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Board Cannot Ignore Injurious Affection Losses

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Case Commented On: *Koch v Altalink Management Ltd*, 2016 ABQB 678 (CanLII)

This case involves WATL (the Western Alberta Transmission Line) and parcels of land owned by the Kochs that will be bisected by the line. The principal point of law involved relates to the injurious affection suffered by the lands retained by the Kochs (i.e. these are Koch lands which lie outside the area of the right of way acquired by Altalink). It is a standard principle of compensation law that such losses should be recoverable. However, in this case, Altalink, in an argument accepted by the majority of the Surface Rights Board panel hearing the case, took the position that the Kochs had bought the lands at a price that was already discounted from its original market value by the prospect of WATL being constructed. Accordingly, the Kochs had suffered no injurious affection losses and were therefore not entitled to any compensation under this head of damages. On this theory the party that had suffered the loss was the vendor to the Kochs and to compensate the Kochs for injurious affection would to award them a windfall. The minority would have awarded injurious affection damages of $125,780. The Kochs appealed.

Justice Sisson concluded that the majority had made an error of law which rendered the majority's conclusions with respect to injurious affection unreasonable. Section 25(d) of the *Surface Rights Act*, RSA 2000, c. S-24 provided that adverse effect (or injurious affection) refers to the effect of the taking and operations of the operator on "the remaining land" of the owner; it does not (at para 45) "refer to the adverse effect on the [owners'] financial position."

As for the calculation of the amount of an injurious affection award the Court conceded that this would always be a matter of judgement but that it was not unreasonable to apply a percentage to discount the value of the land as a result of the project (i.e. before and after). In this case the Court rejected the owners' contention that 30% would be a reasonable discount factor and concluded instead that 15% was more reasonable. This would have resulted in an injurious affection award of $131,135. However, rather than ordering that amount the Court preferred to adopt the award that the minority had endorsed of $125,780 on the basis, effectively, that it was 'close enough'; or, as the Court actually put it (at para 170) "In result, Mr. Zenko's award of $125,780 appears reasonable and I see no reason to make minor adjustments." It is not clear to me that this particular conclusion was open to the Court given the reasoning it had followed to that point. I say this because I don't think that the idea of deference applies to a minority award. The minority's decision and its reasoning might well inform the Court's own approach, but if the Court's own reasoning results in conclusion "A" as to the amount of compensation, then I am not sure that it is then open to the Court to adopt conclusion "B" on the basis that conclusion "B" was that reached by the minority and it did not differ significantly in amount from conclusion "A".

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