February 18, 2011

Supreme Court Broadly Interprets s. 99(1) of the National Energy Board Act

By Matthew Ducharme

Cases Considered:

Smith v Alliance Pipeline Ltd., 2011 SCC 7

In S*mith v Alliance Pipeline Ltd.*, 2011 SCC 7 (*Smith*) all nine judges of the Supreme Court of Canada endorsed a broad view of the power of the federal Pipeline Arbitration Committee (PAC) established under the *National Energy Board Act*, RSC 1985 c N-7 (*NEBA*) to award costs to a claimant to an arbitration proceeding. Committee costs may include solicitor-client costs of related litigation. The Court grounded its finding in subsection 99(1) of the *NEBA*, which if triggered requires a company to pay "all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by that person in asserting that person's claim for compensation," and in the history of statutory reform of the law of expropriation, specifically the principle of full compensation for expropriation. The Court was silent on the Federal Court of Appeal finding that matters for which a committee may award compensation are restricted by section 84 of the *NEBA*, under which litigation costs are not compensable (*Alliance Pipeline Ltd. v Smith*, 2009 FCA 110 at para. 55 (*Smith FCA*)). The impact of *Smith* may be limited to cases in which compensation awarded by the committee exceeds 85 percent of the value offered by the company, as the statutory basis for the Court's decision is subsection 99(1), and the subsection is triggered only where the 85 percent threshold is exceeded.

In simplified form, the facts in *Smith* are as follows. In 1998, the National Energy Board approved Alliance's proposed pipeline. The proposed route crossed the land of Smith. At first Smith objected to the route, but in 1999 he concluded a private easement agreement with Alliance, granting Alliance a right-of-way (ROW) over his land. Among other things, Alliance agreed to remediate Smith's land after construction of the pipeline by levelling the land along the ROW of the buried pipeline and to manure that land, and Smith agreed to grant Alliance a right-of-access over his land to the ROW, but only in the case of an emergency.

In the Fall of 1999, Alliance completed construction of the portion of the pipeline crossing Smith's land but did not remediate that land. By the Spring of 2000, Alliance had moved its equipment to other land and advised Smith that due to cost it had no immediate plans to return the equipment to Smith's land for the purpose of remediation. Smith remediated his own land, not being barred from doing so by the easement agreement, and invoiced Alliance for $9829. Alliance refused to pay, offering $2500.

Smith refused the offer and filed a notice of arbitration with the Arbitration Committee (the PAC). The PAC is an *ad hoc* committee established under section 91 of the *NEBA*. It has jurisdiction to hear disputes over compensation between pipeline companies and other parties regarding the actions of pipeline companies. Specifically, its powers to hear matters and award

compensation are informed by sections 73, 75, 84, 97 and 99 of the *NEBA*. In summary form: section 73 sets out a broad list of powers of a pipeline company; section 75 requires a pipeline company to make "full compensation" to an interested person for all "damage" to that person by the pipeline company in the exercise of its powers; section 84 restricts the scope of arbitration over compensation to certain types of "damage" caused by the pipeline company (the types of which are not relevant to this case); subsection 97(1) grants an Arbitration Committee a broad discretion to consider the factors it finds proper when arbitrating a dispute over compensation; and section 99 addresses costs – of particular relevance to this case, subsection 99(1) requires a pipeline company, when the compensation the committee awards exceeds 85 percent of the value offered by the company, to pay "all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by that person in asserting that person's claim for compensation."

In 2003, the relationship between Smith and Alliance deteriorated. Smith pursued his claim with the arbitration committee. The committee sat in a panel of three, three being its quorum, on May 6, 2003, and then reserved its decision. Before it could issue a decision, the committee lost quorum, due to the appointment of one of its members to the bench, and in result did not issue a decision. This proceeding was considered a nullity. In June of 2003, Alliance asked Smith for a right of access to its ROW for non-emergency work. Smith refused to grant the right unless Alliance paid compensation to him in advance. On July 10, 2003, Alliance responded by filing a statement of claim in the Alberta Court of Queen's Bench, seeking, among other things, unhindered access to Smith's land and an order that the first committee not render its decision until resolution of the Queen's Bench action. On August 7, 2003, Alliance filed for an injunction against Smith to prevent him from interfering with Alliance's claimed right of access to the land. On October 21, 2003, Justice Nation found the easement agreement between Smith and Alliance did not grant Alliance a right of access to the ROW via Smith's private land other than in the case of an emergency. In result, she refused to grant the injunction and awarded Smith party-and-party costs (*Alliance Pipeline Ltd. v Smith*, 2003 ABQB 843). In March 2005, Alliance discontinued the Queen's Bench action.

In August 2005, a second arbitration committee was appointed to hear Smith's claim. By January 2006, Smith had amended his Notice of Arbitration to claim his costs for proceedings before the first committee, and to claim solicitor-client costs (net of costs already recovered) for the Queen's Bench action. In March and April of 2006 the second committee heard the matter. In its decision of September 18, 2006 (note: the PAC does not publish its decisions. Decisions which have been judicially reviewed are available by contacting the PAC) the second committee granted the costs claimed for the Queen's Bench action, on the basis that defending it was directly related to Smith's claim before the first committee. It did not grant costs of attendance or correspondence for the first committee hearing, on the basis that it was a nullity, but did grant some costs for filing and other legal work on the basis that this work was relevant to the hearing before the second committee. In total, the committee's award exceeded 85 percent of the value offered by Alliance.

Alliance appealed the second committee's holdings on both committee and litigation costs to the Federal Court. On January 4, 2008, Justice O'Keefe of the Federal Court issued his decision, upholding the second committee's findings on costs (*Alliance Pipeline Ltd. v Smith*, 2008 FC 12 (*Smith FC)*). Justice O'Keefe found: the committee had jurisdiction, relying on the fact that litigation costs were included in the notice of arbitration, and on precedent on subsection 97(1) in which it had been held a committee "must consider all of the compensation matters set out in the notice of arbitration" (see *Bue v Alliance Pipeline Ltd*., 2006 FC 713 at paragraph 25 and *Balisky*

v Canada (Minister of Natural Resources), [2003] FCJ No 341, at paragraph 22); the committee's award of litigation costs was not barred by the principle of *res judicata* – Justice O'Keefe relied on the language of subsection 99(1) that the committee may award "all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by that person in asserting that person's claim for compensation" and a finding of fact that if the claimant did not defend the litigation action then his claim for compensation before the first committee may have been lost, as such the litigation costs were reasonably incurred in asserting a claim before the compensation committee; and, Justice O'Keefe affirmed the refusal of the second committee to award hearing costs for the proceeding before the first committee.

Alliance appealed to the Federal Court of Appeal, which, in a decision delivered by Justice Nadon dated April 8, 2009, found in Alliance's favour (*Smith FCA*). While Justice Nadon affirmed that the committee had jurisdiction over all compensation matters raised in a notice of arbitration, he made two key holdings on the interpretation of the *NEBA*, which restricted matters regarding which a committee may award compensation to exclude the costs claimed. First, Justice Nadon held that subsection 99(1) applied only to a "claim for compensation made in the arbitration proceeding" and not in a related court proceeding (at para. 49). Second, Justice Nadon held that matters for which compensation could be made were circumscribed by section 84 of the Act, specifically that "damages that are caused by the activities of the company are only compensable if they are directly related to those matters enumerated at subparagraphs 84(1)(a)(i) [the acquisition of lands for a pipeline], (ii) [the construction of the pipeline,] and (iii) [the inspection, maintenance or repair of the pipeline]" and the costs claimed, including litigation costs, did not fall within the enumerated grounds (at para. 55).

Smith appealed to the Supreme Court of Canada. The Court was unified in the result. Justice Fish wrote for the majority of eight and Justice Deschamps wrote reasons concurring in the result but, on the preliminary issue of standard of review alone, with different reasons. Justice Fish, relying on *Dunsmuir v. New Brunswick*, 2008 SCC 9, and a finding that the committee was interpreting its home statute found the standard of review of the committee's decision was reasonableness (at para. 28-33). Justice Deschamps agreed with this result, but noted the fact an administrative body is interpreting its home statute is not sufficient to ground a finding that the standard of review is reasonableness. She opined that *Dunsmuir* states if the question raised is not constitutional, of central importance to the legal system, or concerned with demarcating one tribunal's authority with respect to another, then to attract a reasonableness standard there must be a "clear rationale for deference" based on either clear legislative intent or "a discrete regime or question of law in which the decision-maker has specialized expertise" (at paras. 100, 106). In Smith, she found there was such a question, namely the "quintessentially discretionary" question of costs to which deference will usually apply (at para. 110).

Justice Fish phrased the question on costs as "whether the Second Committee could reasonably find that it was entitled under s. 99(1) of the *NEBA* to make the impugned awards on costs." (see, for example, para. 41). He found the committee's view coherent that the Queen's Bench action was directly related to Smith's claim before the arbitration committee, and that it was reasonable for the second committee to award the costs of filing and preparation for the hearing before the first committee but not the attendance and correspondence costs. Justice Fish then embarked on a review of legislative reform of the law of expropriation to affirm the principle of full compensation (at paras. 46 and 49-54).

The principles to be taken from this case include:

- the Court will take a liberal view of the PAC's ability to award compensation, relying on the principle of full compensation in expropriation cases. It is interesting that the Court relied on expropriation principles as there was no expropriation. The ROW was acquired by agreement, as opposed to a right-to-enter order under section 104, which itself, arguably, is not an expropriation of land as underlying title remains with the landowner;
- where the committee grants an award greater than 85 percent of the amount offered by the company, thereby triggering subsection 99(1), an award may include solicitor-client costs for litigation found to be "directly related" to the claim before the committee;
- such an award is not barred by a *res judicata* argument. This may be because where a court in related litigation makes an award of costs that award is in regards to the *litigation*, where arguably an award made by a committee is not part of that litigation but part of compensation in the *arbitration*; and,
- perhaps, section 84 of the *NEBA* does not restrict matters for which the committee may award compensation when subsection 99(1) is triggered. Interestingly, Justice Fish did not address the holding of the Federal Court of Appeal that the right to award compensation was circumscribed by section 84.