

CASE LAW UPDATE

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Smith v. Alliance Pipeline Ltd.

2011 SCC 7 (Released February 2, 2011)

Expropriation – Standard of Review – Costs – *National Energy Board Act*

In this case the Supreme Court of Canada held that it was reasonable for an arbitration panel formed pursuant to the *National Energy Board Act* to award substantial indemnity costs to an individual whose land has been expropriated.

Pursuant to an expropriation agreement between the two parties, Alliance Pipeline Ltd. (“Alliance”) obtained a right-of-way over Smith’s land. Alliance then failed to reclaim the land in a timely manner, as required by the agreement, and refused to compensate Smith fully for Smith having done so in Alliance’s place. Smith brought arbitration proceedings pursuant to the *National Energy Board Act* (“NEBA”) to recover his costs related to the reclamation.

Before the arbitration panel delivered its decision, Alliance brought proceedings in the Alberta Court of Queen’s Bench for unhindered access to Smith’s land, a declaration that the parties’ releases in the expropriation agreement precluded Smith’s compensation claim, and an order that the panel not render its decision pending resolution of the Queen’s Bench action. Alliance discontinued its action after 18 months, and the Queen’s Bench awarded Smith costs on a party-and-party (partial indemnity) basis in regard to that action.

A newly appointed arbitration panel awarded Smith compensation for his costs before the first panel and the balance of the costs he had incurred defending Alliance’s Queen’s Bench action on a solicitor-client (substantial indemnity) basis.

The Supreme Court (per Fish J., with Deschamps J. concurring in separate reasons) held that the standard of review of the panel’s costs decision was reasonableness. This standard was appropriate because the arbitration panel was interpreting its “home statute” and awards for costs are fact-sensitive and generally discretionary.

With respect to the reasonableness of the costs decision, Fish J. noted that NEBA, like various provincial expropriation statutes, is remedial and so should be given a broad and liberal interpretation. The decision to award costs on a solicitor-client basis was reasonable for several reasons. First, in the context of modern expropriation law, where a statute authorizes awards of “all legal, appraisal and other costs”, costs should generally be given on a solicitor-client basis.

Second, awarding costs on a solicitor-client basis accords well with the remedial purpose of NEBA. Third, Fish J. noted the inordinate amount of money and time that Smith had had to invest in what should have been an expeditious process. Fish J. held that Smith should not be made to bear the costs of what was clearly a test case for Alliance.

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