

Clubroot Right-of-Way and Leases, and Injurious Affection

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INTRODUCTION

Landowners who find themselves faced with a right-of-entry order from the Surface Rights Board (the “SRB”) typically have the unenviable choice of negotiating compensation for that right-of-entry with the operator, or having that compensation set by the SRB under section 23 of the *Surface Rights Act*, RSA 2000, c. S-24 (the “Act”).

The factors that the SRB may consider in determining what compensation a landowner is entitled to under the Act include:

- the loss of use by the owner or occupant of the area granted to the operator;¹ and
- 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.²

We will talk about two recent and novel claims for SRB compensation as well as the broader implications of the decisions for landowners. More particularly, we’ll explore how compensation for adverse effect and loss of use may be used to encourage better cleaning practices by operators. We’ll also talk about a recent decision from the Court of Queen’s Bench on injurious affection, which makes it clear that it is the transmission line’s impact on the remaining land, and not on the financial position of the landowner, that is relevant.

LEGISLATIVE FRAMEWORK

In order to proceed with a project like a pipeline or powerline, operators need to apply for and obtain a license from a licensing agency such as the Alberta Utilities Commission (“AUC”). Even with a license for a project, operators will not have a right of entry to the surface of any land for, for example, the construction, operation, or removal of a power line, until the operator has obtained the consent of the owner and the occupant of the surface of the land, *or* has become entitled to right of entry from the SRB under the Act.³ Generally speaking, the Board’s role in granting right-of-entry orders is “essentially a rubber stamp.”⁴

¹ Section 25(1)(c) of the *Surface Rights Act*, RSA 2000, c. S-24.

² Section 25(1)(d) of the *Surface Rights Act*, RSA 2000, c. S-24.

³ Section 12(1) of the *Surface Rights Act*, RSA 2000, c. S-24.

⁴ *Mueller v. Montana Alberta Tie Line*, 2011 ABQB 738 (CanLII) at para. 34.

Where a landowner and occupant consent to the entry of the operator upon their land, the compensation associated with that entry will, in the writers' experience, be set out in a negotiated right-of-way agreement, temporary workspace agreement, and/or damages release. If the parties cannot agree on compensation, compensation will be determined by the SRB in accordance with sections 23 and 25 of the Act.

Section 25(1) of the Act, setting out the factors to be considered in awarding compensation to landowners, is reproduced below:

CASE STUDY #1: ATCO ELECTRIC LTD. V. WELSH, 2016 ABSRB 15 (“WELSH”)

Carscallen LLP represented Roger and Debora Welsh, grain farmers in Minburn County, Alberta, in their November 2014 compensation hearing before the SRB against ATCO Electric Ltd. (“**ATCO**”). The central concerns for the Welshes were the equipment cleaning practices by ATCO's employees and contractors, the risk of spreading plant disease (and specifically clubroot) as a consequence of those cleaning practices, and the compensation that the Welshes should receive for their efforts at mitigation.

Clubroot: A Primer

Canola crops contribute approximately \$7.1 billion and \$26.7 billion annually to the Alberta⁵ and Canadian⁶ economies. Canola is one of the most profitable commodities for Canadian farmers.⁷ Because of the importance of canola to farmers' livelihoods, and to the economy as a whole, it is important for landowner counsel to be aware of and understand the risks to canola crops that can arise as a result of operator activity on their clients' lands. These negative impacts can include the spread of virulent plant diseases such as clubroot.

Clubroot is a very destructive soil-borne disease caused by a microscopic plant pathogen called *Plasmodiophora brassicae* (“**P. brassicae**”).⁸ Clubroot was first detected in canola in Alberta near Edmonton in 2003, and has since spread to a number of counties in Alberta.⁹ Canola, mustard, and

⁵ LMC International, “The Economic Impact of Canola on the Canadian Economy” (December 2016) at page 16, online: http://albertacanola.com/wp-content/uploads/2017/03/LMC_Canola_10-Year-Impact-Study-Canada_Final_Dec-2016.pdf

⁶ LMC International, “The Economic Impact of Canola on the Canadian Economy” (December 2016) at page 16, online: http://albertacanola.com/wp-content/uploads/2017/03/LMC_Canola_10-Year-Impact-Study-Canada_Final_Dec-2016.pdf

⁷ Canola Council of Canada, “What is Canola?” online: <http://www.canolacouncil.org/oil-and-meal/what-is-canola/>

⁸ Alberta Agriculture and Forestry, “Alberta Clubroot Management Plan” (January 3, 2017), online: [http://www1.agric.gov.ab.ca/\\$Department/deptdocs.nsf/all/agdex11519](http://www1.agric.gov.ab.ca/$Department/deptdocs.nsf/all/agdex11519)

⁹ Alberta Agriculture and Forestry, “Cumulative Clubroot Infestations (2003-2016) in Alberta (January 25, 2017), online: <http://www1.agric.gov.ab.ca/%24department/deptdocs.nsf/all/prm14661>