

In the Court of Appeal of Alberta

Citation: Sabo v AltaLink Management Ltd, 2024 ABCA 179

Date: 20240530
Docket: 2201-0081AC
Registry: Calgary

Between:

KB Docket: 1903 19219

**Dean Sabo, Teresa Sabo and
the Alberta Surface Rights Board**

Respondents

- and -

AltaLink Management Ltd.

Appellant

And Between:

KB Docket: 2010 00673

**Kenneth Allan Wagers, Jill Ann Wagers, and
the Alberta Surface Rights Board**

Respondents

- and -

AltaLink Management Ltd.

Appellant

And Between:

KB Docket: 1910 01080

**Robert John Garrison, Penny Louise Garrison,
Darrell W. Edgar, Christie L. Edgar, and**

the Alberta Surface Rights Board

Respondents

- and -

AltaLink Management Ltd.

Appellant

And Between:

KB Docket: 2010 00676

**Timothy Earl Jackson, Dianna Lynn Melnyk,
Janice Lee Teiniranta, Brent Jackson,
Sandra Patricia Jackson, Mark Andrew Jackson, and
the Alberta Surface Rights Board**

Respondents

- and -

AltaLink Management Ltd.

Appellant

The Court:

**The Honourable Chief Justice Ritu Khullar
The Honourable Justice Jo'Anne Streckf
The Honourable Justice Bernette Ho**

Memorandum of Judgment

Appeal from the Decision by
The Honourable Justice J.T. Henderson
Dated the 23rd day of February, 2022
(2022 ABQB 156, Docket: 1903 19219; 2010 00673; 1910 01080; 2010 00676)

Memorandum of Judgment

The Court:

[1] This appeal concerns the narrow issue of the proper interpretation of section 25(1)(d) of the *Surface Rights Act*, RSA 2000, c S-24:

25(1) The Board, in determining the amount of compensation payable, may consider

...

(d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,...¹

[2] The question is whether the Board has authority under this section to award compensation arising from power transmission line structures that are not located on the area granted to the operator under a right of entry order.

[3] The appellants, AltaLink Management Ltd, are the operators of a power transmission line. The Board granted AltaLink Right of Entry Orders (ROE Orders) in respect of land owned by the respondent landowners (the ROE Lands). AltaLink built the power transmission line structures on land that is adjacent to the land subject to the ROE Orders; the structures are not on the land subject to the ROE Orders (save for one exception). After granting the ROE Orders, the Board determined compensation in accordance with section 25 of the *Surface Rights Act*. The Board concluded that it did not have authority under section 25(1)(d) to award compensation arising from power transmission line structures that are not located on the ROE Lands. The Board's decision was reversed on appeal to the Court of Queen's Bench, as it then was, by the judgment now appealed. AltaLink was granted permission to appeal the reviewing judge's decision: *Sabo v AltaLink*, 2022 ABCA 233.

[4] We agree with the hearing judge that the Board erred in its conclusion on the scope of its authority. However, we find that the hearing judge erred in the manner in which he determined compensation. As a result, we allow the appeal in that regard and return the question to the Board to determine compensation in accordance with the principle enunciated in these reasons, namely

¹ As it was at time of the Surface Rights Board hearings that are the subject of this appeal. Section 25(1)(d) was later amended by striking out "Board" and substituting "Tribunal".

that compensation under section 25(1)(d) for “nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator” is not restricted to operations on the area granted to the operator under the ROE Orders.

[5] A further issue was raised as to whether the hearing judge had jurisdiction under the *Surface Rights Act* to consider an appeal of the Board’s cost decision. We find that the hearing judge had no jurisdiction to consider an appeal of the Board’s cost decision.

Background

[6] The background facts are set out in detail in *AltaLink Management Ltd v Sabo*, 2019 ABSRB 571 [*Sabo*]; *AltaLink Management Ltd v Garrison*, 2019 ABSRB 572 [*Garrison*]; *AltaLink Management Ltd v Wagers*, 2020 ABSRB 477 [*Wagers*]; *AltaLink Management Ltd v Jackson et al*, 2020 ABSRB 533 [*Jackson*] (collectively the *Board Decisions*), and the hearing judge’s reasons reported at *Sabo v AltaLink*, 2022 ABQB 156 [*Sabo QB*].

[7] AltaLink received a permit and license from the Alberta Utilities Commission to proceed with two 138kV double circuit transmission lines. When AltaLink was not able to negotiate a right of way agreement with the landowners, AltaLink applied to the Board under section 15 of the *Surface Rights Act* for right of entry orders on lands owned by the respondents. The affidavits and exhibits filed in support of AltaLink’s section 15 applications provide that parts of the ROE Lands are “required” for the rights-of-way approved by the Alberta Utilities Commission. The Board granted AltaLink’s application for the ROE Orders. Thus, parts of the ROE Lands form part of the rights-of-way approved by the Alberta Utilities Commission.

[8] By the terms of the ROE Orders, AltaLink was granted a right of entry in respect of several parcels of land that are the subject of this appeal. Each ROE Order states that the operator’s right of entry is “for or incidental to the construction, operation or removal of a power transmission line”.

[9] AltaLink constructed the power transmission lines and the structures entirely within the road allowance adjacent to the ROE Lands, subject to one exception where approximately one inch of the caisson (the foundation of the structure) is located on the ROE Lands owned by the Wagers respondents. The foundations of the other structures are not physically located on the ROE Lands. The structures are steel monopole towers that range in height from 20-34 metres. Each structure has three cross arms that are approximately five to six metres in total width, with approximately three metres on each side of the structure. The structures have cross arms that overhang approximately one and a half to two and a half metres over the ROE Lands.

[10] The Board ordered compensation for amounts that the parties had agreed to. For example, some parties agreed to the amount of compensation for the value of the land taken by the ROE Orders. The parties did not agree on the compensation to be awarded under section 25(1)(d) of the *Surface Rights Act*. The landowners argued that the presence of the transmission lines so close to

their property should result in some form of compensation for reduced land value resulting from various impacts such as loss of view. This form of compensation is referred to by various names in the *Board Decisions*: “adverse effect”, “injurious affection”, and “impact”.

[11] The Board held that it did not have authority under section 25(1)(d) to award compensation arising from power transmission line structures that are not located on the ROE Lands. The Board reasoned that it is “well settled” that in considering “injurious affection”, which it views as a subset of “adverse effects” under section 25(1)(d), the Board may only consider the impact of structures within the area granted by the ROE Orders on the remaining lands of the owner. Further, there is no compensation available for the “nuisance, inconvenience and noise that might be caused by or arise from or in connection with” the structures on adjacent land because that compensation is not related to the taking before the Board.

[12] For the Wagers, the Board held that approximately one inch of the caisson (the foundation) for structure 46 is located on the Wagers’ ROE Lands. The Wagers submitted an expert appraisal report estimating that the transmission line adversely effected their remaining lands by diminishing the residential market value by 15 percent (or \$499,267.00) with \$265,500.00 of that total adverse effect allocated to structure 46. In arriving at this estimate of diminished market value, the expert considered visual impacts, health and safety concerns, site planning, disturbing sounds, electrical interference, lessened utility, unauthorized entry/threat of trespass, reduced mortgageability, and stigma. AltaLink’s expert opined that there was no adverse effect on the value of the remaining land from the transmission lines. The Board concluded that there was no supportable connection between the evidence presented and the conclusion of an adverse effect of a 15 per cent reduction in market value of the remaining lands. The Board found that such an award would “unjustly enrich the Owners” and found that there was no “Injurious Affection or Adverse Effect to the remaining land as a result of the area granted to AltaLink by the ROE”: *Wagers* at paras 60-61.

[13] On appeal to the Court of Queen’s Bench, the hearing judge reversed the Board and held that the Board had authority under section 25(1)(d) to award the compensation sought by the landowners (*Sabo QB* at para 102):

I conclude that s 25 gives the [Board] very broad discretion to determine the compensation payable in relation to the ROE Order. Specifically with respect to these appeals, I conclude that the [Board] had the discretion pursuant to s 25(1)(d) to award compensation for injurious affection arising from the nuisance, inconvenience and noise arising from the installation and operation of the power transmissions lines within the government road allowance even though neither the lines nor the steel monopole towers were installed within the area granted by the ROE Order. I conclude that the [Board] erred when it concluded that it did not have jurisdiction to make such an award.

[14] The hearing judge then fixed compensation for some of the respondents, exercising his authority under section 26(7) of the *Surface Rights Act*, in the following amounts:

Jackson	\$77,500
Wagers – E ½ NW 33	0
Wagers – NE 32	\$96,971
Wagers – W ½ NW 33	\$29,492
Garrison	\$56,500
Edgar	\$108,000

(collectively, the “Cost Respondents”).

[15] The hearing judge made no award of compensation in relation to the Sabos as the issue of the amount of compensation for those parties was reserved pending the outcome of these proceedings.

Relevant Law

[16] On making a right of entry order, section 23 of the *Surface Rights Act* requires that the Board determine the amount of compensation payable and the person to whom it is payable. In determining the amount of compensation payable, section 25 sets out a number of factors the Board may consider:

- 25(1) The Board, in determining the amount of compensation payable, may consider
- (a) the amount the land granted to the operator might be expected to realize if sold in the open market by a willing seller to a willing buyer on the date the right of entry order was made,
 - (b) the per acre value, on the date the right of entry order was made, of the titled unit in which the land granted to the operator is located, based on the highest approved use of the land,
 - (c) the loss of use by the owner or occupant of the area granted to the operator,
 - (d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,

(e) the damage to the land in the area granted to the operator that might be caused by the operations of the operator, and

(f) any other factors that the Board considers proper under the circumstances.

[17] Section 25 is not an exhaustive list, nor is it a list of heads of damage under which compensation is to be assessed individually and totalled: *Sawiak v Petroleum Ltd*, 1989 ABCA 324 at para 9; *Cabre Exploration Ltd v Arndt*, [1986] 4 WWR 529, 69 AR 279 (QB) at para 34, leave to appeal to ABCA refused in respect of the appellant’s claim pursuant to s 25(1)(d) for adverse effect, 1987 ABCA 2. In considering the factors listed in section 25, the Board has authority to determine the amount that “properly compensates the owner for the infringement” of their surface rights as a result of granting the right of entry: *Sawiak* at paras 4 and 9.

[18] Expropriation principles do not necessarily apply to the fixing of compensation under the *Surface Rights Act* as the *Surface Rights Act* is “expressly founded on compensation rather than valuation”: *Sawiak* at paras 4 and 7 (emphasis in original).

Grounds of Appeal

[19] AltaLink’s grounds of appeal can be stated as follows:

1. whether the hearing judge erred in his interpretation of section 25(1)(d) of the *Surface Rights Act*; and
2. whether the hearing judge erred in finding he had jurisdiction to entertain an appeal of an award of costs incidental to the *Board Decisions*.

Standard of Review

[20] When a court reviews the decision of an administrative-decision maker, like the Board, there is a presumption that the legislature intended the standard of review to be reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23. This presumption is rebutted when the legislature includes a statutory appeal mechanism, like the one in section 26(1) of the *Surface Rights Act*, and in those cases the appellate standards of review from *Housen v Nikolaisen*, 2002 SCC 33 apply: *Vavilov* at paras 36-37.

[21] On June 2, 2021, the *Land and Property Rights Tribunal Act*, SA 2020, c L-2.3, came into force which amalgamated the Board with other administrative tribunals and established the Land and Property Rights Tribunal: at ss 1(1)(d) and 2. This new legislation provides that an appeal of a Tribunal’s decision is to be reviewed for reasonableness: s 19. However, the transitional provision provides that appellate standards of review apply to proceedings, like this one,

commenced prior to June 2, 2021: s 21(c). Therefore, the usual appellate standards also apply to the appeal from the hearing judge to this Court.

[22] All grounds of appeal concern questions of statutory interpretation which are questions of law reviewed for correctness.

Analysis

The proper interpretation of section 25(1)(d)

[23] The starting point when interpreting a statute is the words used in their entire context (*Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10):

It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see 65302 *British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[24] The *Surface Rights Act* is remedial legislation enacted for the specific purpose of providing for the orderly exercise of rights of landowners and operators and providing landowners with compensation where no such right existed at common law, and where the landowner cannot refuse entry: see *Cabre Exploration* at para 21. The *Surface Rights Act* must be given the fair, large and liberal interpretation that best ensures the attainment of its objects: *Interpretation Act*, RSA 2000, c I-8, s 10.

The Board erred in failing to consider the specific words of the statute

[25] It is necessary to consider the specific words used in the *Surface Rights Act* to determine the proper interpretation of section 25(1)(d). The Board's line of reasoning hinged on its view that "injurious affection" is a subset of "adverse effect", even though "injurious affection" is not specifically mentioned or defined in the *Surface Rights Act*. As set out below, the Board failed to consider the specific words of the statute and this error led the Board to misinterpret the scope of its authority to award compensation under section 25(1)(d).

[26] The parties, the Board, and the hearing judge used the term “injurious affection” to describe the type of compensation sought by the landowners arising from the transmission lines not on the ROE Lands. “Injurious affection” has been described as “legal shorthand which describes the reduction in the value of land caused by public, or indeed, private, activities on adjacent land”: Eric C.E. Todd, “The Mystique of Injurious Affection in the Law of Expropriation” (1967), UBC L Rev (Centennial Edition) 125 at 127. At the appeal hearing it became clear that the parties were not in agreement about the meaning of this term used in this context. Moreover, its meaning at common law is somewhat amorphous: see Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed (Toronto: Carswell, 1992) at 328.

[27] While the Board commonly uses the term “injurious affection” in its reasons when issuing compensation orders, it is not always clear what the Board is referring to. For example, in *TransAlta Utilities Corp v Kube* (1987), 77 AR 290, 37 LCR 228 (QB) the operator and landowners cross-appealed a compensation order after the operator placed three steel towers on land granted by a right of entry order. The Board ordered \$3,000 in compensation “for injurious affection (adverse effect)” to the landowners for the burden of having a highly energized powerline in their front yard. The Court of Queen’s Bench held that the Board was not using the term “injurious affection” in its “technical legal sense” to refer to a loss or depreciation in value of the remainder of land attributable to the actual taking and intended use of the land granted by the right of entry order, rather, the Board was using the term in a more general sense to refer to adverse effects that could be described as “general damages”. The court upheld the \$3,000 award as compensation for the adverse effect of the transmission line on the aesthetic and market value of the landowner’s property, and in doing so emphasized that the *Surface Rights Act* uses the words “adverse effect” and not the term “injurious affection”.

[28] The Board has misinterpreted *Kube* as confirming that the Board’s use of “injurious affection” was in its technical legal sense: *AltaLink Management Ltd v Daines*, 2018 ABSRB 236 at para 52 citing *Kube* at para 12. And the *Board Decisions* under appeal rely on this misinterpretation of *Kube* in finding that the landowners claims were not compensable because the transmission lines were not located on the ROE Lands: *Wagers* at para 30; *Garrison* at para 43; *Sabo* at para 29. In our view, *Kube* did not decide the issue that is now before us and the Board erred in relying on *Kube* for that proposition.

[29] About a decade ago the Board stated that it considered the term “injurious affection” as a subset of “adverse effect”, with the former referring specifically to the loss of land value but recognizing that “adverse effect” applies more generally: see *AltaLink Management Ltd v Royal West Property Corp*, 2014 ABSRB 221; *AltaLink Management Ltd v Soorya Investments Ltd*, 2014 ABSRB 222; *AltaLink Management Ltd v Koch*, 2015 ABSRB 476, rev’d 2016 ABQB 678. The types of adverse effects that are not strictly loss of land value include items such as the added cost to normal field operations around the obstruction in a field, incidental production losses, or the effect on farming management decisions and practices: see *Canadian Natural Resources Ltd v*

Bennett & Bennett Holdings Ltd, 2008 ABQB 19 at para 128, aff'd on other grounds 2010 ABCA 91.

[30] This use of terminology has continued as a generally accepted practice and is reflected in the Board's decisions under appeal.

[31] The term "injurious affection" is used in other Alberta statutes, see for example the *Expropriation Act*, RSA 2000, c E-13, ss 42 and 56. Some statutes offer a statutory definition when the term is used. Section 534(1) of the *Municipal Government Act*, RSA 2000, c M-26, defines "injurious affection" as "the permanent reduction in the appraised value of land as a result of the existence, but not the construction, erection or use, of a public work or structure for which the municipality would be liable if the existence of the public work or structure were not under the authority of an enactment". Comparatively, section 1(1) of Ontario's *Expropriations Act*, RSO 1990, c E.26 offers a different definition of "injurious affection" that includes a reduction in market value of the remaining land as well as personal and business damages from the construction or use of the works.

[32] It follows that a person's statutory entitlement to compensation for "injurious affection" will depend on the specific statute at issue. Some statutes provide for compensation for "injurious affection" in general terms and in those cases it may be necessary to look to case law for the rules prescribing the circumstances in which such compensation can be recovered. But the tests or pre-conditions developed in the case law dealing with claims of "injurious affection" are often created in the course of interpreting specific statutory language. For this reason, it is generally unhelpful to look at how the term "injurious affection" has been interpreted by courts in other cases because the meaning ascribed to the term is necessarily statute and jurisdiction specific.

[33] It is also for this reason that we reject the appellant's position. The appellant argues that the chambers judge erred by failing to apply the common law test or conditions required to establish compensation for "injurious affection". The appellant says that the common law precludes compensation for "injurious affection" for activity that takes place on land not taken, citing the "rule" in *Edwards v Minister of Transport* (1963), [1964] 1 All ER 483, [1964] 2 QB 134 (CA). The appellant then says that this common law test applies to the interpretation of section 25(1)(d) of the *Surface Rights Act* because there is no clear and unambiguous expression of legislative intent to displace the common law, relying on *Heritage Capital Corp v Equitable Trust Co*, 2016 SCC 19 at paras 30-31 and *Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp*, 2020 SCC 29 at para 40.

[34] It is unnecessary for us to comment on the test at common law to establish a right to compensation for "injurious affection" because in our view the *Surface Rights Act* expressly and unambiguously alters the common law as it relates to the rights of the operator and the rights of the landowner: *Cabre Exploration* at paras 21 and 25; *Sawiak* at para 4.

[35] Moreover, the cases cited by the appellant in support of its argument relate to statutory provisions that are worded quite differently from section 25(1)(d), and most of which specifically refer to “injurious affection”. We find these cases are of no assistance in interpreting section 25(1)(d): see *Gravel v Edmonton (City)*, 2005 ABCA 374 at para 10 citing *Beierbach v Medicine Hat (City)*, 1982 ABCA 4.

[36] The common thread through all of the cases relied on by the appellant is that compensation is determined by whatever the relevant statute provides.

[37] For the purposes of this appeal, we place little significance on the term “injurious affection”. As already noted, the term is not found within the *Surface Rights Act* itself. The ultimate question is whether, in determining what factors it may consider in awarding compensation, the Board’s interpretation of section 25(1)(d) is correct. In our view, the Board’s use of the term “injurious affection” steered the Board into error and caused it to depart from its statutory mandate to implement the express words of the statute. The Board and the courts must interpret section 25(1)(d) by applying the ordinary rules of statutory interpretation with regard to the specific words used by the legislature. Here, the Board’s reasoning was divorced from the words chosen by the legislature.

The Board has authority under section 25(1)(d) to consider matters arising from the operations of the operator on lands not subject to the right of entry order

[38] The Board held that its authority to order compensation under section 25(1)(d) is limited to consider only those matters which arise from the operations of the operator on the lands which are subject to the right of entry order in question. We reproduce section 25(1)(d) for convenience:

25(1) The Board, in determining the amount of compensation payable, may consider

...

(d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,... [emphasis added]

[39] The appellant argues that the Board’s interpretation of section 25(1)(d) was correct because the phrase “of the area granted to the operator” must be read as applying to the entirety of section 25(1)(d) such that any claim for compensation must be as a result of operations conducted on the area granted to the operator. The appellant submits that the Board only has authority to award compensation arising out of operations that take place on the ROE Lands. Since the transmission lines were not located on the ROE Lands, there is no basis for compensation under section 25(1)(d).

[40] We agree with the hearing judge that the Board was incorrect, although we arrive at this conclusion for a different reason.

[41] In our view, based on the ordinary meaning of the words, there are two components to section 25(1)(d). The first component — “the adverse effect of the area granted to the operator on the remaining land of the owner or occupant” — is restricted to adverse affects that are attributable to the area granted to the operator. However, no such restriction is placed on the compensation that may be awarded under the second component — “the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator”.

[42] The appellant argues that its position is supported by the history of legislative amendments to this section. Sections 12(2)(c) and 12(2)(e) of the first iteration of the Act provided for the same factors, with some minor differences in wording, that now appear together as section 25(1)(d). Section 12(2) of *The Right of Entry Arbitration Act*, SA 1947, c 24 provided:

(2) The Board, in determining the amount of compensation may consider,—

(a) the value of the land;

(b) the amount of land which may be permanently damaged by the operator's operations;

(c) the adverse effect of the right of entry on the remaining land;

(d) compensation for severance;

(e) compensation for the nuisance, inconvenience and noise which may be caused by or arise from or in connection with the operations;

(f) such other factors as the Board may from time to time deem proper, relevant or applicable. [emphasis added]

[43] When *The Right of Entry Arbitration Act* was repealed and replaced in 1972, sections 12(2)(c) and 12(2)(e) were combined into a single section which is reflected in the wording of section 25(1)(d) as it reads today.

[44] The hearing judge held that the combination of sections 12(2)(c) and 12(2)(e) was merely housekeeping: *Sabo QB* at paras 88-95.

[45] The appellant agrees the combination of the sections was housekeeping but argues we ought to attach further significance to the amendment: the legislature was making clear that the “nuisance, inconvenience and noise” part is subordinate to the dominant “adverse effect of the area granted to the operator” part. In other words, the appellant asks us to read the “and” between the

two clauses as “including” such that compensation for “nuisance, inconvenience and noise” is limited to operations of the operator that take place on the area granted to the operator.

[46] We disagree that any meaning must be attached to the amendment in 1972 that simply combined sections 12(2)(c) and 12(2)(e). We cannot draw conclusions about legislative intent from the amendment of this section: *Interpretation Act*, s 37(2). Nor does an amendment necessarily alter the substantive meaning of a statute: Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) at § 23.02

[47] In our view, the use of the conjunctive “and” in section 25(1)(d) demonstrates that the first and second components stand separate and apart. We are also of the view that *Conocophillips Canada Resources Corp v Lemay*, 2009 ABQB 72 at para 2, relied on by the appellant, is of no assistance because the court was merely re-stating the grounds of appeal as put forth by the parties.

[48] Had the legislature intended to restrict “nuisance, inconvenience and noise” to operations on the area granted to the operator, the legislature could have said so. This point is illustrated by examining the language of section 25(5), as compared to that found in section 25(1)(d). Section 25(5) provides:

(5) In making a compensation order, the Board may also determine the amount of compensation payable by the operator

(a) for damage caused by or arising out of the operations of the operator to any land of the owner or occupant other than the area granted to the operator, if those operations were incidental to the operations of that operator on the area granted to the operator under the right of entry order,

(b) for the loss of or damage to livestock or other personal property of the owner or occupant caused by or arising out of the operations of the operator, and

(c) for time spent or expense incurred by the owner or occupant in recovering any of the owner’s or occupant’s livestock that have strayed due to an act or omission of operator,

and shall determine the person to whom the compensation is payable. [emphasis added]

Notably, in section 25(5)(a) the legislature restricted “operations” to a specific area, but this limiting language is not found in other provisions of the same section, such as section 25(5)(b) or section 25(1)(d). The absence of this limiting phrase in section 25(1)(d) demonstrates a clear intention that compensation for “nuisance, inconvenience and noise” is not limited to operations

of the operator on the lands subject to the right of entry order. The legislature will restrict the operations to a specific area if it intends to do so.

[49] To summarize, when considering compensation under section 25(1)(d) the Board has authority to consider matters arising from the operations of the operator on the lands which are not subject to the right of entry order in question. The authority for that is found in the second component of section 25(1)(d) which provides that the Board may consider as a factor, when awarding compensation, “the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator”.

[50] This is not a novel interpretation as the appellant suggests. The Board has previously awarded compensation for “nuisance, inconvenience and noise” for activities not on the lands subject to the right of entry order. For example, in *Kube* the court upheld the Board’s compensation award for “nuisance, inconvenience and noise” for time spent in negotiation with personnel of the operator and the operator’s use of the landowner’s personal driveway. Neither of those are operations *on* the lands subject to the right of entry order in the strict sense advocated by the appellant.

Other statutory limitations on the Board’s authority to award compensation

[51] The Board’s authority is restricted in other ways.

[52] First, the Board does not have authority to issue a compensation order when no right of entry order is granted. The right of entry order is what triggers the compensatory scheme under the *Surface Rights Act*. A neighbouring property that is not the subject of a right of entry order is not entitled to a compensation order from the Board. That is where the legislature has chosen to draw the line, even where that property experiences nuisance, inconvenience and noise as a result of the operator’s operations.

[53] Second, the “operations of the operator” in section 25(1)(d) must be the same “operator’s operations” in section 15(1) for which the right of entry order was issued. This interpretation is consistent with the scheme of the *Surface Rights Act*.

[54] Here, the ROE Orders state that the right of entry is “for or incidental to the construction, operation or removal of a power transmission line”. The ROE Lands are part of the right-of-way necessary for the operation of the power transmission lines at issue. The respondent landowners seek compensation for losses arising from the power transmission lines for which the ROE Orders were granted.

[55] The appellant argues that the issues on appeal were decided in *Voermans v Alberta (Surface Rights Board)*, [1988] 4 WWR 547, 87 AR 58 (QB) and that the hearing judge erred by failing to follow *Voermans* having regard to principles of horizontal *stare decisis*. In our view, *Voermans* is distinguishable because the court was primarily concerned with the interpretation of section 25(5)

of the *Surface Rights Act*. In *Voermans*, the landowner’s position was that the loss and damage suffered to his crop-spraying business was compensable under section 25(5). The court’s decision turned on the interpretation of the “qualifying phrase” “incidental to the operations of the operator on the area granted...under the right of entry order” in section 25(5)(a) (*Voermans* at para 23); as noted above, section 25(5)(a) limits operations to a specific area – but that limiting language is absent from section 25(1)(d).

[56] To conclude, the Board is correct that “the adverse effect of the area granted to the operator on the remaining land of the owner or occupant” is restricted to adverse affects that are attributable to the ROE Lands. However, no such restriction is placed on the Board’s consideration of “the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator”. This outcome is driven by the express words of the *Surface Rights Act* and there was no need for the hearing judge to rely upon the reasoning outlined in *Landex Investments Ltd v Red Deer (City)*, 1991 ABCA 199 as that case considered language of a different statute.

What is the appropriate compensation?

[57] Notwithstanding our agreement with the hearing judge on the authority of the Board to award compensation, in our view the hearing judge erred when he applied principles of common law nuisance in determining the appropriate compensation: *Sabo QB* at para 110. The reference to “nuisance” in the *Surface Rights Act* is not restricted to actionable nuisance at common law and is referencing a broader basis for compensation: *Caswell v Alexandra Petroleum Ltd*, [1972] 3 WWR 706, 26 DLR (3d) 289 at 306 (Alta CA). Further, the hearing judge awarded compensation based on reduced value of land. While that may be one method of quantifying compensation for nuisance, inconvenience and noise, in our view, the Board is best placed to determine the appropriate method of quantification.

[58] We also reject the appellant’s argument that a loss of view is not necessarily compensable under the *Surface Rights Act*. While in *St Pierre v Ontario (Minister of Transportation and Communications)*, [1987] 1 SCR 906, 39 DLR (4th) 10, the Supreme Court of Canada held that the loss of prospect or the loss of view is not compensable, the Supreme Court made this statement in the context of what was compensable under the common law tort of nuisance. The Ontario *Expropriations Act* at issue in *St. Pierre* provided compensation for injurious affection where injurious affection was statutorily defined to include compensation for damages that would be actionable at common law. No such condition requiring that the “nuisance, inconvenience and noise” be actionable at common law is included in the *Surface Rights Act*.

[59] The Board has previously recognized the presence of transmission lines cause a visual impact compensable under section 25(1)(d): *Soorya*; *Royal West Property Corp*; *Koch*. While these cases considered the visual impact of transmission lines located on ROE lands, the Board has authority to consider the nuisance and inconvenience caused by the visual impact of the

transmission lines for which the ROE Orders were granted even where the transmission lines are not on ROE Lands.

Whether the Board's decision as to costs is appealable?

[60] The Board held that, in accordance with the *Surface Rights Act* and the *Surface Rights Board Rules*, it had discretion to order costs if the Board was of the opinion that the costs were “directly and necessarily related to the proceeding”. The Board ordered AltaLink to pay costs to each of the Cost Respondents as follows (EKER Tabs 7-12):

- \$21,989.79 to the Garrison respondents of \$50,424.66 actually claimed;
- \$18,241.65 to the Edgar respondents of \$51,444.60 actually claimed;
- \$26,907.77 to the Wagers respondents of \$41,595.41 claimed; and
- \$30,493.17 to the Jackson respondents of \$42,109.87 claimed.

[61] The Board did not address costs in relation to the Sabo respondents.

[62] The Board did not grant full indemnity costs to the Cost Respondents. Rather, the Board awarded between 25-50% of the professional legal fees actually incurred for counsel and experts. The Board held that the landowners advanced “somewhat novel arguments” but that many of the costs incurred were unreasonable or excessive because the issue raised by the landowners had already been decided: *Garrison* at paras 78-79; *Jackson* at para 64; and *Wagers* at para 76.

[63] On appeal before the hearing judge, the Cost Respondents argued that the Board did not exercise its discretion reasonably and in a manner consistent with the law, and sought full indemnity costs of the Board hearings. The appellant argued that the hearing judge did not have jurisdiction to consider an appeal of the Board's costs decision because section 26(1) of the *Surface Rights Act* only permits an appeal of a “compensation order” and that the Board's costs decision under section 39 of the *Surface Rights Act* does not fall under the definition of a “compensation order”. The appellant relied on *Bergman v Francana Oil and Gas Ltd*, 1985 ABCA 32 at paras 6-7 [*Bergman CA*] as authority for the proposition that the Board's costs decisions are not appealable because they do not form part of the “compensation order”.

[64] The hearing judge held that he did have jurisdiction to consider an appeal of the Board's costs decisions. The hearing judge held that *Bergman CA* stands for the narrow proposition that there is no stand-alone appeal from a costs decision of the Board. But when a party brings a successful appeal of a compensation order, and the costs decision is inextricably and directly tied to the errors made in arriving at compensation, the costs decision can be the subject of an appeal under section 26 of the *Surface Rights Act*. The hearing judge varied the costs award to provide the landowners with full indemnity costs for the professional fees charged by counsel and experts.

[65] The hearing judge was incorrect that *Bergman CA* affirming *Bergman v Francana Oil and Gas Ltd* (1983), 45 AR 288 (QB) [*Bergman QB*] considered a stand-alone appeal from a cost

award. The appeal from the Board to the Court of Queen's Bench was an appeal of the Board's decision relating to costs as well as the Board's decision relating to loss of use. At the Court of Queen's Bench, Justice Veit held that the Board's decision on loss of use was reasonable and also held that the Board's decision on costs is not appealable because costs do not form part of a compensation order. It follows that the hearing judge's conclusion that *Bergman CA* was distinguishable as a stand-alone cost appeal cannot stand. Further, no request to reconsider *Bergman CA* was made to this Court pursuant to Rule 14.46 of the *Alberta Rules of Court*, Alta Reg 124/2010.

[66] In supplementary submissions, the appellant and the Cost Respondents agreed that judicial review of the Board's cost award remains available. This was expressly contemplated in *Bergman QB* when Veit J. wrote that "the possibility may exist for an appeal from a decision concerning costs by way of a prerogative writ": *Bergman QB* at para 7. This is also consistent with the Supreme Court's pronouncement in *Vavilov* that "the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply": *Vavilov* at para 52; *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 at paras 47-48.

[67] That said, the appellant noted that the Cost Respondents did not expressly seek judicial review of the Board's cost award when seeking relief from the court below. However, the Cost Respondents submit that the hearing judge or this Court could cure any defect arising from the fact that judicial review was not expressly pleaded at the outset. Rule 3.2(6) allows a court to make a procedural order to correct and continue a proceeding if it was started in one form but should continue in another.

[68] But in our view an order under Rule 3.2(6) is not a full answer in this case because the hearing judge considered the Board's cost decision *de novo* as though it was a statutory appeal rather than a judicial review. Given the hearing judge's comments respecting the Board's cost decision, the appropriate remedy in a judicial review would have been to remit the question of costs to the Board for reconsideration because it cannot be said that the hearing judge's decision on costs was "inevitable": *Vavilov* at para 142. We further note that there are specific rules regarding the commencement and service of an application for judicial review that must be adhered to that were not followed in this case. Therefore, the proper recourse for the Cost Respondents would have been for them to seek judicial review of the Board's cost decision and Rule 3.2(6) does not assist them.

[69] We have no alternative but to conclude that the hearing judge erred in determining he had jurisdiction to consider an appeal of the Board's original cost decision. The hearing judge's cost order must be set aside.

Conclusion

[70] We agree with the hearing judge’s conclusion that under section 25(1)(d) of the *Surface Rights Act* the Board may award compensation “for the nuisance, inconvenience and noise” from the operations of the operator arising from power transmission line structures that are not located on the area granted to the operator under a right of entry order. However, we conclude that the hearing judge erred in the manner he determined the quantum of compensation and therefore remit the matter back to the Board to determine the amount of compensation to be awarded to the respondents in light of our conclusion in this decision.

[71] With respect to costs, the hearing judge erred by considering the cost decision as an appeal on a *de novo* basis because he had no jurisdiction to do so. The hearing judge’s cost order is hereby set aside.

[72] Given the result of this appeal, we consider the respondents to be the successful party and accordingly award costs of this appeal to them.

Appeal heard on September 13, 2023

Memorandum filed at Calgary, Alberta
this 30th day of May, 2024

Khullar C.J.A.

Strekaf J.A.

Ho J.A.

Appearances:

J.N. Agrios, K.C.

J.A. Agrios, K.C.

for the Respondents, D. Sabo and T. Sabo

D. Bishop

for the Respondents, K. Wagers, J. Wagers, R.J. Garrison, P.L. Garrison,

D.W. Edgar, C.L. Edgar, T.E. Jackson, D.L. Melnyk, J.L. Teiniranta,

B. Jackson, S.P. Jackson, and M.A. Jackson

M.J. D'Alquen (no appearance)

for the Respondent, Land and Property Rights Tribunal (formerly the Alberta Surface Rights Board)

D.T. Madsen, K.C.

M. Schneider

for the Appellant