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Landowners Can't Use the Surface Rights Board to Mount a Collateral Attack on the Approval of a Transmission Line

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Case Commented On: *Togstad v Alberta (Surface Rights Board)*, 2015 ABCA 192

In a completely predictable decision the Court of Appeal has applied the doctrine of collateral attack to dismiss the efforts of landowners to have a second kick at the can by seeking to question the constitutional basis for provincial regulation of a proposed transmission line before the Surface Rights Board.

This case, in fact, two cases, *Togstad* on appeal from 2014 ABQB 485 and an appeal from *Kure v Alberta (Surface Rights Board)* 2014 ABQB 572, involves the longstanding efforts of the provincial government to strengthen the transmission grid in the province through the construction of two new major transmission lines known as WATL and EATL – Western Alberta Transmission Line and the Eastern Alberta Transmission Line. These projects have been, to say the least, controversial. Along the way the Energy and Utilities Board bumped into its spy scandal and was subsequently dissolved; the province introduced the so-called critical infrastructure legislation to definitively and authoritatively resolve the question of "need" (SA 2009, c.44); and there was litigation, lots of it, on everything from allegations of bias (*Lavesta Area Group v Alberta (Energy and Utilities Board*), 2011 ABCA 108) to valiant efforts to argue that the Alberta Utilities Commission (AUC) still had to establish need as part of its assessment of public interest and notwithstanding the critical infrastructure legislation: *Shaw v Alberta (Utilities Commission)*, 2012 ABCA 378, albeit involving the Heartland project rather than WATL or EATL. And then, in the hearings on the merits in WATL, the AUC carefully examined (and dismissed, AUC Decision 2012-327) landowner arguments to the effect that the lines were interprovincial undertakings that should be subject to federal regulation.

Alberta's legislative scheme is such that once an intraprovincial transmission line has been approved for construction by the AUC under the terms of the *Hydro and Electric Energy Act*, RSA 2000, c. H-6, the transmission line operator (in this case AltaLink) must acquire the necessary rights of way either by way of private agreements with the relevant landowners, or by way of a right of entry order under the *Surface Rights Act*, RSA 2000, c. S-24 (*SRA*). AltaLink engaged in that process and the applicants in this case took advantage of this new forum, the Surface Rights Board (SRB) to raise, once again, provincial jurisdictional authority to licence the construction of WATL. In doing so, counsel for the landowners in these cases faced at last two hurdles: (1) the province has not included the SRB in the list of provincial regulatory tribunals authorized by the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c. A-3 (*APJA*) and

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Designation of Constitutional Decision Makers Regulation, Alta Reg 69\2006 to consider constitutional questions; and (2) the doctrine of collateral attack.

As to the first issue, the Board itself in both the *Togstad* (2013 ASRB 576) and *Kruse* (2014 ASRB 263) matters concluded that it had no jurisdiction to consider the constitutional question because it was not on the *APJA* list. The landowners in both cases brought applications for judicial review (an appeal to the Court of Queen's Bench only being available on compensation questions (see *SRA*, s.26)). Both Queen's Bench justices (McCarthy and Sisson) agreed with that conclusion (*Togstad* at para 7; *Kruse* at para 22). The Court of Appeal concurred (at paras 3 – 5):

> [3] Togstad says his objection was not constitutional in nature. He says it was based on the statutory limit to the Board's jurisdiction created by the phrase "wholly in Alberta", and only required the Board to determine the nature of the transmission line as a question of fact.
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> [4] The standard of review has no impact on our determination of this issue. It is clear that the Togstad objection raised a constitutional question. It was framed in constitutional terms and accompanied by a *Notice of Constitutional Question*. An inquiry into whether a transmission line is extraprovincial necessarily involves constitutional considerations. No doubt the legislative provisions limiting jurisdiction to lines wholly in Alberta were enacted to ensure that the legislation and its application are consistent with constitutional imperatives.
>
> [5] Having raised the objection as a constitutional question before the Board, Togstad cannot now argue that the Board erred in treating it as such. The Queen's Bench judge correctly concluded that the Board did not err in declining to consider a question which it clearly had no jurisdiction to decide.

All three Courts also found that the landowners' applications constituted an impermissible collateral attack. Justice McCarthy put the point particularly well in the *Togstad* decision at para 16:

> Mr. Togstad's counsel argued that there are two complementary processes in respect of transmission lines, one before the AUC and another before the SRB, and that Mr. Togstad can attack either or both. That is true to some extent, but it does not mean that Mr. Togstad can make the same arguments on the same question before both boards in the hope of getting the answer he wants from one of them. The AUC is the body charged with issuing permits for the construction and operation of transmission lines. It is also the body designated by the Legislature to address constitutional questions arising in this context. If Mr. Togstad was unhappy with the AUC's decision, his remedy was to appeal to the Court of Appeal. Counsel for Mr. Togstad argued that this Court should not prevent a litigant from challenging WATL because no court has dealt with the question of whether WATL is an interprovincial line. But Mr. Togstad had the right to appeal the AUC's decision to the Court of Appeal and to raise the issue there. He did not. The SRB's role is limited to granting right of entry orders that

> are consistent with the permit previously granted by the AUC. While its decisions with respect to compensation or conditions attached to rights of entry may be subject to attack, its deference to the AUC's permit is unassailable. Mr. Togstad's contention that the SRB should make a decision that is entirely inconsistent with the prior decision of the AUC is the essence of collateral attack. I disagree with counsel for Mr. Togstad that collateral attack is limited to situations in which there is a mandatory order issued against a party.

Justice Sisson in the *Kure* case based his analysis on the factors developed by the Supreme Court of Canada in *R. v Consolidated Maybrun Mines,* 1998 CanLII 820 (SCC) (at para 45), [1998] 1 SCR 706, and *R. v Al Klippert Ltd.*, 1998 CanLII 821 (SCC), [1998] 1 SCR 737: (1) the wording of the statute under the authority of which the order was issued; (2) the purpose of the legislation; (3) the existence of a right of appeal; (4) the kind of collateral attack in light of the expertise or raison d'être of the administrative appeal tribunal; and (5) the penalty on a conviction for failing to comply with the order. Having carefully examined each of these factors, Justice Sisson too concluded that this was an impermissible collateral attack (at paras 27 – 62). The Court of Appeal agreed (at paras 8 – 9):

> [8] All of this leads to the inescapable conclusion that the appellants' objections were collateral attacks on the Commission's decision. By seeking to raise the question again before the Board, the appellants were attempting to circumvent the Commission's order and were forum shopping for a different and inconsistent result. This is precisely the approach that the rule is designed to prevent.
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> [9] The legislative scheme does not support the appellants' contention that the rule against collateral attacks should be relaxed in these cases. Indeed, it suggests the opposite, that the rule should be strictly applied so as to maintain the integrity of the integrated and interrelated regulatory regime. A direction that the Board must consider this question would turn the legislative scheme upside down. The Board and the Queen's Bench judges did not err in concluding that the objections were prohibited collateral attacks. Even if this was not a collateral attack, it clearly falls within the doctrine of abuse of process.

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