Utility Corridor Regulation in Canada: Shifting Jurisdictions

What happens to a landowner when the company that has acquired a right-of-way over his or her land for a provincially-regulated energy transmission line decides to move the line to the federal jurisdiction? What if the shift to federal regulation will result in increased restrictions on the way in which the landowner can use the right-of-way and surrounding lands? Does it matter whether the right-of-way was acquired by agreement or by expropriation? Twice in the past year these questions have been raised before energy regulators in Ontario and Alberta as two different gas pipeline companies have sought to have their provincial pipelines regulated by the National Energy Board (NEB).

In 2008, TransCanada Pipeline Limited successfully applied to the NEB to take over regulation of its 24,500 km Alberta System of gas pipelines. This year, Dawn Gateway GP has applied to the NEB to assume jurisdiction over an existing Ontario Energy Board (OEB) regulated pipeline owned by Union Gas Limited in Lambton County. In both cases, there are significant differences for landowners between land use regulations in place provincially and those in place federally under the *NEB Act*. Unlike the provincial regulations in Alberta and Ontario, the federal regulations provide for land use controls in a 200 ft area outside the pipeline right-of-way; company consent requirements for the use of farm machinery on the right-of-way; loss of NEB jurisdiction over abandoned pipelines; and lack of NEB authority to award landowners any costs of participating in company-initiated regulatory processes.

In the Alberta System case, landowners identified to the NEB these negative impacts that would result for them from the transfer of jurisdiction and asked, at the very least, that conditions be placed on the future operation of the pipelines to place landowners in as good a position as they were under provincial regulation. The answer from the NEB and TransCanada was that there was nothing they could do. If the pipeline system was determined to be a federal undertaking, then the shift in jurisdiction would happen automatically and federal regulations would apply to landowners automatically by force of law, not by choice of the company.

As a matter of constitutional law, an undertaking is either federal or provincial and the company’s preference is irrelevant. However, in practical terms, choice does matter in that a company must choose at the time it constructs a pipeline whether to make its application for authorization to construct to the provincial or federal regulator. At that stage, unless someone objects to the constitutional characterization of the proposed pipeline, or unless the regulator raises the issue on its own, the choice of the company will determine whether the line is provincially or federally regulated.

Once constructed and in operation, the line will remain subject to the regulation of its original constitutional jurisdiction until someone makes an application to change the jurisdiction. Although in the Alberta case it was determined by the NEB that the pipeline system was currently being operated in a way that now made it a properly federal undertaking, it is questionable whether the shift in jurisdiction would ever have occurred without an economically-motivated desire on the part of TransCanada to make the shift. Company choice again enters into the equation.

If company choice does matter, then is there a place for the imposition of conditions on the jurisdictional transfer which preserve the rights of the landowner under the original jurisdiction? In the Dawn Gateway case, this issue may be explored by both the OEB (from which Union Gas requires leave to sell its pipeline) and the NEB. For landowners whose lands were expropriated for the pipeline right-of-way, conditions imposed by the regulator are probably the only answer to avoiding the negative effects of a shift in jurisdiction. For landowners who entered into right-of-way agreements with the company, though, there may be contractual remedies available as well to the extent that the negative effects are compensable under the agreements.

Going forward, landowners faced with new pipeline rights-of-way would be well advised to specify the exclusive jurisdiction of the pipeline in their right-of-way agreements. Although companies are unlikely to agree to such a limitation, it is probably the best protection available for landowners against the negative effects of a future jurisdictional shift and is worth a try. Of course, if agreement can't be reached, the company will simply expropriate the right-of-way leaving landowners to rely on the future assistance of the energy regulator. It remains to be seen whether the OEB or NEB react any differently to landowner concerns in the Dawn Gateway case than the NEB did in the TransCanada Alberta System case last year.

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