The Alberta Court of Appeal Allows Parallel Proceedings before the Court and the Surface Rights Board to Continue

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Summary

In Remington v Enmax1, the Court of Appeal of Alberta ruled that parallel proceedings before the Court of Queen's Bench and the Surface Rights Board (SRB) could continue. Specifically, the Court of Appeal ruled that the SRB was required to determine compensation owed to Remington Development Corporation (Remington) having granted a Right of Entry Orders (ROEs) to Enmax. The Court of Appeal also refused to stay a parallel Court action commenced by Remington against Enmax seeking damages for breach of right-of-way agreements, trespass and unjust enrichment. In sum, the Court of Appeal held that both the SRB and the Court were appropriate forums to determine amounts payable by Enmax to Remington. Facility owners/operators and landowners should be prepared for the challenges of parallel proceedings, including conflicting evidence and cost consequences.

Background

Enmax was the owner and operator of power transmission lines located on the Interlink Lands. Enmax's predecessor obtained access to the Interlink Lands in 1948 through a series of right-of-way agreements with the Canadian Pacific Railway Company (ROW Agreements). In 2002, Remington acquired the Interlink Lands, and the ROW Agreements were assigned to it. Remington gave Enmax notice to terminate the ROW Agreements in 2005. Enmax objected to the validity of the assignment of the ROW Agreements to Remington and to Remington's termination notice. In 2008, Remington commenced an action against Enmax in the Court of Queen's Bench for breach of the ROW Agreements, trespass and unjust enrichment (the Action). Pursuant to a Special Application, it was decided in 2011 that the ROW Agreements could be assigned to, and terminated by, Remington. In 2015, the Alberta Utilities Commission denied Enmax's application to relocate the transmission lines on the basis that it was not in the public interest. Enmax applied to the SRB in 2017 for ROEs to permit Enmax to access the Interlink Lands. The SRB granted Enmax the requested ROEs. The outstanding issue before the SRB was determining the amount of compensation owed by Enmax for its use and occupation of the Interlink Lands.

Enmax applied to the Court for a stay of the Action pending the conclusion of the SRB proceedings. A master dismissed this application. A chambers judge dismissed Enmax's appeal of the master's decision. Also, Remington applied to the Court for an order compelling Enmax to withdraw its applications before the SRB. The chambers judge granted the requested order. The chambers judge's decisions were based on the conclusion that the Court is the appropriate forum to determine compensation payable by Enmax to Remington. Enmax appealed the chambers judge's decisions.

Issue

The single issue before the Court of Appeal was whether the SRB should determine the compensation owing to Remington, or whether all issues regarding compensation should be decided in the Court as part of the Action.

Decision

The appeal from the direction to withdraw the application before the SRB was granted. The Court of Appeal held that the chambers judge erred by determining that the Court was the most appropriate forum to determine the amount of compensation payable to Remington. This approach presupposed that the dispute between the parties could and had to be resolved entirely in either forum, and was an error in principle.

The Court of Appeal further held that the SRB is required by its enabling legislation to hold hearings to determine the amount of compensation payable after a ROE has been issued. In fact, section 23 of the Surface Rights Act2 provides that "(o)n 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." The Court of Appeal concluded that there was no compensation application that was distinct from a ROE application, and since the SRB's decision to grant the ROEs was final it followed that there was no application for compensation which could be withdrawn by Enmax. The Court of Appeal also concluded that there was no principled basis to prevent the SRB from exercising its mandate in this case. In particular, Remington had not demonstrated any irreparable harm that it would suffer as a result of the SRB proceedings, or that the balance of convenience of more streamlined proceedings outweighed the public interest of having the SRB, an expert tribunal, determine compensation for the ROEs in accordance with its statutory mandate.

Finally, the Court of Appeal held that although the quantum of damages payable if Remington was successful in the Action might be different than the amount of compensation determined by the SRB, it did not follow that compensation should necessarily be solely determined by the Court as the correct forum. The Court of Appeal stated that the Court and the SRB were engaged in distinct activities that may require the application of different criteria. The Court of Appeal also noted that if compensation was set by the SRB, this information could ultimately be taken into account by the Court if Enmax was found to be liable in the Action.

The appeal from the refusal to stay the Action was dismissed. The Court of Appeal determined that there was no good reason to stay the Action at this time given its conclusions that: 1) the SRB should proceed to determine compensation for the ROEs,

2) the Court was the appropriate forum to decide the issues in the Action, and 3) the amount of compensation determined by the SRB may not be coextensive with the damages determined in the Action.

Implications

There are three important conclusions flowing from this decision which should be considered by facility owners/operators and landowners when dealing with a case that could be before a Court and the SRB simultaneously. First, parallel proceedings before both the Court and the SRB will likely be allowed to continue unless this would cause irreparable harm to one or more parties, or unless the convenience of streamlining the proceedings outweighs the public interest of having separate proceedings. Second, if the SRB makes a determination as to compensation owed by one party to the other, this determination can subsequently be considered in the parallel court action. In other words, if a party is entitled to compensation granted by both the SRB and the Court, the Court may decide to reduce the amount of damages by the compensation amount set by the SRB. Third, when specifically dealing with a ROE application before the SRB, parties must be aware that if a ROE is granted a determination as to compensation by the SRB will necessarily follow. In other words, compensation is intrinsic in a ROE application. If a ROE is granted, the parties cannot forego a compensation hearing before the SRB to commence an action for the determination of the amount of compensation owed. This Court of Appeal decision is reasonable, despite the appearance of multiplicity of proceedings. The chances of inconsistent findings are slim. Even if the Court dismisses the Action, it is likely that there will not be any impact of the ROE compensation granted by the SRB. However, facility owners/operators and landowners should be prepared for the challenges of parallel proceedings, including conflicting evidence and cost consequences.

1 *Remington v Enmax*, 2019 ABCA 69.

2 *Surface Rights Act*, RSA 2000, c S-24, s. 23.

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