Federal Court  Cour fédérale

Date: 20180109

Docket: T-1013-16

Citation: 2018 FC 17

Ottawa, Ontario, January 9, 2018

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

EMERA BRUNSWICK PIPELINE COMPANY LTD.

Appellant
(Respondent by cross-appeal)

and

SIERRA SUPPLIES LTD.

Respondent
(Appellant by cross-appeal)

JUDGMENT AND REASONS

I. OVERVIEW

A. *Nature of the Issues*

[1] Emera Brunswick Pipeline Company Ltd. [the Pipeline Company] appeals the decision of a Pipeline Arbitration Committee [PAC] appointed by the Minister of Natural Resources pursuant to section 91 of the *National Energy Board Act*, RSC 1985, c N-7 [*NEB Act*] to

determine how much should be payable by the Pipeline Company to Sierra Supplies Ltd. [the Landowner] in compensation for an easement granted to the Pipeline Company [Easement] by the National Energy Board [NEB] under subsection 104(1) of the *NEB Act*. A decision, order or direction of a PAC may be appealed directly to the Federal Court on a question of law or jurisdiction: *NEB Act* s 101. This requirement is separately discussed in these reasons as it determines whether or not there is jurisdiction to hear this appeal.

[2] After a five-day hearing, in a decision dated May 28, 2016 [Decision], the PAC awarded the Landowner compensation of $466,066.23 plus interest from the date of the Decision, at a rate of 4.75%, plus costs. The Pipeline Company asks that the Court set aside the Decision and remit it to the PAC for redetermination in accordance with the directions of this Court. The Pipeline Company also asks for costs. By cross-appeal, the Landowner asks that interest be awarded from the date of the taking.

[3] The Pipeline Company alleges that the PAC misapprehended the *NEB Act* and its regulations as well as the evidence on whether a 30-metre area lying on each side of the Easement [the Safety Zone] devalued the land and, whether the Easement and Safety Zone affect the value of the remaining land.

[4] They also allege that the PAC erred in its reasons for rejecting the methodology of the Pipeline Company's appraiser, and the PAC did not follow the pre-agreed formula to be used to account for the value of the temporary workroom.

[5] The Landowner contests all but one of the grounds of appeal and brings a cross-appeal on three grounds. The Landowner argues that the PAC erred by calculating the value of the

Easement on an acreage of 2.44 instead of the actual agreed size of 2.5444 acres. The Landowner asks that the Court vary the award by adding $10,296 on account of this error.

[6] The Landowner also argues that the PAC erred by including the HST paid as part of the advance made to the Landowner when it deducted the advance from the award. The Landowner asks that the Court vary the award by adding that HST of $13,230.88 to the award due to this error.

[7] The Landowner finally requests that the date on which interest was calculated be set to the date of entry, instead of the date of the Decision, or otherwise that this issue be redetermined by the PAC.

[8] The Landowner asks that the Pipeline Company's appeal be dismissed with costs, except that no costs be awarded to either party on the workroom issue given the parties' agreement on that issue and that costs be awarded to the Landowner on the cross-appeal.

[9] The Pipeline Company argues that it should be awarded costs on the cross-appeal since the part of the cross-appeal dealing with interest is of the greatest financial magnitude.

[10] For reasons which follow, the appeal is granted in part and the cross-appeal is granted in part. The total amount of the compensation award is varied to $420,246.06. The calculation details are set out in Appendix "A". The explanations for the changes are set out in these reasons. The issue of the interest start date is remitted to the same Pipeline Arbitration Committee, or, if the members are not all available then to such differently constituted Arbitration Committee as the Minister may appoint under the *NEB Act*, the PAC is to determine the date from which interest should commence to run. Costs of the appeal are granted to the Landowner. If the parties

cannot agree on the amount of costs within thirty days of the date of this judgment then the Landowner may have its costs assessed in accordance with Column III of Tariff B. As the matter of interest has been remitted to the PAC for re-determination, costs for the cross-appeal shall be in the cause.

[11] While the reasons of the PAC do contain errors, there are sufficient reasonable findings to support its conclusions. The main point of contention is whether it was reasonable for the PAC to give an award for injurious affection. In my view, notwithstanding various errors made by the PAC, that award is rationally supported by the evidence in the record and by reasonable findings of the PAC.

[12] The PAC's determination that interest would run from the date of the Decision, although within the provisions set out in the *NEB Act*, did not set out its reasoning with respect to the date chosen. Due to this lack of transparency and justification this Court cannot assess whether such a start date for interest was reasonable given that the entry occurred at an earlier date.

B. *Issues agreed upon by the Parties*

[13] Prior to the hearing, the parties were able to agree upon and resolve three of the issues in dispute.

(1) Size of the Easement

[14] One such issue is the area of the Easement. Although the PAC originally identified it as being 2.5444 acres in size, in awarding damages it subsequently used the amount of 2.44 acres. The parties agree that the correct size of the Easement is 2.5444 acres. They also agree that

100% of the Easement has been taken so the award to the Landowner under that head of damage should be 2.5444 multiplied by the value per acre.

[15] The parties disagree however as to the value per acre for the Property. The PAC found it is $99,000, being an amount derived by taking the midpoint between the two values put forward by each of the appraisers. The Landowner's appraiser valued the land at $108,000 per acre. The Pipeline Company appraiser valued the land at $90,000 per acre. This disagreement will be discussed later in these reasons.

(2) The value of the temporary workroom

[16] The parties also agree that the value of the temporary workroom that was used by the Pipeline Company during construction of the Brunswick Pipeline on the Property is $3,239.78 rather than the $62,458.11 awarded by the PAC. The PAC indicated it agreed with the Landowner's formula for calculating this value but it inadvertently awarded 100% of the market value rather than the temporary use value of 2.75% per year for the two years the workroom was required.

(3) HST in the advance payment to be added to the landowner's compensation

[17] From the total compensation it found to be payable to the Landowner, the PAC deducted the full amount of the advance previously paid by the Pipeline Company to the Landowner. The parties agree that the HST of $13,230.88 included as part of the advance payment should not have been deducted from the compensation therefore it will be added back.

[18] I have reviewed the underlying record and I am satisfied the evidence supports the agreement between the parties with respect to these issues. The judgment to be issued will include these corrections.

II. **BACKGROUND FACTS**

[19] The total size of the property of the Landowner on which the Easement was granted is 10.4031 acres [the Property]. It is part of the McAllister Industrial Park in St. John, New Brunswick. The Landowner purchased the Property in 2003 with the intent of subdividing the land and selling it for industrial development. The Property abuts an arterial road, which is at a different grade; Cave Court is a smaller cul-de-sac protruding into the other side of the Property that provides on grade access. The Landowner has the right to build an access entrance to the Bayside Drive public road but, given grade differences, a substantial amount of fill would be required to build it and bedrock in the area of the pipeline would require blasting.

[20] On June 7, 2007, the NEB granted the Pipeline Company a Certificate of Public Convenience and Necessity in respect of a natural gas transmission pipeline running from Canaport Liquified Natural Gas Terminal at Mispec Point, New Brunswick to a point on the US border near St. Stephen, New Brunswick [the Brunswick Pipeline].

[21] The Plans, Profiles and Book of Reference in respect of the Brunswick Pipeline, including the detailed route that would take it through the Property, was approved by the NEB on March 14, 2008.

[22] On March 26, 2008, the Pipeline Company applied to the NEB for a right of entry that would grant it an easement in perpetuity on the Property to allow it to construct and operate the

Brunswick Pipeline on the Easement and that prohibited certain activities by the Landowner both on the Easement and within the thirty-metre Safety Zone. Some activities were totally prohibited to the Landowner while others could only take place with the Pipeline Company's permission or by further order of the NEB.

[23] The Landowner filed a written objection to the Pipeline Company's application, however on June 2, 2008, the NEB granted entry by order RE-E236-2008 [the Order], which was subsequently registered in the New Brunswick Land Titles System against the Property.

[24] On June 23, 2008 the Pipeline Company paid $115,006.88, including HST, to the Landowner on account of compensation for the taking of the easement.

[25] The parties attempted to negotiate compensation over the next two years, but were unsuccessful. As part of the negotiations, the Pipeline Company commissioned a report by Altus Group Limited [Altus Report], dated June 16, 2008, with a valuation date of May 13, 2008. The report was written by Daniel Doucet, a professional appraiser.

[26] The Landowner commissioned its own appraisal report by Craig Hennigar, also a professional appraiser [the Hennigar Report]. The Hennigar Report was dated July 19, 2010 but assessed the value of the Property as of June 8, 2008.

[27] As the parties could not agree on the appropriate compensation, on November 8, 2010, the Landowner filed a Notice of Arbitration requesting that the compensation be fixed by a PAC. The Pipeline Company filed its reply on December 21, 2010. The reply included the Altus Report as well as a Technical Review prepared by Altus that criticised the methodology of the Hennigar Report.

[28] After dealing with a number of preliminary issues, the three-member PAC heard the matter from January 20-24, 2014. Three witnesses gave evidence on behalf of the Landowner; four witnesses testified for the Pipeline Company. In addition to the oral testimony, the PAC also conducted a site visit at the Property.

[29] After all the evidence was heard, the parties made written submissions to the PAC. However, those submissions were not included in the Appeal Book and are therefore not before the Court.

A. *Expert Evidence of the Pipeline Company at the PAC*

(1) The Witnesses

[30] The Pipeline Company called four witnesses: (1) Rob McAdam, the President of the Pipeline Company at the relevant times; (2) Rochelle Brown, who wrote an engineering expert report in response to the report prepared for the Landowner by Stephen Perry; (3) Stephanie More, an area manager at Spectra Energy, which is the company that operates the Brunswick Pipeline on behalf of the Pipeline Company; (4) Daniel Mark Joseph Doucet, the author of the Altus Report.

(2) The Altus Report (Mr. Doucet)

[31] The Altus Report appraised the value of the Property before the taking at $90,000 per acre. The report found that the easement removed 100% of the value of the Easement. It valued the taking at $229,000. The Altus Report did not find any injurious affection to the rest of the land, as the Pipeline Company was willing to provide crossings over the pipeline at its own cost

and would grant permission for any construction in the Safety Zone to such an extent that the highest and best use of the Property was unaffected by the taking.

[32] Both appraisers based their professional opinions on value as of mid-May (Doucet) or early June 2008 (Hennigar) when the Easement was created. At that time the McAllister Industrial Park, in which the Property was located, had many lots available. Mr. Doucet in his report noted that there was only 23% occupancy.

B. *Expert Evidence of the Landowner at the PAC*

(1) The Witnesses

[33] The Landowner's evidence was heard first by the PAC. Three witness were called: (1) Wesley Raymond Debly, the owner of the Landowner company; (2) Stephen Perry, an engineer who prepared a report on the engineering challenges and costs that would be required to blast and excavate on the Property and to connect the Property to Bayside Drive; (3) Craig Hennigar, the author of the Hennigar Report. Stephen Perry was not qualified by the PAC as an expert because, at the time he wrote his report, the company he worked for was owned by a partner in the law firm representing the Landowner.

(2) The Hennigar Report

[34] The Hennigar Report valued the Property before the taking at $108,000 per acre and said that the Easement should be compensated at 100% of property value. Mr. Hennigar determined that because of restrictions placed on development in the Safety Zone approval may or may not be given for development which introduced an element of risk to prospective purchasers. They

would want to discount the price as there was other land available in the industrial park without any such restrictions.

[35] The location of the Easement divided the Property. The Hennigar Report divided the land outside the Easement into three portions, referred to as Areas "A", "B" and "C". Two of the portions, Areas "A" and "C", were discounted by 50%, and then those parts of each such piece that were within the Safety Zone were discounted by a further 50%. Effectively the land was divided into six pieces with three pieces subject to a 50% discount, two pieces subject to a 75% discount and one piece of Area "B", outside the Safety Zone, was not discounted.

[36] The Hennigar Report found that the Property had declined in value from $1,123,535 to $557,591, for a total loss of $565,944. Of this loss, $274,795 was attributable to the Easement; the difference of $291,149 was attributed to injurious affection.

III. **Applicable Legislation**

[37] There are three sections of the *NEB Act* that are important in this appeal.

[38] Section 75 of the *NEB Act* provides that full compensation is to be paid to all persons who sustain damage by reason of a pipeline company exercising powers given to it under the *NEB Act*:

Damages and compensation	**Indemnisation**
75 A company shall, in the exercise of the powers granted by this Act or a Special Act, do as little damage as possible, and shall make full compensation in the manner provided in this Act and in a Special Act, to all persons interested, for all damage	**75** Dans l'exercice des pouvoirs qui lui sont conférés par la présente loi ou une loi spéciale, la compagnie doit veiller à causer le moins de dommages possibles et, selon les modalités prévues à la présente loi et à une loi spéciale, indemniser pleinement

sustained by them by reason of the exercise of those powers.	tous les intéressés des dommages qu'ils ont subis en raison de l'exercice de ces pouvoirs.

[39] The main point of contention between the parties involves a consideration of subsection 97(1)(d) of the *NEB Act:*

Determination of compensation 97 (1) An Arbitration Committee shall determine all compensation matters referred to in a notice of arbitration served on it and in doing so shall consider the following factors where applicable: (a) the market value of the lands taken by the company; (b) where annual or periodic payments are being made pursuant to an agreement or an arbitration decision, changes in the market value referred to in paragraph (a) since the agreement or decision or since the last review and adjustment of those payments, as the case may be; (c) the loss of use to the owner of the lands taken by the company; (d) the adverse effect of the taking of the lands by the company on the remaining lands of an owner; (e) the nuisance, inconvenience and noise that may reasonably be expected to be caused by or arise from or in connection with the	Détermination de l'indemnité 97 (1) Le comité d'arbitrage doit régler les questions d'indemnité mentionnées dans l'avis qui lui a été signifié, et tenir compte, le cas échéant, des éléments suivants : a) la valeur marchande des terrains pris par la compagnie; b) dans le cas de versements périodiques prévus par contrat ou décision arbitrale, les changements survenus dans la valeur marchande mentionnée à l'alinéa a) depuis la date de ceux-ci ou depuis leurs derniers révision et rajustement, selon le cas; c) la perte, pour leur propriétaire, de la jouissance des terrains pris par la compagnie; d) l'incidence nuisible que la prise des terrains peut avoir sur le reste des terrains du propriétaire; e) les désagréments, la gêne et le bruit qui risquent de résulter directement ou indirectement des activités de la compagnie; f) les dommages que les activités de la compagnie risquent de causer aux terrains

operations of the company;	de la région;
(f) the damage to lands in the area of the lands taken by the company that might reasonably be expected to be caused by the operations of the company;	g) les dommages aux biens meubles ou personnels, notamment au bétail, résultant des activités de la compagnie;
(g) loss of or damage to livestock or other personal property or movable affected by the operations of the company;	h) les difficultés particulières que le déménagement du propriétaire ou de ses biens pourrait entraîner;
(h) any special difficulties in relocation of an owner or his property; and	i) les autres éléments dont il estime devoir tenir compte en l'espèce.
(i) such other factors as the Committee considers proper in the circumstances.	Définition de valeur marchande
Definition of market value	(2) Pour l'application de l'alinéa (1) a), la valeur marchande des terrains correspond à la somme qui en aurait été obtenue si, au moment où ils ont été pris, ils avaient été vendus sur le marché libre.
(2) For the purpose of paragraph (1)(a), market value is the amount that would have been paid for the lands if, at the time of their taking, they had been sold in the open market by a willing seller to a willing buyer.	

[40] The Pipeline Company has alleged that the PAC did not properly interpret s112 of the *NEB Act* when it considered the impact of having to seek approval from the Pipeline Company for certain activities in the vicinity of the pipeline:

Prohibition – construction or ground disturbance	Interdiction de construire ou d'occasionner le remuement du sol
112(1) It is prohibited for any person to construct a facility across, on, along or under a pipeline or engage in an activity that causes a ground disturbance within the prescribed area unless the	112 (1) Il est interdit à toute personne de construire une installation au-dessus, au-dessous ou le long d'un pipeline ou d'exercer une activité qui occasionne le

construction or activity is authorized by the orders or regulations made under subsection (5) and done in accordance with them.	remuement du sol dans la zone réglementaire, sauf lorsque la construction ou l'activité est autorisée par les règlements pris ou par les ordonnances rendues en vertu du paragraphe (5) et est effectuée en conformité avec ceux-ci.
Prohibition — vehicles and mobile equipment	Interdiction relative aux véhicules et à l'équipement mobile
(2) It is prohibited for any person to operate a vehicle or mobile equipment across a pipeline unless	(2) Il est interdit à toute personne de faire franchir un pipeline par un véhicule ou de l'équipement mobile, sauf lorsque cela :
(a) that operation is authorized by the orders or regulations made under subsection (5) and done in accordance with them; or	a) soit est autorisé par les règlements ou ordonnances visés au paragraphe (5) et est effectué en conformité avec ceux-ci;
(b) the vehicle or mobile equipment is operated within the travelled portion of a highway or public road.	b) soit se fait sur la portion carrossable de la voie ou du chemin public.
[. . .]	[…]

[41] When interpreting the provisions of expropriation legislation, the Supreme Court of Canada held in *Toronto Area Transit Operating Authority v Dell Holdings Ltd*, [1997] 1 SCR 32, 142 DLR (4th) 206 [*Dell*] that:

> The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of the person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected.
>
> [. . .]

> It follows that the *Expropriation Act* should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property has been taken.
>
> (*Dell* at paras 20 and 23)

[42] In *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160 [*Smith*], Mr. Justice Fish, writing for the majority, acknowledged the *Dell* decision then noted that the *NEB Act* is also remedial legislation and warrants an equally broad and liberal interpretation to that of provincial expropriation statutes. He specifically held that to interpret the *NEB Act* narrowly would "transform its purpose of full compensation into an unkept legislative promise" (at para 57).

IV. **The Pipeline Arbitration Committee Decision**

[43] After reviewing the relevant provisions of the legislative framework under which it was operating, the PAC set out six issues it was to determine. In addition to addressing costs and interest payable on the award, the issues were whether the Landowner was entitled to compensation under the *NEB Act* and, if so, the value of damages for injurious affection and for the land that was taken for the pipeline. The value of the temporary workroom established on the site was also an issue to be determined.

[44] The PAC determined that the Landowner's whole parcel of land was a total of 10.4 acres zoned Heavy Industrial. The Easement and Safety Zone, also referred to as the Buffer Zone or Control Zone, together total 90 metres in width and run the length of the Property, effectively dissecting it into three parcels, two of which are much smaller than the third parcel.

[45] The PAC noted that the Landowner was seeking full compensation under the *NEB Act* for all the issues while the Pipeline Company would limit compensation to loss of use and value for the land that the pipeline was upon (Easement) and said that there should be no damages awarded for injurious affection.

[46] After an extensive review of the facts the PAC set out its analysis of the issues. As the claim arose from the construction and maintenance of the Brunswick Pipeline the PAC found that globally the Landowner was entitled to compensation under the *NEB Act*. It then examined each of the other issues.

A. *Compensation for the Easement*

[47] The Easement was found by the PAC to be 2.5444 acres in size. The PAC determined that the value of the Easement was $99,000 per acre, which it multiplied by 2.44 acres to arrive at a value for the Easement of $241,560. The parties have agreed that the size of the Easement is 2.5444 acres as originally identified by the PAC and the amount of 2.44 acres was used erroneously in the calculation of the value of the Easement. The correct value for the Easement, using the $99,000 per acre figure, is $251,896, a difference of $10,336.

[48] The PAC also noted that the Easement Agreement contained a Special Conditions Addendum and, in addition to the Easement itself, there was a Safety Zone of 30 metres in width on each side of the Easement.

[49] A significant finding made by the PAC was that given the terms of the Easement Agreement and the fact that the easement runs in perpetuity, “the obligations and restrictions on the Landowner are significant.” The PAC also found that there was no guarantee that permission

to build in the Safety Zone or to blast near the Easement would be granted. This finding is a point of contention between the parties.

B. *Compensation for Injurious Affection*

[50] The PAC found that there was injurious affection on the remainder of the property given the requirement to obtain permission to develop it and the various obligations and restrictions imposed on the Landowner under the Order. The Order requires the Landowner not undertake a wide range of activities without prior written consent of the Pipeline Company.

[51] The PAC concluded that the total value of the property had been reduced by $518,615.90. As it had found that the value of the Easement was $241,560 the remaining amount of $277,055 was attributable to the injurious affection. The PAC deducted $115,006.88 on account of the advance that had already been paid to the Landowner and added $62,458.11 on account of a temporary workroom occupying 0.595 acres.

[52] The PAC erred by using the incorrect acreage calculation for the value of the Easement. As a “before” and “after” calculation was used the total reduction in value of $518,615.90 is not affected by the error. If the correct value is substituted then the amount of injurious affection is simply reduced $10,336, being the amount by which the Easement value was understated.

C. *The Award of Interest on the Total Compensation*

[53] The Cross-Appeal challenges the interest award made by the PAC. In the Decision the PAC noted that it had discretion to award interest and was governed by subsections 98(4) and (5). The PAC accepted the interest rate put forward by the parties was correct and therefore awarded interest of 4.75% to the Landowner.

[54] The PAC stated interest would run from the date of the Decision until the award is paid. The PAC did not provide any reason for choosing the date of the Decision to start interest running.

V. **ISSUES IN DISPUTE**

[55] The parties disagree with respect to five matters; they form the issues in this appeal:

1. The standard of review to be applied to the Decision.
2. The value per acre to be applied to the award.
3. The amount, if any, to be paid for injurious affection.
4. The date upon which interest payable on the award should commence.
5. The costs to be paid on the appeal and cross-appeal.

VI. **STANDARD OF REVIEW**

[56] The parties do not agree on the standard of review.

A. *Positions of the Parties*

[57] The Pipeline Company argues that the standard of review for questions of law was satisfactorily determined by the Federal Court in *Bue v Alliance Pipeline Ltd*, 2006 FC 713 at para 5, 293 FTR 1 [*Bue*] where the Court determined that pure questions of law were subject to a correctness review. The Pipeline Company has phrased all of its grounds of appeal as pure errors of law.

[58] The Pipeline Company supports its position by arguing that the PAC does not have a broad statutory mandate to regulate a complex industry in the public interest like the National Energy Board. The mandate is merely to determine how much compensation is due to a

landowner. Moreover, the Pipeline Company argues that the right of appeal without leave of the Court on questions of law and jurisdiction should indicate that Parliament intended these matters to be subject to a correctness review. Finally, as each PAC is *ad-hoc* the Pipeline Company relies on the concurring opinion of Justice Deschamps in *Smith*, where she argued that an *ad hoc* tribunal like a PAC does not have any relative expertise in interpreting law as compared to a court.

[59] The Landowner relies on *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] to argue the standard of review is reasonableness as all of the Pipeline Company's grounds of appeal are actually questions of fact reviewable on a reasonableness standard or, at most, they are questions of mixed fact and law where the legal questions are not extricable. In the event that there is a pure question of law, the Landowner argues that *Bue* has been overtaken by *Dunsmuir* and *Smith*. While Justice Deschamps in *Smith* said an *ad hoc* tribunal has no special expertise, the majority found that the fact that a PAC was interpreting its home statute was a reason to presume reasonableness.

[60] In addition, the Landowner submits that Parliament has chosen to vest the fact-finding function with a tribunal rather than having compensation determined by a court. While the PAC is *ad-hoc*, in this instance all the members were lawyers. They can be presumed to hold relative expertise in interpreting the statute granting the PAC its mandate.

B. *Analysis*

[61] The standard of review for all issues is reasonableness.

[62] *Bue* was determined pre-*Dunsmuir;* it has been overtaken by more recent jurisprudence from the Supreme Court of Canada. When an administrative decision-maker such as the PAC is dealing with an interpretation of its home statute the presumption is that the standard of review is reasonableness: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30, [2011] 3 SCR 654 [*Alberta Teachers*]. Nothing in the facts of this case or in the legal arguments serves to rebut the presumption. None of the four exceptions to reasonableness are present.

[63] The Landowner is correct to note that in *Smith* eight of the nine justices who determined the case clearly found the standard of review of the decision of a PAC is reasonableness because it is interpreting its home statute. In *Smith* the Supreme Court satisfactorily addressed the standard of review of a PAC, as an *ad hoc* committee, when Mr. Justice Fish concluded that under the *NEB Act* an arbitration committee was entitled to deference, including when a PAC was considering a question of law (*Smith* at para 37).

[64] While the Pipeline Company wishes to distinguish and restrict Smith to cases involving a consideration of costs, the decision is much broader than that – the Court made it clear that the governing factor was that the PAC was considering its home statute. The Supreme Court also recently re-confirmed that a statutory right of appeal does not create a new category for which correctness is the standard of review (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at paras 27 – 30, [2016] 2 SCR 293).

[65] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law (*Dunsmuir* at para 47).

[66] A reviewing court however is required to pay "respectful attention to the reasons [offered or] "which could be offered in support of a decision"" but, the court is not given "a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result"" (*Alberta Teachers* at para 54, citing *Petro-Canada v British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at paras 53, 56, 98 BCLR (4th) 1, in turn citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997), 279 at 286).

VII. **DID THE PAC ERR IN DETERMINING THE VALUE PER ACRE?**

[67] The PAC found that both Mr. Hennigar and Mr. Doucet were credible, well qualified appraisers. As the per acre value differed between them by only $18,000 the PAC simply averaged Mr. Hennigar's $108,000 per acre value with Mr. Doucet's $90,000 per acre value and found that an equitable value was the midpoint of $99,000 per acre.

[68] Both appraisers agreed at the hearing before the PAC that the valuation methods would come to the same result in this scenario whether the "before and after" approach was used or the "summation" method was employed. They also both agreed that 100% of the value of the fee simple interest in the Easement should be awarded to the Landowner.

[69] While the Decision contains some misstatements and errors which can make it difficult to read, those problems do not necessarily affect the conclusions drawn by the PAC. For example, in reviewing Mr. Doucet's calculation of the market value of the Easement the PAC stated that there was insufficient data in New Brunswick to successfully apply the before and after approach. Mr. Doucet, as stated elsewhere by the PAC, used the summation approach.

[70] The Pipeline Company submits that not only did the PAC err in referring to the wrong approach, the conclusion that there was insufficient available data in New Brunswick was a conclusion made without any evidence having been presented. As such it was an error of law to make that finding of fact.

[71] The PAC used the before and after approach to calculate the value per acre but using the summation approach would produce the same result. Neither the misstatement with respect to the method of calculation nor the statement with respect to the amount of data available had any impact on the value per acre determined by the PAC. The PAC simply accepted the values of each appraiser and averaged them together to arrive at the value. There is nothing inherently unreasonable in that approach given that it is the task of the PAC to determine the value per acre and it is not required to select one of the two figures. In *Koch v Altalink Management Ltd.*, 2016 ABQB 678, 3 LCR (2d) 123 [*Koch*], the Court while sitting on appeal from a denial of compensation for injurious affection in a surface rights case, observed that "[a]ppraising land value is as much an art, based on experience, as it is a science" and, using the average of two appraisals was not only reasonable, it had the additional benefit of taking advantage of the expertise of both appraisers and the totality of the information used by them (at para 145). That statement applies equally to this appeal.

[72] In my view, the value per acre of $99,000 is reasonable given the statements made by the two appraisers that using either methodology would produce the same value; nothing turns on the misstatements made by the PAC in their analysis of this issue.

VIII. **DID THE PAC ERR IN ITS INJURIOUS AFFECTION ANALYSIS?**

A. *Overview*

[73] Most of the grounds of appeal put forward by the Pipeline Company relate to the award to the Landowner of $277,055 for injurious affection. It is alleged that the PAC misconstrued and misapplied s 97(1)(d) of the *NEB Act* which requires it to consider the adverse effect of the Easement on the remaining lands of the Landowner.

[74] The Pipeline Company submits there is no injurious affection. It says that the PAC engaged in speculation about future impacts but there is no actual loss to the Landowner.

[75] The Pipeline Company also alleges that the PAC relied on unspecified regulatory requirements to determine that the Pipeline Company did not have discretion to approve requests for construction near the pipeline and to erroneously conclude that blasting near the pipeline would be absolutely prohibited. It is also submitted that the PAC misconstrued s 112 of the *NEB Act* as well as the *National Energy Board Pipeline Crossing Regulations, Part I*, SOR/88-528, and *Part II*, SOR/88-529 in these respects.

[76] Finally, it is alleged that the PAC failed to consider evidence before it with respect to the process employed by the Pipeline Company to approve requests for construction in the Safety Zone and made factual findings without any evidence. For example, the Pipeline Company says the PAC found that blasting is prohibited in the Easement and Safety Zone.

[77] The Landowner submits that s 112 creates a regulatory risk in relation to development within the Safety Zone. It relies on a decision by Mr. Justice Rothstein, when he was on the Federal Court of Appeal, in which he found that the requirement to obtain leave of the National

Energy Board to excavate using power-operated equipment or explosives in the Safety Zone meant that potential purchasers of the lands might see that requirement as a regulatory risk which might diminish the value of the land. Justice Rothstein noted the onus was on the landowner to obtain approval. He rejected the claim by the pipeline owner that the possible denial of permission was speculative and that, until it occurred, there was no adverse effect on the lands (*Balisky v Canada (Minister of Natural Resources*), 2003 FCA 104, 239 FTR 159 [*Balisky*], leave to appeal to SCC refused, [2003] SCCA No 193 (QL), 2003 CarswellNat 3688 (WL Can)).

[78] The Landowner submits that the PAC did not ignore or fail to consider the evidence put forward by the Pipeline Company about prior approvals. Rather, the PAC specifically addressed this evidence and found it irrelevant because it was not clear that other lands for which prior approvals had been given were similar to the Property nor was there evidence of a consistent policy or guidelines of the Pipeline Company for granting permission.

B. *Analysis*

(1) The Law

[79] As previously mentioned, the Supreme Court held in *Dell* and confirmed in *Smith* that for remedial statutes "the aim … [is] to fully compensate a land owner whose property has been taken" (*Smith* at para 56, *Dell* at para 23). The *NEB Act* in s 75 provides that the Pipeline Company shall "make full compensation in the manner provided in this Act"; s 97(1)(d) of the *NEB Act* then provides that compensation shall be provided for "the adverse effect of the taking of the lands by the company on the remaining lands of an owner". This is the concept of injurious affection.

[80] There is no definition of injurious affection in the *NEB Act*. The Federal Court of Appeal has noted that "[t]he principle of injurious affection flows from the overriding objective of compensation in expropriation cases, which is to make the expropriated owner "economically whole"" (*Semiahmoo Indian Band v Canada*, [1998] 1 FC 3 at 58, 148 DLR (4th) 523 at 565 (FCA)).

[81] As in this case there has been a partial taking, the three criteria set out below must be met in order for the Landowner to receive compensation: Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed (Scarborough, Ont: Carswell Thomson Professional Publishing, 1992) at 335.

[82] The first criterion is that the remaining lands must have been held by the Landowner. That criterion has been met and is not in dispute.

[83] The second criterion is that the remaining lands must have been depreciated in value by activities upon the expropriated land. Under paragraph 84(a) of the *NEB Act* claims for compensation do not apply to "claims arising out of activities of the company unless those activities are directly related to (i) the acquisition of the lands for the pipeline […], (ii) the construction of the pipeline, or (iii) the inspection, maintenance or repair of the pipeline". While at first blush this provision appears to prevent the Landowner's claim for injurious affection, the Federal Court of Appeal in *Balisky* considered the matter and determined that it is not an impediment:

> [29] Neither the excluded nor the included activities referred to in paragraph 84(a) have anything to do with the effect of subsection 112(1) on landowners adjacent to a pipeline right-of-way. Claims for compensation arising from subsection 112(1) do not arise from activities of the company as that term is used in

> paragraph 84(a). They arise by virtue of the presence or existence of the pipeline.
>
> [30] The operations of the pipeline company will certainly include the activities referred to in paragraph 84(a). However, the ordinary everyday use of the pipeline, beyond construction, maintenance, inspection and repair, also constitutes operations of the pipeline company. Just as paragraph 84(a) cannot be read to exclude from arbitration claims for damages arising from the ordinary operation of the pipeline, it cannot be read to exclude from arbitration claims for compensation arising from the effect of subsection 112(1). If section 84 has any relevance to subsection 112(1), it would be in the opening words, that arbitration applies "... in respect of all damage caused by the pipeline of a company ...".
>
> [31] For these reasons, I am of the opinion that paragraph 84(*a*) does not preclude claims for compensation arising from the effect of subsection 112(1) from being referred to an Arbitration Committee.
>
> (at paras 29-31)

[84] The two appraisers disagree with respect to the critical issue of whether there is compensable injurious affection.

[85] The third criterion is also in issue: the damage suffered must not be too remote. The Pipeline Company submits that the PAC misapplied s 97 of the *NEB Act* in that there was no actual loss suffered by the Landowner and it was pure speculation to say that there would be a future impact. The Landowner relies on *Balisky* to say the regulatory risk is not speculative.

(2) Mr. Doucet's Approach to Injurious Affection

[86] The Pipeline Company's appraiser, Mr. Doucet, opines that there is no injurious affection. He differs from Mr. Hennigar with respect to the question of whether any permission that may be required from the Pipeline Company would be forthcoming. Mr. Doucet believes that any required consent would be received during a buyer's due diligence period. In his report

he acknowledges that the Landowner is of the opinion that the Easement severely restricts the use of his land. However, Mr. Doucet is of the view that buildings and other structures can be placed outside the Safety Zone. He also believes the Safety Zone, and Easement itself, can be used for parking and storage.

[87] The basis for Mr. Doucet's belief is his view that the highest and best use of the property is for a single large industrial site that can accommodate a large building and parking area. The building would be positioned northeast of the Easement and the remainder of the site would be used for parking or a laydown area.

[88] Mr. Doucet was also aware that prior to the creation of the Easement the Landowner had planned to subdivide the property into nine lots. He notes that smaller lots could be placed on either side of Cave Court and one lot could front on Old Black River Road. It is not clear how many such lots Mr. Doucet believed could be created.

[89] Mr. Doucet used a per acre value of $90,000 to determine that the market value of the Easement was $229,000. As he found there was no loss in market value to the remaining land and therefore no injurious affection that was the amount the Pipeline Company put forward to the PAC as being appropriate compensation.

(3) Mr. Hennigar's Approach to Injurious Affection

[90] The appraiser for the Landowner, Mr. Hennigar, took the approach that the Easement and the Safety Zone imposed restrictions on the use of those lands that required a third party to provide permission for various activities. The result is that the previously enjoyed full land ownership rights are significantly reduced after the Easement was created. He therefore based his

highest and best use analysis on what he ascertained could be done with Areas “A” and “C” without asking a third party for permission.

[91] In addition, Mr. Hennigar noted that due to restrictions on the Easement, it could only be crossed in a vehicle by way of a paved road. Therefore access to the lands referred to as Area “A” was severely restricted and might not be possible at all given conditions related to Bayside Drive and the fact that fill would be required to raise the grade level at that location.

[92] Mr. Hennigar determined that in addition to the location, topography and dimensions of the Property the highest and best use of the remainder lands was determined by the actual dimensions of each of the areas created when the Easement divided the Property. The setback requirements and safety zone restrictions also affected the actual building footprint that could be developed on Areas “A” and “C”. In Mr. Hennigar’s opinion the building shapes that could be placed on those areas without requiring the permission of a third party were not optimal with respect to usable yard area. He did note though that in most cases a smaller building might be constructed. A copy of the map from Mr. Hennigar’s report showing the three Areas, the Easement and the Safety Zone is attached as Appendix “B”.

[93] Mr. Hennigar looked at each of the three lot areas and determined that only Area “B” had sufficient land available for development while Areas “A” and “C” would best be used as an expansion for the property owner to the south. He premised his opinion on the uncertainty of approval which meant access to Area “A” may not be available.

[94] With respect to the Safety Zone Mr. Hennigar found that the restrictions on use may or may not impede future development. While it was possible that permission would be provided

for the area to be developed he found it was also reasonable to conclude permission might be withheld. He also observed that certain industrial land users might conduct a business that may not be permitted in close proximity to the pipeline or may not wish to locate close to the pipeline for reasons of safety or stigma.

[95] The overall conclusion drawn by Mr. Hennigar, which was accepted by the PAC, was that the uncertainty with respect to the future use of the lands was an issue. There was no shortage of industrial zoned land in St. John and there were no site specific features to make the lands within the Safety Zone of greater value than other lands in McAllister Industrial Park. His conclusion was that the reduced rights would drive a lower value from a buyer or investor.

[96] For Areas “A” and “C” Mr. Hennigar found the physical size and limitations coupled with the availability of vacant land for development in the immediate area in 2008 meant the landowner to the southwest was the most likely purchaser. In addition, there was a significant cost to provide fill to Area “A” if it was to be accessed from Bayside Drive. Due to these considerations Mr. Hennigar therefore reduced them in value by 50% to a per acre value of $54,000 based on his original calculation of $108,000 per acre. For that part of the lands within the Safety Zone he assigned a further 50% reduction. Using those figures, the market value of the remaining lands, after the Easement was taken is $557,591.

[97] As both appraisers agreed that the Easement was to have no market value, the market value of the remaining lands is the market value of the Property after the taking. By subtracting that value of $557,591from the before value of $1,123,535 the overall loss in market value of the Property is $565,944 as calculated by Mr. Hennigar.

[98] The market value of the Easement at $108,000 per acre was $274,800. Subtracting that from the loss in value of $565,944 results in an amount for injurious affection of $291,149 which Mr. Hennigar rounded up to $291,150.

(4) Was the PAC's Treatment of Injurious Affection Reasonable?

[99] The PAC devoted over twenty paragraphs of the Decision to an examination of the Safety Zone and the issue of permission to develop within it. With respect to the question of the amount of compensation, if any, to be paid for injurious affection, it considered the evidence of each of the appraisers. With respect to whether permission to develop would be granted, including for blasting within the safety zone, the two witnesses for the Pipeline Company were also important.

(a) *The Landowner's Obligations and Restrictions are Significant*

[100] The PAC made several findings with respect to injurious affection. For instance it found that the Easement Agreement contains restrictions on use by the Landowner of the Easement and the Safety Zone. In addition, it noted that the Order gave the Pipeline Company an immediate right to enter the Property. After noting these documents, the PAC determined that the obligations and restrictions on the Landowner are significant.

[101] Was that a reasonable determination to have made? In my view, the PAC's determination is reasonable. The usual rights of the Landowner with respect to the land on which the pipeline lies were greatly diminished when the Order was issued and registered on title.

[102] The Easement is granted in perpetuity. In perpetuity the Pipeline Company has rights over the entire Property in cases of emergency. It is also permitted to pile and store rock in windrows on the Easement and to clear the Easement of any trees, growth, buildings, structure or

obstructions if they may interfere with any of the rights granted to the Pipeline Company. This right is exercised in the sole and absolute discretion of the Pipeline Company, albeit acting reasonably. The same wording applies to an absolute right for the Pipeline Company to enter on the Property to access the pipeline to construct, operate, maintain, repair and replace it.

[103] Under the Order, the Landowner can use the Easement for any purpose except for a lengthy list of unallowable actions and activities if, in the opinion of the Pipeline Company, they might interfere with or damage the pipeline, impair its operation, interfere with its maintenance or repair, obstruct access to it or create any hazard in the operation, use and maintenance or existence of the pipeline on the Easement.

[104] Given the broad language used to outline the list of prohibited activities and the broad brush given to the Pipeline Company to forbid it if, in its opinion, such activity might interfere, the PAC's observation that the obligations and restrictions on the Landowner are significant is completely reasonable and logical.

(b) *The PAC Misused the word "prohibited"*

[105] The Pipeline Company also takes issue with various statements made by the PAC in the Decision, particularly its use of the word "prohibited" at paragraph 53. There, the PAC erroneously stated that "construction is prohibited by blasting in any pipeline vicinity".

[106] The use of the word "prohibited" in paragraph 53 is not internally consistent with the balance of the Decision. The word "prohibitive" is used in reference to construction or blasting in paragraph 48 and in paragraph 54 where the PAC said "blasting is highly prohibitive". Two paragraphs later, while discussing counsel for the Landowner's submission that blasting would

be prohibited, instead of agreeing with that submission the PAC found that "permission to blast is prohibitive and in perpetuity". The written materials of the Pipeline Company set out this quote but add "sic" after the word prohibitive, thereby indicating it believes the word was a misspelling or error.

[107] I disagree. I am not convinced that the word "prohibitive" was used by the PAC in error rather than the word "prohibited". It is much more likely that the word "prohibited", which appears but twice in the Decision, one being the instance where it was misused, and the other being a re-iteration of the Landowner's position. The word "prohibitive" appears six times, including twice in relation to blasting and generally in relation to planning, construction and approvals.

[108] If something is "prohibitive", it is not the same as being "prohibited". The latter is an absolute. It describes a definitive condition. The former describes a sizeable deterrent but not a certainty. It is not a substitute for prohibited.

[109] The whole process of approval was under active discussion during the arbitration hearing. If blasting was absolutely prohibited, as the Pipeline Company suggests was meant by the PAC, then there would be no need for an approval process. An enforcement process would suffice.

[110] The word "prohibitive" is also consistent with the evidence of Mr. Hennigar. It is consistent as well with Ms. Brown's evidence of there being a 150 metre blasting area buffer from the pipeline and with the overall process of seeking permission to blast bedrock. Taken altogether they serve to make "blasting highly prohibitive".

(c) *The PAC Reasonably Preferred the Expert Opinion of Mr. Hennigar*

[111] The critical difference between the two appraisers was that Mr. Doucet believed that approval would be given for construction activities whereas Mr. Hennigar believed that the requirement for approval and the restrictions placed on the Property by the Order, created a risk that diminished market value.

[112] The PAC's reasons for preferring Mr. Hennigar's opinion on injurious affection over that of Mr. Doucet did not turn on whether construction or blasting was prohibited. The important factors were: (1) the perpetual requirement to obtain permission for a wide variety of possible activities on or in the vicinity of the pipeline; (2) the fact that in 2008 similar land without such restrictions was commonly available.

[113] Mr. Hennigar's professional opinion was that where "land with full rights of use and liberty to the owner was available, a purchaser would elect to purchase [that] land for full value rather than pay the same price for land with diminished rights". In other words, a purchaser would want to discount the price paid for land with diminished rights.

[114] In my view, that basis for Mr. Hennigar's opinion is logical and reasonable. Mr. Hennigar's report said land was "a commodity" in the McAllister Industrial Park in 2008. Mr. Doucet calculated that in 2008 there was only 23% occupancy in the McAllister Industrial Park. He also noted that there had been strong opposition to the pipeline from various groups, including developers. It does not appear that Mr. Doucet took those factors into account.

[115] Although the Pipeline Company suggested to the PAC that Mr. Hennigar's opinion was that no permission would be granted, the PAC determined, correctly, that his opinion was only that permission would be required.

(d) *No Unsupported Assumptions in Mr. Hennigar's Report*

[116] The Pipeline Company submits that this is not a case of the PAC preferring one expert over another on a rational basis. It says the Hennigar Report made unsupported assumptions that were directly contradicted by the evidence and by accepting that report the PAC erred.

[117] The "unsupported assumptions" allegation arises from Mr. Doucet's Technical Review of the Hennigar Report. He concluded that Mr. Hennigar's valuation was based on an assumption that the pipeline could not be crossed, the Safety Zone was of little or no use for development and the requirement to seek permission causes a significant diminution in market value within the Safety Zone. Mr. Doucet disagreed with Mr. Hennigar on all those points.

[118] Mr. Doucet's critique centres on the fact that Mr. Hennigar never contacted the Pipeline Company to discuss the approval process. When Mr. Hennigar was cross-examined on that point he indicated he had a general familiarity with the approval process under the *NEB Act* and did not feel he needed to speak with the Pipeline Company. The PAC concluded that failing to make that inquiry did not matter as Mr. Hennigar's opinion "could not be made more effective by inquiring into the pipeline company's informal practices with landowners".

[119] On reading the reports it appears that Mr. Doucet misstates Mr. Hennigar's opinion and the reasons that he provided in support. Mr. Hennigar's opinion did not rest on whether or not approval from the Pipeline Company would be forthcoming for an activity. Mr. Hennigar opined that the restrictions imposed by the legislation and the Order added a requirement for the Landowner to receive permission for something that previously he had a right to do. That diminished the rights enjoyed by the Landowner and introduced uncertainty to prospective buyers who could not be sure that an approval would be granted.

[120] In his initial report Mr. Hennigar clearly stated, in discussing the Safety Zones, that the presence or absence of approval was not determinative:

> The 30 metre safety zone areas, although not part of the full restrictions of the pipeline easement, present limitations on their use that may or may not impede future development or land use. It was possible that permission would ultimately be provided for these lands to be developed, but it is also reasonable to conclude that such permission may be withheld. It was also reasonable to conclude that certain industrial land users may either conduct a business that may not be permitted in close proximity to the pipeline, or that may not wish to locate close to such a public utility for reasons of safety or stigma. Regardless of the reasons, the preceding issues present uncertainty with respect to the future use of these lands. It was also true that there was not a shortage of Industrial zoned land in Saint John, nor are there site specific features that might make the lands within the safety zones of greater value to a purchaser compared to other lands in the McAllister Industrial Park.
>
> The requirement for the determination of "market value" is the sale to an arm's length third party. It is unclear why a profit motivated enterprise would pay the same price for land with so many potential restrictions compared to land that might be acquired in the open market in the same general area of McAllister Industrial Park without any of these issues. The corollary to this is that a rational buyer or investor would demand a restriction in price to purchase land with these uncertainties and stigma issues that reduce or restrict the rights of the landowner. Based on this observation, it was concluded that these lands would be interpreted to have reduced rights and such a reduction in rights would drive a lower value than other substitute industrial lands in the area.
>
> [emphasis added]
>
> Hennigar Report, July 19, 2010, pages 47 – 48.

[121] In his Technical Review Mr. Doucet also stated that the restrictions in the Safety Zone "are far less intrusive than is suggested" by Mr. Hennigar. Mr. Doucet explained that statement by saying that the Landowner only needs to "notify Brunswick Pipeline of any proposed excavating or explosive work within the safety zone".

[122] In both his original report and his review report Mr. Doucet referred to the process as being one of notice, not approval. That is clearly not accurate. At one point in his original report Mr. Doucet correctly referred to the process as approval. The problem is that in otherwise calling it "notice" and using "notice" to rebut Mr. Hennigar's statement of the intrusiveness of the easement, it is not clear whether Mr. Doucet actually believed that only notice was required to develop in the Safety Zone or that approval was required but would be granted. Either way, it fails to rebut Mr. Hennigar's opinion about restrictions in the Safety Zone.

[123] In his response to the Technical Review, Mr. Hennigar referred to the Order which clearly states that an owner is not permitted to construct any structure on, along or under the Easement, nor can an owner excavate using power-operated equipment or explosives on the Easement or within 30 metres of the Easement without prior written consent of the Pipeline Company.

[124] Mr. Doucet also pointed out in his Technical Review that the St. John website contained a map identifying the pipeline corridor which showed that there were "existing buildings within the safety zones in various locations throughout Saint John." Mr. Doucet concluded that Mr. Hennigar's opinion of the value of the land after the taking was misleading because his highest and best use conclusion was arrived at without adequately researching local market conditions.

[125] In his responding report Mr. Hennigar agreed that various buildings were located in safety zones throughout St. John. He noted though that the buildings existed prior to the development of the pipeline at a time when permission to excavate would not have been required.

[126] Contrary to the submission of the Pipeline Company, there was a rational basis for the PAC to prefer the evidence of Mr. Hennigar over Mr. Doucet. The PAC acknowledged Mr. Doucet's opinion but found that his assumption of the likelihood of approval was in error. The record shows that not only did that assumption fly in the face of the testimony of Ms. More, it is contrary to the terms of the Order (paragraph 4(a)(v)). The PAC referred to both these factors in the Decision.

(e) *No Evidence was Misconstrued or Ignored*

[127] The Pipeline Company also says that the PAC ignored or misconstrued evidence of the approval process and evidence that approval would be given both for blasting and for a crossing over the Easement. This allegation is, in many ways, the cornerstone of the appeal. The certainty of approval underscores Mr. Doucet's opinion on injurious affection and, if true, it removes most of the regulatory risk found by Mr. Hennigar to be determinative of the diminished value of the remaining lands.

[128] The PAC did not ignore or misconstrue the evidence; nor did it make important findings in the Decision in the absence of evidence. The PAC was not convinced there was a certainty of approval. The PAC stated specifically that it did not accept Mr. Doucet's opinion in light of the testimony given by Ms. More. It reviewed and considered her testimony and that of Ms. Brown at some length.

[129] Mr. Doucet found there was no injurious affection because he expected the Pipeline Company would approve and pay for a crossing over the Easement as well as give consent to any blasting required for construction purposes in the Safety Zone. He concluded that any nuisance in terms of stigma, noise or disturbance from operation of the pipeline would be minimal.

[130] Mr. Hennigar understood that various permissions were required for a number of activities. He believed that there was a risk that approval might not be received and the uncertainty which that process introduced diminished the value of the land to a prospective purchaser. That conclusion is consistent with Mr. Doucet's acknowledgement of the opposition from developers to the pipeline.

[131] In considering the Safety Zone, the PAC stated that it had taken into account the Order, which sets out restrictions on the Easement, and the restrictions imposed on the control area or Safety Zone. It found that "[t]here is no evidence suggesting that the pipeline company's prospective permissions would be granted" as there were no contractual agreements to that effect. The concern was that there was nothing concrete to compel the Pipeline Company to agree to a proposal.

[132] Reference was made during the arbitration hearing to a commitment letter signed by the Pipeline Company however that letter was not in evidence before the PAC. Mr. McAdam, the president of the Pipeline Company at the relevant time, confirmed in cross-examination that the commitment letter was not binding although he stated that it was a public commitment from which the company would not resile.

[133] In arriving at the conclusion that there was no evidence that prospective permissions would be granted the PAC considered the testimony of Ms. More who spoke for the operator of the pipeline, Spectra Energy [Spectra]. Ms. More told the PAC that Spectra would not preclude any construction in the Safety Zone but would have concerns about blasting being used as a method of construction. Ms. More believed a qualified blast engineer would not propose anything that would be a concern but that Spectra might have to "tweak" blasting plans to reduce

the impact to the pipeline. She indicated that approval for blasting had been given within other Safety Zones. In the previous five years no proposals had been rejected as Spectra had always been able to work with the proposer to resolve any concerns.

[134] On cross-examination Ms. More testified that she "certainly wouldn't want to imply that we – that's it's a rubber stamp. We evaluate every proposal and what its potential impact could be to the integrity of the pipeline and grant approval where we can." [emphasis added]

[135] The PAC found that Ms. More did not indicate whether the prior approvals were for a similar type of property. The evidence before the PAC had been that the approvals were for lands in other Safety Zones. It was unknown whether those areas contained bedrock similar to the Property or only loose farm soil.

[136] The PAC noted that in 2008 the Pipeline Company's "record providing landowners with crossings over the pipeline were simply unknown". The PAC concluded that it would be "difficult for anyone to predict the pipeline company's position in the future in relation to this particular landowner".

[137] The PAC had testimony that past approvals had been granted in other Safety Zones. But, there was no evidence before the PAC that prior approvals were given for similarly situated and geologically similar properties. There was no evidence of any administrative policy setting out, for example, whether some activities would be presumptively approved and others would never be approved. The PAC noted that there was no evidence of internal decisions that could bolster the assumption that approval would be given in future.

[138] In my view, it was not unreasonable for the PAC to observe that there was no evidence presented to confirm that prior approvals had been given for the same kind of property as the Landowner's property. In any event, the PAC relied on a critical finding in preferring Mr. Hennigar's opinion to that of Mr. Doucet: a purchaser would not pay as much for land with restrictions when there is readily available land without restrictions.

IX. **DID THE PAC ERR IN DETERMINING INTEREST SHOULD RUN FROM THE DATE OF THE DECISION?**

A. *Positions of the Parties*

[139] The parties agreed that the applicable rate of interest is 4.75%. It is just the starting date for interest which is in issue.

[140] The Landowner seeks interest from the date of the Order, June 2, 2008. It points out that from that date to the date of the hearing was five years and seven months and that it would be inequitable for the Pipeline Company to have both possession of the property rights and the unpaid compensation without any interest accruing.

[141] The Landowner argues that subsection 98(4) of the *NEB Act* directs that the amount of interest is to be determined by reference to a Bank of Canada rate charged for the month in which the pipeline company entered the lands or damages first occurred. Although the PAC may award interest from a different date, the Landowner argues that subsection 98(4), by implication, establishes the normal date from which interest should run.

[142] The Pipeline Company submits that the cross-appeal with respect to interest be denied. It says that the PAC has the discretion under subsection 98(5) of the *NEB Act* to award interest

from such later date as the PAC may specify. It distinguishes that level of broad discretion from the requirement that the PAC consider specific factors in determining compensation.

[143] The Pipeline Company speculates that the PAC may have determined that as the easement was compensated to 100% of the market value, although the Landowner was not completely deprived of the use of those lands, an award of interest from a date later than the date of the taking may have been used to avoid overcompensating the Landowner.

B. *Analysis*

[144] Generally in law, when harm is done compensation begins as of the date of the harm. The PAC gave no indication in the Decision as to why it was starting interest from the date of the Decision. Unfortunately, the written submissions of the parties to the PAC are not in the record before the Court. It is not possible therefore to look to the record for support or to draw any inference with respect to the award of interest being from the date of the Decision.

[145] Given the object of the *NEB Act* is to keep a landowner economically whole, and section 75 of the *NEB Act* stipulates that full compensation is to be made in the manner provided in the *NEB Act*, the failure of the PAC to explain the date on which to start interest is not transparent or intelligible.

[146] It is, as the Pipeline Company submits, a large amount of money if the interest rate is to start approximately eight years before the date of the Decision. As there were other slips of the pen in the Decision, there is a possibility that the PAC inadvertently stated the date of the Decision would be the date on which interest would accrue. It is also possible that the PAC

exercised its discretion and purposely chose the date of the Decision. Only the PAC can confirm whether the intention was to start interest as of the date of the Decision and not another date.

[147] The appropriate remedy is to remit the issue of interest to the same Pipeline Arbitration Committee, or, if the members are not all available then to such differently constituted Arbitration Committee as the Minister may appoint under the *NEB Act*, to determine the date from which interest should commence to run.

X. COSTS OF THIS APPEAL and CROSS-APPEAL

[148] The Landowner has succeeded in defending the appeal and is entitled to its costs. If the parties cannot agree on the amount of costs within thirty days of the date of this judgment then the Landowner may have its costs assessed in accordance with Column III of Tariff B.

[149] The result of the cross-appeal dealing with interest will be unknown until the PAC reconsiders that issue to confirm the starting date for interest and its reasons for that date. Once that is resolved, costs of the cross-appeal, which shall be in the cause, are to be determined by agreement of the parties failing which the successful party may have its costs assessed in accordance with Column III of Tariff B.

[150] No costs are awarded for the issues that were agreed upon between the parties prior to the hearing of the appeal and cross-appeal.

XI. CONCLUSION

[151] The PAC found that the impact on the value of the Property must be evaluated at the time of the taking in 2008. At that point in time, the Pipeline Company did not yet have a track record by which prospective purchasers could evaluate the likelihood of having development in the

Safety Zone approved. Similarly, there was no track record to enable prospective purchasers to determine the reliability of the Pipeline Company's commitment to build pipeline crossings.

[152] Regardless of whether or not there was an actual risk of development permission being denied, it was reasonable for the PAC to conclude that there was a perception that the permission could be denied. Remembering also that there was only 23% occupancy in the McAllister Industrial Park in 2008, such a perception would reasonably create concern for purchasers planning on developing the Property as the risk of the Pipeline Company being capable of refusing approval would cause them to prefer land without this risk.

[153] The PAC explained why it accepted the Hennigar Report's appraisal method of valuing the injurious affection over that of the Altus Report. The record supports the findings made by the PAC and the outcome is within the range of possible, acceptable outcomes defensible on the facts and law. In my view, the *Dunsmuir* criteria have been met.

[154] To overturn an administrative tribunal's decision, the appealing party must show that the conclusion was not rationally supported by any material before it: *Stelco Inc v British Steel Canada Inc*, [2000] 3 FCR 282 at para 22, 20 Admin LR (3d) 159 (FCA). Even though there are some questionable findings in the PAC's analysis, there are other reasonable findings that support its conclusion.

[155] The evidence of the two appraisers and the witnesses provided the necessary evidence to support the Decision. The reasons of the PAC must be taken as a whole in determining whether the Decision was reasonable, even if not every single point in its reasoning meets the

reasonableness test: *Jarada v Canada (Minister of Citizenship and Immigration)*, 2005 FC 409 at para 22, [2005] FCJ No 506 (QL).

JUDGMENT IN T-1013-16

THIS COURT'S JUDGMENT is that:

1. The award of the Pipeline Arbitration Committee is varied by awarding $251,895.60 on account of the easement, $266,886.68 on account of the injurious affection and $3,239.78 on account of the temporary workroom. The amount of the award is also varied by only reducing the award by $101,776.00 on account of the advance payment. The total amount of the compensation award is varied to $420,246.06.
2. The portion of the Decision relating to the interest start date is set aside. That matter is remitted to the same Pipeline Arbitration Committee, or, if the members are not all available then to such differently constituted Arbitration Committee as the Minister may appoint under the *NEB Act*, to determine the date from which interest should commence to run.
3. As the matter of the interest start date has been remitted to the PAC costs for the cross-appeal shall be in the cause. If the parties cannot agree as to the quantum of costs within twenty days of the date of this judgment the successful party may have its costs assessed in accordance with Column III of Tariff B.
4. Costs of the appeal are granted to the Landowner. If the parties cannot agree as to the quantum of costs within thirty days of the date of this judgment the Landowner may have its costs assessed in accordance with Column III of Tariff B.

5. Notwithstanding the foregoing, costs are not awarded for the issues that were agreed upon between the parties prior to the hearing of the appeal and cross-appeal.

"E. Susan Elliott"
Judge

Appendix "A"

Calculations Made by the PAC

Property value before the Easement: 10.4031 acres x $99,000/acre =$1,029,906.90

Property value after the Easement

Areas	**Size (acres)**	**Value (per acre)**	**Value Adjustment**	**Revised Value (per acre)**	**Value of section (Size x Revised Value)**
"A" (excluding safety zone)	0.9188	$99,000.00	0.5	$49,500.00	$45,480.60 (PAC incorrectly calculated $45,648)
"B" (excluding safety zone)	3.112	$99,000.00	1	$99,000.00	$308,088.00
"C" (excluding safety zone)	0.6949	$99,000.00	0.5	$49,500.00	$34,397.55
"A" Safety Zone	0.6773	$99,000.00	0.25	$24,750.00	$16,763.18
"B" Safety Zone	1.8431	$99,000.00	0.5	$49,500.00	$91,233.45
"C" Safety Zone	0.6126	$99,000.00	0.25	$24,750.00	$5,161.85
Easement	2.44	$99,000.00	0	$0.00	$0.00
Totals	10.2987				**$511,124.63**

Loss in Property value

$1,029,906.90 ("before" value) - $511,124.63 ("after" value) = $518,782.28

(PAC incorrectly calculated $518,615.90 due to multiplication error above)

Loss due to Easement

2.44 acres x $99,000.00/acre = $241,560.00

Loss due to Injurious Affection

$518,782.28 (loss in Property value) - $241,560.00 (loss due to Easement) = $277,222.28

(PAC incorrectly calculated $277,055.00 due to multiplication error above)

Amount Awarded: $466,233.51

$518,782.28 (loss in Property value) - $115,006.88 (total advance) + $62,458.11 (workroom)

= $466,233.51

(PAC incorrectly calculated $466,066.23 for amount awarded as they used $518,615.90 as loss in value due to multiplication error above)

Amended Calculations by this Court

Property value before the Easement: 10.4031 acres x $99,000/acre =$1,029,906.90

Property value after the Easement

Areas	**Size (acres)**	**Value (per acre)**	**Value Adjustment**	**Revised Value (per acre)**	**Value of section (Size x Revised Value)**
"A" (excluding safety zone)	0.9188	$99,000.00	0.5	$49,500.00	$45,480.60
"B" (excluding safety zone)	3.112	$99,000.00	1	$99,000.00	$308,088.00
"C" (excluding safety zone)	0.6949	$99,000.00	0.5	$49,500.00	$34,397.55
"A" Safety Zone	0.6773	$99,000.00	0.25	$24,750.00	$16,763.18
"B" Safety Zone	1.8431	$99,000.00	0.5	$49,500.00	$91,233.45
"C" Safety Zone	0.6126	$99,000.00	0.25	$24,750.00	$15,161.85
Easement	2.544	$99,000.00	0	$0.00	$0.00
Totals	10.4031				**$511,124.63**

Loss in Property value

$1,029,906.90 (“before” value) - $511,124.63 (“after” value) = $518,782.28

Loss due to Easement

2.5444 acres x $99,000.00/acre = $251,895.60

Loss due to Injurious Affection

$518,782.28 (loss in Property value) - $251,895.60 (loss due to Easement) = $266,886.68

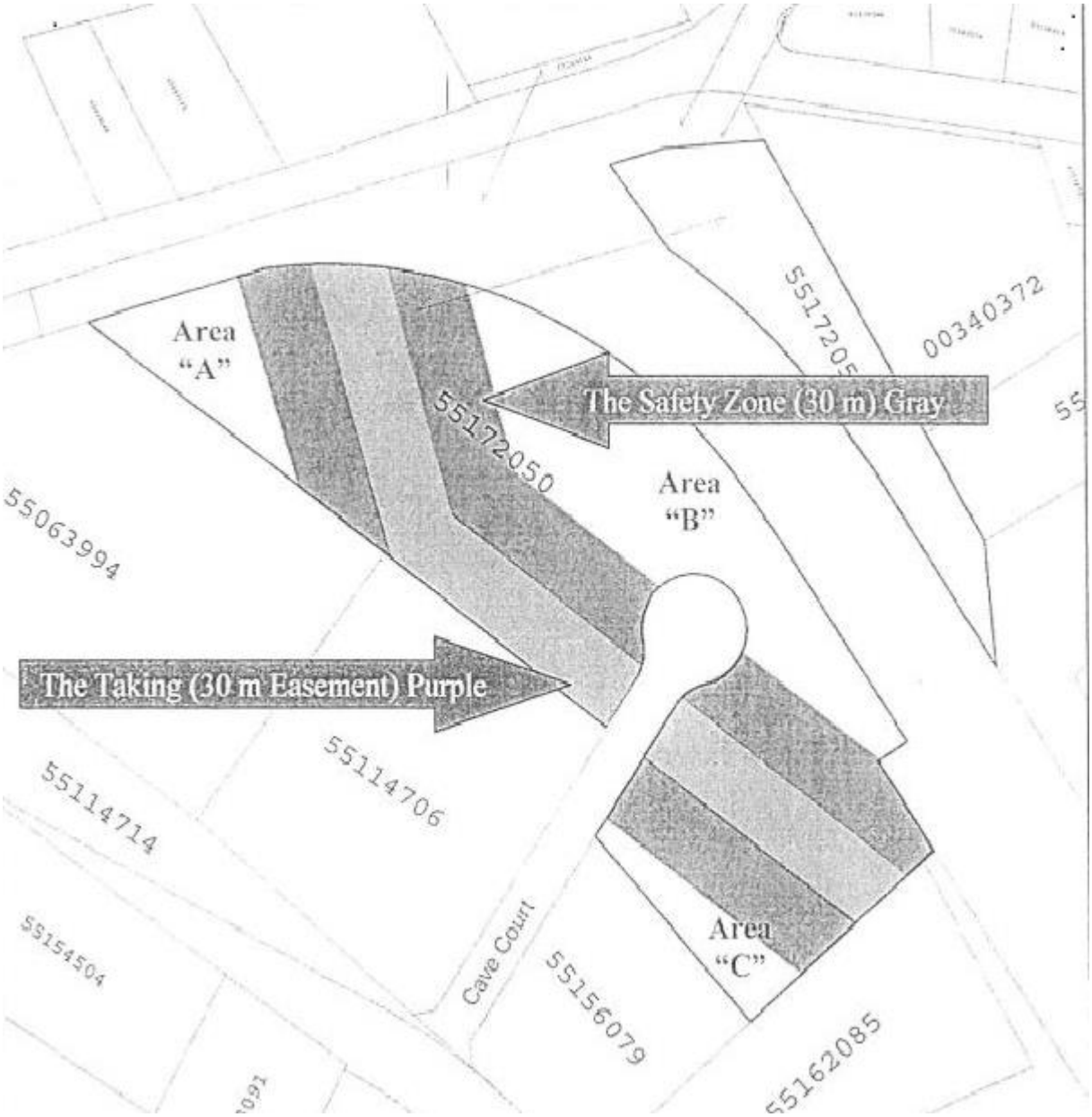
Amount advanced (excluding HST of 13%, advance made June 23, 2008)

$115,006.88 (total advance including HST) ÷ 1.13 = $101,776.00

Amount Awarded: $420,246.06

$518,782.28 (loss in Property value) - $101,776.00 (advance) + $3,239.78 (workroom value) = $420,246.06

Appendix "B"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"A"
The Safety Zone (30 m) Gray
55172050
Area
"B"
55063994
The Taking (30 m Easement) Purple
55114706
55114714
55154504
Cave Court
55156079
Area
"C"
55162085
00340372

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1013-16
STYLE OF CAUSE:	EMERA BRUNSWICK PIPELINE COMPANY LTD. v SIERRA SUPPLIES LTD.
PLACE OF HEARING:	FREDERICTON, NEW BRUNSWICK
DATE OF HEARING:	JANUARY 10, 2017
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	JANUARY 9, 2018

APPEARANCES:

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