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Thursday, June 17, 2010 - Issue 203

Bi-weekly issues are added on Thursdays.

**** HIGHLIGHTS ****

- * The Alberta Court of Appeal has, for the time being, rejected annual compensation payments to farmers whose lands are adversely affected by pipeline construction. In 2007, the Alberta Energy & Utilities Board, for the first time, awarded annual compensation to a group of farmers for a pipeline which was to be constructed across their land. The Board concluded that a one time up front payment based on what the pipeline company had paid other farmers along the same line was not reliable evidence of fair compensation. This decision was set aside by a Justice of the Alberta Court of Queen's Bench who held that there was no evidence of unfair negotiations which would taint the evidentiary value of agreements negotiated with other farmers. A Justice of the Court of Appeal held that there was no reasonable prospect of success for the farmers' appeal from the Queen's Bench Decision. (*Enbridge Pipelines (Athabasca) Inc. v. Karpetz*, [CALN/2010-017](#), [2010] A.J. No. 647, Alberta Court of Appeal)

**** NEW CASE LAW ****

Enbridge Pipelines (Athabasca) Inc. v. Karpetz; [CALN/2010-017](#), Full text: [\[2010\] A.J. No. 647](#); Alberta Court of Appeal, J. Watson J.A., June 9, 2010.

Expropriation and Surface Rights -- Pipelines -- Compensation: Up Front Payment vs. Annual Payments.

Summary of Facts: John Karpetz and other members of the North Central Surface Rights Association (the "Farmers") applied for leave to appeal to the Court of Appeal from a decision of a Justice of the Alberta Court of Queen's Bench (the "Trial Justice"). The Trial Justice had allowed the appeal of Enbridge Pipelines (Athabasca) Inc. ("Enbridge") from a decision of the Alberta Energy & Utilities Board (the "EUB") concerning

compensation that the Farmers were entitled to with respect to a pipeline to be constructed by on their lands.

Before the EUB, Enbridge argued that the Farmers should have been granted compensation for a permanent right-of-way for the pipeline, and temporary work space for the construction of the pipeline, based on the "Pattern of Dealings" approach which contemplates that landowners whose use of their land is adversely affected should be generally treated equally in relation to compensation for the injurious affect of a pipeline. Enbridge lead evidence before the EUB concerning the amount of compensation it had paid to 77 landowners with whom it had negotiated settlements, and an additional 71 landowners who initially objected, but who ultimately agreed to an increased payment of \$1,900.00 per acre for the right-of-way and \$950.00 per acre for the temporary work space. The 71 landowners who initially negotiated settlements had their compensation "topped up". A total of 148 landowners had signed right-of-way agreements and were paid the negotiated amounts.

The applicants were 14 landowners who had property near Grassland, Alberta. The EUB rejected Enbridge's proposed compensation package on the basis that to give any weight to the Pattern of Dealings, the EUB needed:

- "a) a sufficient number of comparables with identical or at least very similar terms, and b) assurance that the negotiation process met certain minimum criteria", including evidence that the agreements were "freely and willingly made without coercion, compulsion or compromise."

The EUB concluded that \$700.00 per acre was appropriate as up front compensation, and in addition \$100.00 per acre in annual payments should be awarded, with the amount reviewable every 5 years under s. 25(1)(c) and 25(1)(d) of the Alberta Surface Rights Act (the "Act").

Enbridge appealed from the EUB's decision to the Court of Queen's Bench. The hearing before the Court of Queen's Bench was conducted as a trial de novo.

The Trial Justice concluded that the EUB's objection of the Enbridge Pattern of Dealings approach was unreasonable and that there was nothing unique about this case requiring a different approach to compensation than what has been used in the vast majority of previous cases. Before the EUB's decision, no court or board had opposed an annual payment component in a compensation package. The EUB's decision indicated that it was moving away from the "traditional" approach for compensation and that it saw merit to a system which would allow landowners to choose between a lump sum settlement and a compensation package which included an annual payment component.

The Trial Justice set aside the EUB's award as unreasonable and set compensation in accordance with Enbridge's Pattern of Dealings at \$1,900.00 per acre for the right-of-way and \$950.00 per acre for the temporary work space.

Decision: J. Watson, J.A. dismissed the application for leave to appeal [at para. 30].

Watson, J.A. concluded that there was evidence to support the decision of the Trial Justice to the effect that the 148 agreements should not have been "swept aside" as having not been obtained through a fair negotiation process [at para. 19], and there was no evidence of "negotiation conduct" that might destroy the representative values of the Pattern of Dealings comparables [at para. 23]. There was no reasonable basis to depart from using a reasonable Pattern of Dealings approach, and from paying amounts which were similar to the 148 agreements for the same pipeline, in relation to similar land [at para. 24].

Watson, J.A. also found no grounds to interfere with the Trial Justice's conclusion that an annual payment component was speculative and hypothetical and did not provide a basis for this type of compensation [at para. 25 and 26].

Watson, J.A. concluded [at para. 29]:

"It is, however, sufficient to say that, on the record before Macklin J. and the Board, it was reasonable for Macklin J. to conclude that an arguable justification for departing from the established PoD to include an annual payment component was not lifted from the conjectural or redundant and it was unreasonable for the Board to conclude otherwise. To disturb Macklin J.'s conclusions in those respects, having regard to the standard of review, would require a clear ground of appeal of arguable substance which does not exist here."

**** CREDITS ****

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