Therefore, at this stage of the inquiry, it would appear that conduct of the City in attempting to close the Municipal Airport, the reasons for that action, the approval by the City of a City Centre Area Redevelopment Plan and the activities relating to

the same, would not be proper subject matters for a hearing before the Inquiry Officer. Furthermore, as noted by counsel for the City, the fact that there are Leases in place between the Objectors and the City in connection with the Airport Lands does not appear to be in dispute. Again, the terms of those Leases, whether they have been renewed, and all facts surrounding that activity would not appear to be appropriate subjects for exploration at the hearing conducted by an Inquiry Officer.

As an Inquiry Officer does not determine legal rights, the role of an Inquiry Officer is not directly analogous to that of an arbitrator or a mediator who assists parties in reaching a resolution of a dispute. However, the role of an Inquiry Officer is somewhat analogous to a mediator who does not conclude a settlement of a dispute. Therefore, it is noteworthy that the Law Society of Alberta Code of Professional Conduct requires that a mediator obtain the consent of a client or former clients before agreeing to mediate a particular matter. It is clear in this case that at least one current client of McLennan Ross does not consent to me acting as Inquiry Officer.

Certainly, it is conceivable that the Inquiry Officer's report may have some influence on parties who are obliged to review the same. Accordingly, it is conceivable that there may be some economic impact on McLennan Ross LLP's current clients. This is a factor to consider and is somewhat analogous to the ***Graumans*** case provided by Mr. Agrios. Another factor to consider in deciding whether to recuse R. Graham McLennan is the consequences to the parties. As far as R. Graham McLennan is aware, there are other individuals who can be appointed Inquiry Officer with respect to these intended expropriations. Further, as far as R. Graham McLennan is aware, the likely impact of my recusal would simply be a commencement of the process of expropriation contemplated by the Act with the filing of the Notice of Intention to Expropriate by the City and serving that, once again, on the Objectors. This process is contemplated to be complete within 120 days of any Notices of Objection being provided to the Minister. Accordingly, there would not appear to be great delay occasioned by R. Graham McLennan's recusal.

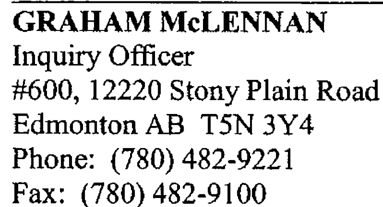
Finally and above all else, it is important that legal processes, even quasi-judicial processes such as these, continue to be seen by all members of the public as being beyond reproach in terms of following the rule of law. It is as important that justice appear to be done to the public as the actual delivery of just processes and just resolution of differences. In R. Graham McLennan's opinion, his recusal would be consistent with these principles.

For all of the above reasons should it have been necessary, R. Graham McLennan would have himself recused as Inquiry Officer.

COSTS

The Objectors shall be granted all reasonable costs in connection with this matter pursuant to Section 15(10) of the Act be paid by the Expropriating Authority.

DATED at the City of Edmonton, in the Province of Alberta, this 21 day of January, 2013.



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APPENDIX 1 – EXHIBITS

1. Letter from McLennan Ross dated January 10th, 2013
2. Letter from McLennan Ross dated January 14th, 2013
3. Email from Kevin Ozubko to the Edmonton Flying Club dated October 19th, 2012 and attached letters from the City of Edmonton
4. Statement of Defence of Edmonton Regional Airports Authority
5. Amended Statement of Defence of the City of Edmonton
6. Email from Ed Schlemko to Fred Kozak dated January 14th, 2013
7. Letter from Edmonton Flight College to Jack Agrios dated January 16th, 2013