

**ALBERTA SURFACE RIGHTS BOARD**  
(the "Board")

**Citation:** AltaLink Management Ltd. v. Royal West Property Corp., 2014 ABSRB 221

**Date:** 2014-03-20

**File No.** RE2012.0012

**Decision No.** 2014/0221

**In the matter of** the *Surface Rights Act*, RSA 2000, c S-24 (the "Act")

**And in the matter of** land in the Province of Alberta within the:

NE ¼-10-55-23-W4M as described in Certificate of Title No. 062 535 950  
(the "Land")

BETWEEN:

ALTALINK MANAGEMENT LTD.

and

EPCOR DISTRIBUTION & TRANSMISSION INC.,

Operator,

and -

ROYAL WEST PROPERTY CORP., (owner)

DR. JASON LAMOUREUX

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED

BY THE MINISTER OF NATIONAL DEFENCE,

Respondents.

Before: E. Gordon Chapman  
Edward V. Zenko  
(the "Panel")

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**DECISION**

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**APPEARANCES**

- For the Operator:
- Paul T. Whitford, Surface Land Coordinator, AltaLink Management Ltd.
  - John A. Kosolowski, Legal Counsel, Duncan & Craig LLP
  - Alex Kennedy, Student-at-law, Duncan & Craig LLP
  - Fiona Ellington, Student-at-law, Duncan & Craig LLP
  - Glen Doll, Appraiser, Serecon Valuations Inc.
- For the Respondents:
- Bruno Mastroprimiano, with Royal West Property Corp.
  - Don Mallon, Counsel, Prowse Chowne LLP
  - Paul Barrette, Prowse Chowne LLP
  - Brian Gettel, Gettel Appraisals Ltd.

No other Respondents were represented or provided submissions although duly notified of the hearing.

## EXHIBITS FILED

See Appendix A.

## BACKGROUND

The Lands are located 1.5 miles north of the City of Edmonton Corporate Limits (i.e. north of Highway 37) along Highway 28A. AltaLink Management Ltd. (“AltaLink”) is constructing a power transmission line along/over the Lands. After not being able to acquire the consent of Royal West Property Corp. (“Royal West” or the “Respondent”), AltaLink applied for and was granted a right of entry order by the Board as provided for in Section 15 of the *Act*.

A hearing was held on July 3 and 4, 2013, in Edmonton, Alberta, to address the matter of compensation as provided for in s.23 of the *Act*.

A summary of the subject file follows:

Table 1: Summary of File

SRB File No	Respondent Landowners	Land Description	Order Number and Date	Area in Acres	Number and Type of Structures on Land
RE2012.0012	Royal West Property Corp	NE ¼-10-55-23-W4M	No 0525/2012; March 26, 2012	ROW 6.98 WS 0.27 Total 7.25	½ each of 2 steel towers plus conductors

ROW---Right-of-way  
WS---Workspace

The Panel conducted site inspections of its own volition on July 24, 2013, and September 30, 2013, as provided for in s.24(1) of the *Act*. Neither party was in attendance. The Panel viewed the Land from the municipal road and from Highway 28A without entering onto the Land. The structures and conductors were in place at the time of the September 30, 2013, site inspection.

Dareld Cholak was a member of the original Panel. His appointment expired before deliberations were complete and before this decision was issued. The remaining Panel Members completed the decision as provided for in s. 10 of the *Act*.

## OVERVIEW

## 1. A Brief Description of the Transmission Line

- Referred to as the Heartland Transmission Line
- 66 kilometres in length starting in south Edmonton and ending near Redwater
- 500 kilovolt
- Under construction at the time of the Hearing, July 2013
- The structures on the subject line are of a steel lattice tower design and are 60–70 metres high (described in evidence as the largest currently in Alberta)
- The structures straddle the west property line with two legs on the subject property and two legs on the NW ¼-10-55-23-W4M
- The right-of-way is 70 metres wide and straddles the west property line (35 metres occupy each of the NW ¼-10 and NE ¼-10)
- The Panel counted 20 cables/lines hanging from the transmission towers – six “conductors” (bundles with three cables in each), plus two “shields” (two individual cables at the highest points of the towers).

## 2. A Brief Description of the Land

- Located approximately 1.5 miles north of the Edmonton city limits (nearest point to nearest point)
- Has a 2.80 acres (1.13 ha) strip in the east excepted for Road Plan 1451PX, for a total remaining area of 157.20 acres (63.617 ha)
- The land is cultivated and used for annual crop production
- Soil type is variable with 50 percent CLI class 2S, 45 percent CLI class 3S, and five percent a low-lying uncultivated CLI class 6W
- Does not contain a yard or buildings.
- Owned by Royal West Property Corp. as of the March 26, 2012, effective date of Right of Entry Order No. 0525/2012.

## PRELIMINARY MATTERS

As a first matter, AltaLink informed the Panel that it was withdrawing a request for an amendment under s.29 of the *Act* that it had made after the disclosure deadline, but before the hearing. The Respondent did not object to the withdrawal.

As a second matter, the Parties informed the Board that the required 80 percent of the final offer was paid to the Landowners.

As a third matter, the Parties informed the Panel that they had agreed on some, but not all, components of compensation. The agreement thus far is as follows:

Right-of-way (ROW)	To be determined by Board
Workspace	100 percent of ROW value
General disturbance	\$3,000.00
Adverse effect on the remaining lands (injurious affection)	To be determined by Board
Annual structure payment	\$1,350.00 /annum
Damages	Request to reserve
Costs	Request to reserve

The hearing proceeded on this basis.

## RELEVANT LEGISLATION

See Appendix B

## ISSUES

1. What is the amount of first-year compensation payable?
2. What annual compensation is payable for loss of use, adverse effect, nuisance, inconvenience, and noise?
3. To whom is the compensation payable?
4. Is interest payable and, if so, at what rate?
5. Has damage occurred and, if so, what is reasonable compensation?
6. To whom and in what amount, if any, should costs be payable?

## DECISION

1. The Panel determines first-year compensation as follows:

Right-of-way	6.98ac @ \$10,000.00/ac	= \$ 69,800.00 (s.25(1)(b))
Workspace	0.27ac @ \$10,000.00/ac	= \$ 2,700.00 (s.25(1)(b))
General Disturbance		= \$ 3,000.00 (s.25(1)(f))
Injurious Affection	0.05 x [149.95ac @ \$10,000.00/ac]	= <u>\$ 74,975.00</u> (s.25(1)(d))
Total		\$150,475.00

2. Annual compensation is payable at the rate of \$1,350.00. (s.25(1)(c)-(d))
3. Compensation is payable to Royal West Property Corp.
4. Interest is payable on any amounts outstanding at the Bank of Canada rate from the date of right of entry order was made.
5. The matter of damages is reserved.
6. The matter of costs is reserved.

## KEY EVIDENCE AND ANALYSIS

The Panel has thoroughly reviewed all of the evidence and arguments, and acknowledges the efforts and contribution of all of the witnesses. However, it will only focus on key evidence and arguments in outlining reasons for the award of compensation.

It is the practice of the Board to determine compensation based on a pattern of dealings when one exists unless there are cogent reasons for doing otherwise. This approach is consistent with that used by the Court in *Livingston v. Siebens Oil & Gas Ltd.* (1978), 8 AR 439 (CA) (“*Livingston*”), and was the starting point in determining the subject compensation matters.

The parties variously used the terms “injurious affection” and “adverse effect” when referring to aspects of Royal West’s request. The Panel considers the former to be a subset of the latter. To avoid confusion, this Decision will use the term injurious affection when speaking specifically of the loss of land value claimed by Royal West, and adverse effect when speaking of adverse effect in general.

This Decision will now address in turn the six issues identified earlier.

*1. What is the amount of first-year compensation payable?*

In determining first-year compensation, the Panel will consider six sub-issues:

- Highest and best use of the Land
- Pattern of dealing
- Right-of-way compensation
- Workspace compensation
- First-year nuisance, inconvenience, and noise (“General disturbance”)
- Injurious affection

(a) Highest and best use

Bruno Mastroprimiano (“Mastroprimiano”) introduced himself as a developer for over 30 years, and a principal of Royal West. He stated that Royal West is in the business of acquisition and development, and it acquired the subject property for that purpose.

Brian Gettel (“Gettel”), the appraiser for Royal West, described the highest and best use of the land as follows:

An optimal program of utilization is deemed to be a continuation of the current use with the property holding potential for more intensive residential uses over the medium to longer term. In the interim, subdivisions in accordance with densities specified in the Land Use Bylaw could be initiated on an immediate basis. (Exhibit 9, page 29)

Gettel stated that under current zoning, the Land could be subdivided into two 80- acre parcels, and a 2.47-acre subdivision could then be taken from each 80-acre parcel. This could all be realized immediately.

Doll forAltaLinkAltaLink, described the highest and best use of the Land as: “...agricultural...; with the potential for subdivision....” Doll, in Exhibit 5 goes on to say: “Under the current zoning, the land could be split into four parcels. Once a quarter is split into two 80 acre parcels; an acreage could also be removed from each 80 acre parcel.” (Exhibit 5, page 18)

It is common ground and the Panel finds that:

- The land could be divided into two 80-acre parcels
- These could each host a single 2.47-acre residential subdivision
- This could be done under current zoning
- The Land is currently being used for agricultural production.

The Panel finds that the subject land is being utilized as a holding property awaiting longer term development.

This description is relevant to the subject matter in that it will form the basis for reviewing comparables and for analyzing evidence relating to injurious affection.

(b) Pattern of dealing

AltaLink’s pattern evidence indicates that negotiated compensation rates range from \$6,500.00 per acre at the north end of the transmission line to \$13,300.00 per acre for the NE 3, as the transmission line approaches Highway 37 and the City of Edmonton Corporate Limits. The Panel notes neighbouring agreements as indicated in Table 1.

Table 1: Illustration of Neighbouring ROW Compensation (per acre)

NW 15	NE 15
\$8,450.00	\$8,450.00
SW 15	SE 15
\$8,450.00	\$9,100.00
NW 10	NE 10
\$9,100.00	<b>Subject</b>
SW 10	SE 10
\$9,750.00	\$11,200.00

NW 3	NE 3
TBD	\$13,300.00
SW 3	SE 3
TBD	TBD

The Panel determines that the range and gradient found in neighbouring agreements form a pattern. The Panel notes a pattern whereby compensation tends to increase approaching Edmonton.

The Panel also notes a weaker pattern whereby compensation is higher along Highway 28A (the more easterly quarter sections). This is the case with both the S ½ 15 and the S ½ 10.

The Panel uses a broad interpretation of *Livingston*, and determines that these agreements form a pattern of dealing with respect to s. 25(1)(b) of the Act. These agreements will ultimately be found to provide the best basis for the determination of compensation.

The Panel also heard and finds that there is no provision for injurious affection in any of the agreements presented in the pattern evidence. The Panel finds that this represents a pattern of dealing with respect to injurious affection.

These determinations will be referred to in succeeding sections of this decision.

*(c) Right-of-way compensation ((s.25(1)(a) and s.25(1)(b))*

Royal West took the position that the right-of-way (6.98 acres) is not homogeneous, that 5.92 acres should be compensated at \$10,500.00 per acre, and that 1.06 acres should be compensated at \$97,166.00 per acre. These two requests will be considered in turn.

*i. What is a reasonable rate of compensation per acre for the 5.92 acres (excluding the 1.06 acres that lies within Royal West's notional subdivision)?*

Royal West's position is that the majority of the taking (5.92 acres) should be compensated at \$10,500.00 per acre (or \$62,160.00 for 5.92 acres) based on Gettel Appraisals Ltd.'s valuation of the Land. Gettel provided seven comparable sales which, in his opinion after adjustments, indicated a value estimate of \$10,500.00 per acre.

AltaLink's position is that the right-of-way should be compensated at a rate of \$7,000.00 per acre (i.e. Serecon Valuations Inc.'s appraised value of the Land). Alternatively, if the Panel decides to award the Respondent compensation at the same rate as landowners who received a premium for early resolution, AltaLink's secondary position is that the right-of-way should be compensated at a rate of \$9,100.00 per acre.

Royal West argued that the \$7,000.00 being offered by AltaLink is not in line with the pattern of dealings. Royal West argued that AltaLink paid two neighbouring landowners \$9,100.00 per acre and \$11,200.00 per acre. It argued that these numbers and others form a pattern for land value, and the subject land's value is between \$9,100 and \$11,200.00 per acre. Royal West requested compensation of \$10,500.00 based on Gettel's valuation.

AltaLink's pattern evidence indicates that negotiated compensation rates are lower at the north end of the transmission line (\$6,500.00 per acre), and these rates increase as the transmission line approaches Highway 37 and the City of Edmonton (and the NE 3-55-23-W4 at \$13,300.00 per acre). The Panel accepted this range or gradient as forming a pattern of dealing. Furthermore, Royal West argued that land adjacent to Highway 28A (SE 10) attracted \$450.00 per acre higher compensation than the adjoining SW 10, and that land adjoining Highway 28 attracted higher compensation. It also argued that quarter sections with potential to create two 80 acre parcels each with 2.47 acre subdivisions are more desirable.

When these three factors (distance from the City of Edmonton, proximity to Highway 28A, and subdivision potential) are taken into account, the Panel concludes that the subject quarter should attract:

- higher compensation than the neighbouring NW 10 (\$9,100.00 per acre) because the subject quarter is closer to Highway 28 and has no existing subdivisions (NW 10 adjoins the subject quarter – to the west – and has one existing subdivision);
- higher compensation than the SE 15 (\$9,100.00 per acre) because the subject quarter is further south along the compensation gradient and has no existing subdivisions (SE 15 is further from the City of Edmonton Corporate Limits and has one existing subdivision);
- less compensation than the neighbouring SE 10 (\$11,200.00 per acre) because the subject quarter is farther north along the observed compensation gradient and from the City of Edmonton Corporate Limits (neither has any existing subdivisions);
- still less compensation than the NE 3 (\$13,300.00 per acre) because the subject quarter is one mile farther north along the compensation gradient and from the City of Edmonton Corporate Limits (neither has any existing subdivisions).

On balance, the Panel awards compensation of \$10,000.00 per acre for these 5.92 acres of the NE 10 after reconciling the rate with surrounding negotiated rates of compensation in the manner described above. This approach is consistent with *Livingston*, which suggests that negotiated settlements form the best basis for the determination of compensation.

The Panel considered Gettel's appraised value of \$10,500.00 per acre but did not find the valuation and choice of comparables to be sufficiently persuasive. Gettel's comparables are four to five miles away and in what Doll suggested are superior locations. The Panel concurs with this assessment. It preferred the simpler analysis above in which negotiated agreements formed the basis for the rate of compensation.

The Panel considered AltaLink's argument that compensation should be based on Serecon's appraised value of \$7,000.00 per acre, and that the additional amount paid was a premium for cooperating and avoiding a hearing. AltaLink argued that in the "vast majority" of those agreements, AltaLink paid the "bare-land value" of the land plus 0.3 times that value as a premium for cooperation and avoiding a hearing. It argued that this method of determining land value is so uniform that it constitutes a pattern of dealings. It argued that in *Enbridge Pipelines (Athabasca) Inc. v. Karpetz*, 2010 ABQB 108, Macklin J ("Karpetz") stated that a pattern of dealings "is an approach that refers to not only the amounts paid but also to the method by which compensation is determined." It argued that the cooperation premium should be considered part of the pattern of dealing, and because the Landowners did not expedite the process by signing early, they should receive only the bare-land value and not the additional 0.3 times given to other landowners along the transmission line.

The Panel finds that the negotiated rates of compensation were what it took to get the deals done – it was the compensation that was required to persuade the landowners to allow the transmission line on their land. Royal West is entitled to similar compensation per acre. AltaLink's argument does not constitute cogent reason to depart from the range of compensation negotiated by neighboring landowners.

The Panel awards \$59,200.00 based on 5.92 acres at \$10,000.00 per acre.

*ii. Does the northernmost 1.06 acres (0.429 ha) of the right-of-way warrant higher compensation, and if it does, what should that compensation be?*

Royal West's position is that 1.06 acres of the right-of-way in the northwest corner of the Land should be compensated at a rate of \$97,166.00 per acre (\$102,995.96 for 1.06 acres). It contends that were it not for AltaLink's right of entry, a 2.47 acre (1.00 ha) parcel could be subdivided from the Land and sold as a single-lot residential acreage, and 1.06 acres of this parcel would lie under the transmission line.

Royal West's argued that the highest and best use of the 1.06 acres is to be partitioned into a single-lot residential partition. It made multiple arguments:

- numerous cases have shown that the highest and best use of lands does not need to be homogeneous over an entire property, particularly *Ciphery v. Alberta (Minister of Transportation)* (2008), 95 LCR 280 (Alta L.C.B.), which established a test;
- the highest and best use may also take future developments into consideration. In *True Energy Inc. v. Kitching* (2007), 452 AR 356 (Alta QB), Sulyma J. held that determination of highest and best use encompasses all potential and future uses of the land;
- further, the Supreme Court in *Alliance Pipeline Ltd. v. Smith*, 2011 SCC 7, held that statutes enabling proprietary takings are remedial and, therefore, should be interpreted broadly and liberally. A liberal interpretation of s.25(1)(a) would assume a willing seller with a reasonable degree of market savvy, and the Respondent's market experience further promotes the assumption of a savvy seller;
- the use of a hypothetical seller attempting to maximize its return was used for calculations in *Koziol v. Edmonton (City)* (2000), 71 LCR 298 (Alta L.C.B.);
- both Mr. Gettel and Mr. Doll agree that the best way to maximize the value of the Land in the immediate future is to partition two single-lot residential acreages from it, which could be done with little obstacle, and continue to farm the rest. However, Mr. Doll's assessment does not consider the value of this partitioning; and
- if the Landowner wanted to create a 2.47 acre subdivision, the northwest corner of the Land would be the most valuable place to do so.

Based on these cases and evidence, Royal West argued that the Panel should treat the northernmost 1.06 acres of the Land as having a different highest and best use than the rest of the Land within the right-of-way.

AltaLink disagreed with this argument for at least two reasons:

- the Panel should not award more for the northernmost 1.06 acres because the Board has previously indicated that it will not award damages on speculative uses of the land. If, at a later date, the Landowner were to sell parcels of the land and had to sell them at a reduced rate because of the transmission line, then the Landowner would have the right to raise the issue before the Board under section 29 of the *Act*; and
- the Landowner has some obligation to mitigate damages in cases of surface rights, as determined in *Gulf Canada Resources Inc. v. Moore* (1982), 22 Alta LR (2d) 328; *Penn West Petroleum Ltd. v. Lagace*, 2013 ABRB 40; and *Alberta Oilsands Inc. v. Hi-Way 39 Industrial Park Inc.*, Decision No 2012/0517 (Alta SRB) (*Hi-Way 39*). According to Mr. Doll, the Landowner could mitigate losses by placing the parcel at least 400 metres from the transmission line.

The Panel was not persuaded by the Landowner's argument that the northernmost 1.06 acres has a different highest and best use. The Panel is not persuaded that because the northwest corner of the subject land is farther from Hwy 28A, it necessarily is the best location for the 2.47 acre potential subdivision. An equally persuasive argument could have been made that a location with closer access to a numbered highway (Hwy 28A), or a location farther from neighboring residences, would be the best location. No steps have been taken to subdivide 2.47 acres from the northwest corner, so even the actions of the Landowner are not available to support their position. The Panel was not persuaded that there is anything inherent to the northwest corner of the subject land that would have made it preferable as a 2.47 acre subdivision or that a subdivision in that location would have a higher market value than a subdivision elsewhere along the northern property boundary. The Panel rejects the request to value the 1.06 acres at \$97,166.00 per acre. The Panel (a) finds that the subject land and the right-of-way are homogeneous, (b) makes no special allowance for the 1.06 acres in question, and (c) awards compensation for these acres based on \$10,000.00 per acre like the remainder of the right-of-way.



The Panel awards \$10,600.00 based on 1.06 acres at \$10,000.00 per acre just as was awarded for the remainder of the right-of-way. When added to the \$59,200.00 awarded for the other 5.92 acres of right-of-way, this totals \$69,800.00 for the 6.98 acres of right-of-way.

(d) *Workspace compensation (s.25(1)(b))*

The parties agreed that workspace should be compensated at 100 percent of the rate of the right-of-way. The Panel has no reason to do otherwise and awards \$2,700.00 (0.27 acres at \$10,000.00 per acre) under s.25(1)(b) of the *Act*.

(e) *First-year Nuisance Inconvenience and Noise “General Disturbance” (s.25(1)(d))*

The Panel awards \$3,000.00 for general disturbance as agreed to by the parties.

(f) *Injurious Affection (s.25(1)(d))*

Royal West requested \$211,908.00 for adverse effect in the event that it was successful in having the NW 2.47 acre parcel valued as a small parcel overlying the right-of-way. In the alternative, Royal West requested \$237,657.00 for adverse effect (quoted from its Final Submissions at page 11):

- \$60,000.00 value for adverse effect over the entirety the [sic] NW 2.47 acre parcel at a rate of 25% of its net value of \$240,000.00;
- \$24,000.00 value for adverse effect over the entirety of the NE 2.47 acre parcel at a rate of 10% of its net value of \$240,000.00;
- \$153,657.00 for adverse effect over the 146.34 acres of the remaining Lands at a rate of 10% of their market value of \$10,500.00 per acre [Panel note: Royal West’s determination of remaining land includes 0.27 acres of workspace, which has already been awarded at 100 percent of land value. If the workspace were removed from the calculation, the area of remaining land would be 146.07 acres]

Royal West was not successful in having the portion of the right of way lying on the notional NW 2.47 acre parcel valued as a small parcel, and the Panel will address this alternative request.

In determining this matter, the Panel considered six sub-issues:

- Is injurious affection (i.e. loss of market value) compensable?
- Are there cogent reasons to depart from the pattern of dealing with respect to injurious affection?
- Do the \$10,000.00 per acre compensation and the compensation rates provided to the Panel as pattern evidence already include some provision for injurious affection?
- Should the two 2.47 acre notional subdivisions attract compensation for injurious affection beyond that awarded for other acres on the remaining Land?
- Did the market value of the remaining land decrease as a result of Right of Entry Order No 0525/2012 dated March 26, 2012, and as a result of the subject transmission line?
- What is the magnitude of the loss, if any?

i. *Is injurious affection (i.e. loss of market value) compensable?*

Royal West argued that it is compensable and properly falls under s.25(1)(d) of the *Act*.

This was not disputed by AltaLink which stated in its closing argument at paragraph 52: “If a taking reduces the present value of the land, then there is a compensable adverse effect....” AltaLink did not dispute that loss of present value is compensable; it argued that the present value (i.e. market value as of the date of the right of entry order) of the land did not decrease.

Section 25(1)(d) of the *Act* states that in determining compensation, the Board may consider: “...*the adverse effect of the area granted to the operator on the remaining land of the owner or occupant*... .”

The Panel finds that any demonstrated decrease in market value resulting from the subject transmission line satisfies this requirement and is compensable under section 25(1)(d).

*ii. Are there cogent reasons to depart from the pattern of dealing with respect to injurious affection?*

The Panel considered AltaLink’s pattern of dealing evidence (Exhibit 3). In no instance is there a provision for injurious affection. The Panel already found that the lack of a payment for injurious affection establishes a pattern of dealing with respect to injurious affection.

The Panel now finds that there is cogent reason to depart from this pattern for several reasons. Firstly, the Panel has no knowledge of, and heard no evidence of, the circumstances or the effects on other land and other landowners in this regard. Secondly, Royal West is entitled to compensation for a loss in market value if it can demonstrate a loss on a balance of probability regardless of what is happening on adjoining properties.

As was already stated, under section 25(1)(d) Royal West is entitled to compensation for the adverse effect of the area granted to the operator on the remaining land of the owner or occupant.

*iii. Do the \$10,000.00 per acre compensation and the compensation rates provided to the Panel as pattern evidence already include some provision for injurious affection?*

The Panel considered the possibility that any decrease in land value was somehow anticipated and included in the up-front compensation accepted by other landowners along the subject transmission line. The Panel rejects this possibility for at least two reasons:

- AltaLink did not argue this possibility; and
- the Panel was given no reason to believe that the compensation agreed in the pattern evidence included anything other than compensation for the right-of-way itself under section 27 (1)(b) of the *Act*. After all, AltaLink itself argued that compensation for injurious affection was not warranted.

*iv. Should the two 2.47 acre notional subdivisions attract compensation for injurious affection beyond that awarded for other acres on the remaining Land?*

Royal West requested that injurious affection for the two 2.47 acre notional subdivisions be based on a value of \$240,000.00 per notional subdivision. Furthermore, it requested that injurious affection for the NW subdivision be calculated based on a 25 per cent decrease in value, and the NE subdivision be calculated based on a 10 percent rate.

AltaLink’s position is that an award of compensation for injurious affection is not justified for any acres in the subject case. Its position is that there has been no convincing evidence of a decrease in land value, that any future development is speculative, and that any future loss should be dealt with at the time of that loss. AltaLink argued that speculative events should not form the basis of an award of compensation. AltaLink also argued that any suggested subdivision of the subject Land was speculative, and no steps have been taken to subdivide the Land.

The Panel needed to be persuaded that when making an award, it would not be double compensating Royal West. It is common ground that the subject quarter section could be subdivided into two eighty acre parcels, and these parcels could each host a 2.47 acre residential subdivision. The Panel needed to be persuaded that the request for compensation for the notional subdivisions and the request for compensation for the balance of the Land are mutually exclusive. It was not so persuaded.

The Panel finds that market value includes the present value of any future use. The Panel finds it inconceivable that buyers and sellers would not consider zoning, development potential, future revenue, future costs, probability, and risk in making their decisions. Market value already includes all of these factors properly discounted. It is not logical to first appraise the Land with an adjustment for development potential (see Gettel adjustment table Exhibit 9, page 46), then take out notional subdivisions, all while leaving the original land value unchanged. The Panel notes that Gettel's appraisal and Royal West's position does just that. Gettel states that "...a value estimate of \$10,500.00 per acre has been concluded for the parent parcel." (Exhibit 9, page 47) Royal West is requesting injurious affection on the balance of the remaining land based on the same \$10,500.00 per acre as if taking out the subdivisions would have no effect on the per acre value of the property. The Panel finds that the components of Royal West's request are not mutually exclusive.

This interpretation is consistent with the following quotation:

...the value to the owner consists in all advantages which the land possesses, present and future, but it is the present value alone of such advantages that falls to be determined. The future advantages, therefore, may be taken into account in determining the value of the property, but in so far only as they may help to give to the property its present value. *Cedar Rapids Manufacturing & Power Co. v. Lacoste*, [1914] A.C. 569, 6 W.W.R. 62, 16 D.L.R. 168 (Que. P.C.) at para. 52.)

The Panel finds that the present value of subdivision potential is already included in its determination of land value, and it is this present value on which injurious affection should be calculated. It rejects Royal West's request that these 4.94 acres be compensated based on a higher per acre value or a higher percentage decrease in value than the balance of the remaining acres.

v. *Did the market value of the Land decrease as a result of Right of Entry Order No 0525/2012 dated March 26, 2012, and as a result of the subject transmission line?*

Gettel provided appraisal evidence for Royal West. He presented a summary of twelve studies, plus two analyses that he conducted himself. The results are summarized in Table 2.

**Table 2: Injurious Affection Studies – Gettel/Royal West**

No.	Study	Date	Study Time Frame	Location	Power Line Capacity	Distances at Which Effects Were Observed	% Value Impact
1	Bigras	1964	Early 1960s	N/A	N/A	N/A	0
2	Kinnard	1967	1956/65	Connecticut	N/A	200 feet	0-2
3	Colwell & Foley	1979	1968/78	Illinois	138 kv	50 feet 200 feet	8.8 3.6
4	Colwell	1990	1968/78	Illinois	138 kv	50 feet 200 feet 200 feet+	6.6 2.0 0-limited
5	Hamilton & Schwann	1995	1985/91	Vancouver	60 kv 500 kv	100 m. 200 m.	6.3 1.1
6	Callann & Hargreaves	1995	1983/93	New Zealand	110 kv	30 feet 100 feet 300 feet	27.3 9.1 2.7
7	Cowger et al.	1996 2000 2003	1990/91	Washington Oregon	115 kv/ 500 kv	N/A	0-limited
8	Des Rosiers	2002	1991/96	Montreal	315 kv	50 feet 100 feet 500 feet	14 10 0-limited
9	Chalmers	2009	1998/07	Connecticut Massachusetts	345 kv	N/A	0-limited
10	Delaney &	1992					10.01

	Timmons						
11	Gimmy	1994		California			18-53.8
12	Lower Colorado River Authority	1997		Texas			<10
13	Gettel	2011		Tsawwassen Heights Vancouver	230 kv 98 ft towers	75 feet approx.	18-24
14	Gettel			Legend Estates Spring Meadow Est. Royal Spring Est. Morningside			5-11 8-31  8 4-28

Based on the above, Gettel estimated that the subject land lost 10 percent of its market value as a result of the taking. He stated that, in his opinion, there was a negative visual impact, which made the property less desirable. He opined that the effect decreased with distance and was lessened by visual buffers such as trees and houses. The Panel also notes that the transmission lines in these studies are likely smaller because the subject line was described as being the largest in Alberta.

AltaLink argued that the transmission lines in Gettel’s evidence relate to urban residential properties, suburban homes, and small country residential parcels. Furthermore, the studies mostly relate to shorter distances than in the subject circumstance. For these reasons, they are not comparable and the conclusions cannot be applied to the subject case. The Panel finds that the properties are not comparable, and that the conclusions must be interpreted with caution.

AltaLink presented Doll as its witness. Doll presented Exhibit 5 along with opinion evidence for AltaLink. He agreed that the largest impact is visual. Doll suggested a two to four percent negative impact in the case of residential lands but also stated that any effect would decrease with distance, and that the subject lands were not residential lands. Doll further opined that transmission lines had no effect on agricultural land values. This opinion was supported by reference to a second study conducted by Serecon, which was not entered in evidence. That study did not find statistically significant evidence of a decrease in the market value of rural agricultural properties. Doll stated that he is not aware of any studies that find that the market value of farmland is diminished by the presence of transmission towers/lines, and in his opinion there was no effect. For all of these reasons, Doll suggested that the subject transmission line would have no effect on the value of the remaining land.

Royal West argued that Doll’s evidence and opinions related to agricultural land and was not relevant to the subject case. The Panel agrees that Doll’s evidence and opinions relating to agricultural land are of little relevance in the subject case. Although agricultural production may be its current use, that is not the use driving its market value.

Both structures and conductors were in place at the time of the Panel’s September 30 site inspection. In open areas, both were easily visible on the horizon from a distance of over three miles. The Panel noticed little if any visual buffer on the Land. The structures gave every appearance of being approximately 70 metres tall as agreed by the parties. They were visible and prominent at a distance of 800 metres. The structures and conductors were prominent and dominated the field of vision at a distance of 400 metres. The Panel counted a total of 20 individual cables/lines, six conductors with three cables per bundle plus two additional individual “shield” cables at the top of the structures above the conductors.

The Panel rejects AltaLink’s position that the effect of the transmission line on the market value of the subject property is zero. Both parties agreed that there is a visual impact, and that at least some buyers will lose interest in the Land. The Panel also noted a large number of perceived adverse effects in Doll’s study, entered as Exhibit 5 at page 52 and 53, that further supports the conclusion that the properties are perceived by the marketplace as being less desirable in the presence of the transmission line. Gettel’s studies, although conducted on urban residential properties, suburban homes, and small country residential parcels, confirm that power lines have a negative impact on residential property. Although the Land is not residential now, the Panel cannot imagine a prospective buyer/investor not taking this into

account when purchasing the Land, no matter how far in the future his/her development and investment horizon.

Although being used for agricultural purposes, the Land was described as an investment or holding property by both parties. Mastroprimiano, a principal of Royal West, stated that the land was purchased as an investment property with eventual development in mind. After hearing the evidence and arguments, the Panel concludes that if the land had been sold immediately after the taking, it would have been sold as an investment property. It further concludes that a knowledgeable investor would have demanded and gotten a discount if he/she were to purchase the subject property after the date of the right of entry order.

The Panel recognizes that there are no studies that analyze identical circumstances. The Board cannot demand the impossible – identical transmission lines have never been built before in Alberta by AltaLink, and neither Gettel nor Doll provided evidence of studies of identical lines. The Panel must determine reasonable compensation, and it must work with the information that is available.

What the Panel does conclude from Gettel's and Doll's evidence is that:

- Transmission lines have a negative visual impact
- Transmission lines have an effect that decreases with distance
- Transmission lines are perceived negatively in at least some markets
- Visual buffers minimize the negative impact
- The Land will be less desirable with the transmission line in place
- The most likely buyer would be another developer or investor
- An investor/developer would discount the property when purchasing it

The Panel concludes that the impact on market value, on a balance of probability and although difficult to measure, is something other than zero.

The Panel notes a similar conclusion in the decision *Transalta Utilities v. Kube* 1987 CarswellAlta 409, 77 A.R. 290, 37 L.C.R. 228, [1987] A.W.L.D. 333 at para. 14 (“Kube”):

It is common ground that the presence of transmission towers is a factor taken into consideration by purchasers. The evidence is that some owners felt the line would decrease the value of their property and some were indifferent. There is no evidence to suggest that anyone is attracted by the presence of a high voltage power line. If some purchasers would consider the presence of the line to be a negative factor, and no purchaser would consider it to be a positive factor, it is reasonable to conclude that the value of the land is adversely affected to some extent.

*vi. What is the magnitude of the loss, if any?*

The Kube decision goes on to say: “[t]he precise monetary value of this effect is difficult to quantify. This difficulty, however, should not deter the Board from putting some value on this effect.”

Gettel did not provide “before” and “after” appraisals, but rather, he estimated a percentage loss of market value. The Panel must determine: (a) the land value to which that percentage applies, and (a) an appropriate percentage.

With respect to market value, the Panel is basing the calculation of injurious affection on a valuation of \$10,000.00 per acre. The Panel considered the valuations provided by Doll and Gettel. Royal West criticized Doll's appraisal, comparables, and adjustments for not placing sufficient weight on development potential. AltaLink criticized Gettel's appraisal, comparables, and adjustments for placing too much weight on development potential. The Panel concurs with both parties. On balance, the Panel considers the \$10,000.00 per acre valuation arrived at earlier to be based on the best evidence before it.

AltaLink argued that even if it accepted the 10 percent number, which it did not, this should not apply to the entire parcel but only to that portion of the Land that lies within the “negative value zone” around the

transmission line. It is common ground that an effect, if present, would decrease with distance. The Panel accepts that the decrease in value of some portions of the quarter section is less, while the effect on other portions of the quarter section is higher. The Panel will concern itself with the decrease in value of the remaining land as a unit, which it was at the time of the taking, in arriving at a percentage decrease.

In arriving at a final determination of compensation, the Panel considered all of the evidence and arguments including the following:

- The structures are AltaLink's tallest in Alberta.
- The Land is flat and there is little visual buffer on the subject land.
- The transmission towers and conductors are visible for several miles, and increasingly dominate ones field of vision at distances of 800 metres and less.
- Transmission lines are perceived negatively.
- The property was purchased as an investment property. Doll opined that the most likely purchaser would be another investor. The Panel concludes that a financially savvy investor would demand and get a discount if he/she were to purchase the subject property with knowledge of the taking.
- None of the studies relate to property that is identical or even similar to the subject circumstance.
- It is common ground that if there is an effect, it will diminish with distance. The Panel accepts this idea as logical and took this into account in arriving at a final determination
- The determination of an appropriate percentage decrease in this case is necessarily subjective; after all, an identical line does not exist in Alberta.
- To require empirical evidence in such a circumstance is unreasonable and impossible. The Panel must make its determination on a balance of probability based on the evidence before it.

The Panel finds that the market value of the remaining Land on average is diminished by five percent, and that this percentage should be applied to the market value of all land outside of the right-of-way and workspace, \$1,499,500.00 (149.95 acres @ \$10,000.00 per acre).

The Panel awards compensation of \$74,975.00 for injurious affection.

2. *What annual compensation is payable for loss of use/adverse effect/nuisance/inconvenience/noise?*

Annual compensation is payable at the rate of \$1,350.00. (s.25(1)(c) and (d))

This is the amount agreed to by the parties, and the Panel has no reason to depart from this agreed-upon amount of compensation.

3. *To whom is the compensation payable?*

Compensation is payable to Royal West Property Corp.

Section 23 of the *Act* requires that the Panel determine to whom the compensation is payable. Royal West was the only Respondent that claimed compensation. In the absence of a dispute and based on the evidence provided, all compensation is payable Royal West Property Corporation.

4. *Is interest payable and, if so, at what rate?*

Interest is payable at the Bank of Canada Rate as legislated in s.25(9)

The Panel considers that it is proper to award interest on the compensation payable by the Operator from the date of the right of entry until payment in full, having regard to the part payment made by the

Operator; and that the appropriate rate for that period pursuant to section 25(9) of the *Act* is the Bank of Canada rate in effect on the date of issue of the respective right of entry order.

*5. Has damage occurred and, if so, what is reasonable compensation?*

Construction was not complete as of the hearing date. The matter of damages is reserved as requested by the parties.

*6. To whom and in what amount, if any, should costs be payable?*

The Panel reserves on the matter of costs as requested by the parties. In the event the matter cannot be resolved, the Panel directs the parties to provide written submissions to the Board and the opposing party in accordance with the following timelines:

- The Respondent – within 10 weeks of the date of this decision;
- The Operator – within two weeks of receiving the Lessor’s submission; and
- The Respondent’s Reply, if any – within one week of receiving the Operator’s submission.

The parties are reminded of the provisions of Rule 31(1) and (2) of the *Surface Rights Board Rules* and are asked to provide their submissions in a manner which complies with the requirements of the Rule and addresses the factors to be considered as set out in the Rule. Please provide the Board with three paper copies; one for the Panel and one for Board Administration.

#### ORDERS

An order will issue determining and fixing the compensation and to whom it is payable by the Operator as set out in this decisions.

Dated at the City of Edmonton in the Province of Alberta on March 20, 2014.

SURFACE RIGHTS BOARD

MEMBER

## APPENDIX A

### EXHIBITS FILED:

- Exhibit 1: One-page map of the transmission line route
- Exhibit 2: One-page detail of map in Exhibit 1
- Exhibit 3: Three-ring binder titled *AltaLink Heartland 500kv Project: Pattern of Dealings Binder (Sturgeon County)*
- Exhibit 4: Three-ring binder titled *AltaLink Management Ltd v. Royal West Property Corp et al: Book of Documents*
- Exhibit 5: Cerlox binder by Serecon Valuations Inc. titled *Appraisal Report of Transmission Line Right-of-Way on the NE 10-55-23-W4: Royal West Property Corp.*
- Exhibit 6: Three-ring binder titled *AltaLink Management Ltd v. Royal West Property Corp et al: Book of Planning Documents*
- Exhibit 7: One-page map of comparables
- Exhibit 8: 36 stapled pages by Serecon Valuations Inc. titled *The Impact of High Voltage Overhead Transmission Lines on Multi-Unit Country Residential Property Values*
- Exhibit 9: Cerlox binder by Gettel Appraisals Ltd. titled *Compensation Analysis, Power Line Acquisition, Urban Periphery Land, Township Road 552 & Highway 28A, Comprising 157.20 Acres, Sturgeon County, Alberta*
- Exhibit 10: Four stapled pages printed from Google Maps
- Exhibit 11: Cerlox binder by Serecon Valuations Inc. titled *Appraisal Report of Transmission Line Right-of-Way on Pt. NW 3-55-23-W4: Soorya Investments Ltd.*, originally prepared for hearing for Alta SRB File No RE2012.0014
- Exhibit 12: One poster-sized paper of hand-drawn map

Information received 1: Three-ring binder of Operator final submission and book of authorities

Information received 2: Three-ring binder of Landowner final submission and book of authorities

- Exhibits numbered 1–8 were filed by the Operator
- Exhibits numbered 9–11 were filed for the Respondent
- Exhibit number 12 was filed jointly



## APPENDIX B

### Relevant Legislation

**Sections 23 and 25(1) and (9) of the *Surface Rights Act RSA 2000, Chapter S-24* reads as follows:**

#### **Compensation**

**23** On making a right of entry order, the Board shall, in accordance with its rules, hold proceedings to determine the amount of compensation payable and the persons to whom it is payable.

RSA 2000 cS-24 s23;2009 c31 s8

#### **Determining compensation**

**25(1)** The Board, in determining the amount of compensation payable, may consider

- (a) the amount the land granted to the operator might be expected to realize if sold in the open market by a willing seller to a willing buyer on the date the right of entry order was made,
- (b) the per acre value, on the date the right of entry order was made, of the titled unit in which the land granted to the operator is located, based on the highest approved use of the land,
- (c) the loss of use by the owner or occupant of the area granted to the operator,
- (d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,
- (e) the damage to the land in the area granted to the operator that might be caused by the operations of the operator, and
- (f) any other factors that the Board considers proper under the circumstances,

...

**(9)** The Board may order the operator to pay interest on any or all of the compensation payable on and from the date the right of entry order was made, at the Bank of Canada rate on the date the right of entry order was made....

RSA 2000 cS 24 s23;2009 c31 s8