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Building energy empires on (legal) foundations of sand, or, can I have my cake and eat it too?

By Nigel Bankes

Cases Considered:

Remington Development Corporation v Enmax Power Corporation, 2011 ABQB 694, aff'd 2012 ABCA 196.

Most people would think that if Utility Co (U Co) needs access to cross Y's land in order to construct a major capital investment in the form of a utility right of way, U Co will secure any necessary access rights (easement or utility right of way) either: (1) by way of an agreement, or (2) by way of expropriation if Y tries to extract hold-out rents. In either case, U Co will want the expropriation or agreement to bind the land: i.e. to run with the land no matter what Y does with it (sell it, assign it into bankruptcy etc.). And in either case one would think that U Co (and its lawyers) would want to make sure that the agreement bound the land for so long as U Co needed the right of way – or at least for a reasonable amortization period for the investment that U Co is about to make, so as to ensure that it does not have stranded assets on its hands, or worse still, a gap in its transmission system.

But what if Y is not just Joe Y, but Y Co – the most important land owner in the area\country (think HBC or CPR). And suppose further that Y Co says: "here's the deal: you get to build your project, the rent or fee is nominal (trial judgement at para 3, $40.00 per year), but by the way, I can terminate on three months' notice." So long as U Co can trust Y Co this looks like a pretty sweet deal for U Co. But what if, many years later, the property becomes more valuable and Y Co wants to sell the land to R Co, and worse still, R Co wants to develop the property and to do that is quite happy to trigger the termination clause? Well, in that case, the three month termination clause looks fatal or, perhaps from another perspective, negligent (thank goodness for limitation
s periods) and certainly expensive.

These paragraphs provide the core facts of the case which is the subject of this post. U Co was originally the City of Calgary (which assigned its rights to Enmax – with Y Co's consent); Y Co is the CPR and the developer, R Co, is Remington.

The arguments

In the above scenario, U Co (Enmax) finds itself in a conundrum. On the one hand it wants to say: "my interest is an interest in land (howsoever characterized) which binds the land." On the other hand it might also want to say (given the vulnerability of that interest to the 3 month notice period): "my interest is a personal interest; Y Co may be able to exercise the termination rights, but certainly not R Co, the current owner; the right to terminate is personal and non-assignable."

But these arguments are deeply incompatible, the agreement cannot be at one and the same time real and personal. In the end nobody can ride these two horses. U Co cannot claim both that: (1) R Co is bound by the right of way, but that (2) R Co cannot terminate. The Court of Appeal understood this when it said (at para 22): "if Enmax was correct, [in asserting that the agreement gave rise to a licence and not an easement] it is difficult to understand how it could have any right to maintain its transmission lines on the Interlink Lands following the sale to Remington and why it would not be trespassing."

The judgements and the practical consequences

Justice Park at trial sided with Remington. He held that: (1) CPR could assign the agreement along with the land to Remington without seeking the consent of Enmax (the agreement specifically required the City to obtain CPR's consent to the assignment but was silent with respect to assignments by the owner of the burdened land), and that (2) the agreement was terminable by Remington in accordance with its terms.

The Court of Appeal agreed (the standard of review was correctness – para 13) observing that the general rule is that a party can assign the benefits of a contract but not the contractual obligations. The exceptions to the general proposition or authoritatively laid out in McLachlin JA's (as she then was) decision in *Fredrickson v Insurance Corporation of British Columbia* (1986), 3 BCLR (2d) 145, 28 DLR (4th) 414 (BCCA) at para 44, aff'd, [1988] 1 SCR 1089:

> Today there are six categories of contracts which are considered to be unassignable. They are:
> 1. Contracts which expressly by their terms exclude assignment;
> 2. Mere rights of action (assignments savouring of maintenance and champerty);
> 3. Contracts which by their assignment throw uncontemplated burdens on the debtor;
> 4. Personal contracts;
> 5. Assignments void by public policy (public officers' wages or salary and alimony or maintenance agreements); and
> 6. Assignments prohibited by statutory provisions.

The Court concluded that Enmax could not bring the arrangement within any of these categories and thus the agreement was validly assigned by CPR to Remington and that (at para 21) "Remington was entitled to issue a notice terminating Enmax's rights, benefits and privileges under the Transmission Agreements."

So where does this leave us? The transmission lines in question represent two of the main feeds for supplying electricity to downtown Calgary. These facilities will no doubt be licensed under the terms of the *Hydro and Electric Energy Act*, RSA 2000, c H-16, s 15 [*HEAA*] and subject to the jurisdiction of the Alberta Utilities Commission. This aspect of the matter was dealt with in the Order bringing the dispute before the Court. That Order spelled out the two issues to be decided (the validity of the assignment and the validity of the notice to terminate) but then went on to stay (at para 3) "the balance of the action pending … any subsequent determination by the Alberta Utilities Commission (AUC) whether some or all of the Transmission Lines would be relocated …. It further directed that if the Stated Issues were resolved in favour of Remington, Enmax would be directed to make an application before the AUC to remove the Transmission Lines from the … Lands" but "none of the Transmission Lines would be removed or relocated in

the absence of an order by the AUC." The relocation of a licensed transmission line is governed by section 17 of the *HEAA* which provides that:

17(1) The Commission may, on any terms and conditions it considers proper, direct a permittee or licensee to alter or relocate any part of the permittee's or licensee's transmission line if in the Commission's opinion the alteration or relocation would be in the public interest.
(2) The Commission may, in an order under subsection (1), provide for the payment of compensation and prescribe the persons by whom and to whom the compensation is payable.
(3) When an order under this section provides for the payment of compensation, the Commission may at any time provide that if agreement on the amount of compensation cannot be reached between the parties, the amount is to be determined by the Alberta Utilities Commission on the application of either party.

It is hard to imagine the Supreme Court of Canada granting leave to appeal (although no doubt some incentive for Enmax to apply) in this case, and so the next port of call for the parties is the Alberta Utilities Commission when the AUC will have to apply the rather bizarre compensation provisions of section 17 which remind this blogger of section 99 of the *Oil and Gas Conservation Act*, RSA 2000, c O- 6 and part of the gas over bitumen litigation: *Gulf Canada Resources Limited v Alberta*, 2001 ABQB 286.