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Entitlements Protected by a Property Rule vs Entitlements Protected by a Liability Rule; or FPIC vs Regulated Access

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Case Commented On: *Sproule v Altalink Management Ltd*, 2015 ABQB 153

AltaLink is building a transmission line to connect new wind generation in southern Alberta to the grid. The routing and construction of the line was approved by the Alberta Utilities Commission. Part of the line crosses private lands including lands owned by Sproule and the other parties to this appeal, and part crosses Piikani First Nation lands. Altalink reached a negotiated agreement with the Piikani First Nation but was unable to reach an agreement with Sproule et al. Accordingly, Altalink proceeded under the terms of the *Surface Rights Act*, RSA 2000, c. S-24 (*SRA*) to obtain right of entry orders and subsequently compensation orders for the different parcels.

Sproule et al appealed the compensation order on two main grounds; only the first is the subject of this post. The first ground of appeal was that the Board had wrongly refused to consider other compensation arrangements in setting the appropriate level of compensation for the Sproule et al lands. In particular, the appellants argued that the Board should have taken into account: (1) the levels of compensation that Sproule received under other agreements for wind turbines and a cell phone tower located on his land, and (2) the amounts received by the Piikani First Nation from Altalink for consenting to the transmission line crossing the Piikani Reserve. There was evidence before the Board that Altalink had been considering two routes for the transmission line, a preferred route that would cross the reserve and a second best route that avoided the reserve. The route across the reserve resulted in savings to Altalink (and ultimately to all consumers in Alberta) of about $30 million. Sproule's evidence on appeal suggested that the Piikani received about $444,000 per mile under their agreement with Altalink (for a total of $7.45 million) whereas Sproule *et al* received about $60,000 per mile under the terms of the Board compensation order.

Justice Langston first held that the Board did not err in concluding that the compensation payable for the wind turbine and cell phone developments were essentially irrelevant and should be given no weight. The Board's job was to apply the regime established by the *SRA*. That scheme is a liability regime and not a consent regime (i.e. a property regime): see Calabresi and Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 Harvard Law Review 1089. By contrast, the applicable regime for locating wind turbines and cell phone towers on a person's land is a consent regime (at para 39): "compensation was

determined by what the landowner or their designate was able to successfully negotiate in an unfettered free market." This seems unremarkable.

Justice Langston reached the same conclusion with respect to Altalink's arrangements with the Piikani. He reasoned as follows:

> [29] The federal government has exclusive jurisdiction over "lands reserved for Indians": s91(24) of the *Constitution Act, 1867*. Section 35 of the *Indian Act*, RSC 1985, c I-5, states that when any provincial legislation authorizes use of land without the consent of the owner, such as the *Surface Rights Act* does, that power may only be exercised over reserve lands if there is consent from the Governor in Council.
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> [30] The end result of the *Surface Rights Act*, the *Constitution Act, 1867*, and the *Indian Act* is that when a transmission line is proposed to cross a reserve and to cross lands held by private individuals, First Nations, through the federal government, have the right to say "no". The private individual does not.

Justice Langston also referred with apparent approval to a passage in the Board's reasons to the effect that the compensation payable to the Piikani is not governed by the *SRA* and the compensation factors listed in that Act.

Here is the text of subsections (1) and (2) of s.35 of the *Indian Act*:

> **35.** (1) Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.
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> (2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) are governed by the statute by which the powers are conferred.

The first thing to note is that both subsections make the relevant provincial legislation (here the *SRA*) conditionally applicable to reserve lands (i.e. subject to a federal Order in Council). Second, the terms of acquisition of the lands is governed by the relevant provincial statute "unless the Governor in Council otherwise directs". Thus while, as a matter of law, reserve lands are still vulnerable to the application of provincial legislation, as matter of practice or politics, it has long been clear that the Governor in Council will not readily consent to the compulsory acquisition of reserve land absent authorization from the First Nation. This is a *de facto* consent regime (free, prior informed consent (FPIC)) if not a *de jure* one; and it applies not only to provincial legislation but also under the terms of s.35 of the *Indian Act* to federal legislation such as the *National Energy Board Act*, RSC 1985, c. N-7. This is more remarkable since it shows how a compensation or liability regime may evolve into a consent regime over time.

It is particularly interesting to compare this outcome with the application of these ideas in the context of confirmed aboriginal title lands under the Supreme Court's decision in *Tsilhqot'in,* 2014 SCC 44. From that case it is apparent that while title lands are *prima facie* subject to a consent regime, such a regime may be abrogated in appropriate circumstances by both federal and provincial legislation through the Court's doctrine of justifiable infringement (see post here). This leads to the rather strange result that the politics of obtaining a federal Order in Council offers stronger protection to reserve lands (and consequential implications for the bargaining position of First Nations) than does the combination of s.35 of the *Constitution Act, 1982* and the doctrine of justifiable infringement for confirmed aboriginal title lands.

All of this is food for thought in the context of the major linear infrastructure developments that the energy industry is currently rolling out across the country (and see here also my previous post on a Federal Court case dealing with Indian reserve easements for Kinder Morgan's expansion project).