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Applicants to a feed-in tariff program must expect change.

By Nigel Bankes

Case Commented on:

Skypower CL 1 LP et al v Minister of Energy (Ontario) et al, 2012 ONSC 4979

In an earlier post entitled "Low carbon energy policies: vested rights, legitimate expectations and differential treatment in domestic and international law" (see here) I commented on a UK case involving changes to a feed-in tariff (FIT) program as well as a couple of ongoing international arbitrations against Canada involving provincial energy policies (one in British Columbia and one in Ontario, the Mesa Power arbitration). The Skypower decision which is the subject of this post involves changes to Ontario's FIT program. The common theme of all of these cases are the legal implications for government where government changes its mind about the terms of incentive programs designed to encourage the uptake of low carbon forms of generation.

The facts

In May 2009, Ontario brought into force the *Green Energy and Green Economy Act, 2009,* which enacted the *Green Energy Act, 2009* ("*GEA*") and amended and repealed various statutes including changes to the *Electricity Act, 1998,* SO 1998, c 15, Sch. A to allow the creation of a FIT program. Specifically, section 25.35(1) of the *Electricity Act, 1998* provides that:

> The Minister may direct the OPA [the Ontario Power Authority] to develop a feed-in tariff program that is designed to procure energy from renewable energy sources under such circumstances and conditions, in consideration of such factors and within such period as the Minister may require.

The Minister gave that Direction to OPA in September 2009 requiring OPA to create a FIT program for projects that produce electricity from renewable sources including wind, solar voltaic, bioenergy and water power. OPA issued a set of rules, version 1.0 defining the procedures for applications and the processing of those applications (see here). The Direction contemplated that OPA would conduct a formal program review at least very two years. As it happens, seven modifications were made to version 1.0 before it was replaced by the current version 2.0. The rules were and are complex. They contemplated that OPA would need to take account of transmission and distribution availability and the need for new transmission and distribution capacity as part of an economic connection test (ECT) as part of determining which projects to accept and with what priority. The rules themselves contemplated that OPA might make changes to the rules (see para 40).

The applicants in this case were some 118 limited partnerships who had submitted a large number of applications under these rules. The applicants alleged (at para 35) that "they have made significant investments in time and money to prepare complete and eligible applications

for ground mount solar projects …. [including] …obtaining the rights to land; purchasing data layers and software; conducting analyses to determine appropriate project siting; applications fees; posting security in excess of $20 million; and staffing and consultant costs." The minister's Direction did not set any particular targets for the amount of energy that OPA was to procure through the FIT program and it seems fair to say that OPA was both surprised and overwhelmed by the interest in the program which resulted in over 2,300 applications for projects to supply over 14,000 MW of energy. (To put that figure in perspective, the total amount bid is about the same as the total installed capacity of the Alberta Interconnected Electric System (AIES): (see here) quoting a total of 14,098 MW installed capacity.) Once an application had been processed it was included in a "FIT Production List" to await a FIT Contract if capacity were available or in a FIT Reserve List if the project did not meet the ECT.

In the end, OPA offered FIT contracts to 249 projects for some 4339 MW of capacity before initiating the two year review. OPA never conducted the promised ECT scheme deciding instead to conduct a streamlined ECT as part of a provincial initiative to identify priority grid expansion projects. Once the two year review commenced, OPA indicated that it would not process existing applications while the review was ongoing and that applications that had not received contracts by a specified date would only be processed in accordance with the new rules adopted as a result of the review. Applicants were also advised that they might withdraw their applications and have their deposits and fees refunded.

The Two-Year Review, published in March 2012, recommended changing the scheme from (at para 30) "a first-come, first-served approach to a priority point system that would rank applications based on the ability of the project to achieve a number of FIT Program objectives including (1) community and Aboriginal equity participation in the program; (2) local and municipal support for the program; and (3) project readiness." The Review also proposed other changes including reductions in FIT rates for several categories of projects and changes that affected eligible locations for projects. The Minister directed OPA to implement these changes which it did by adopting version 2.0 of the FIT rules. All those who filed applications in round 1 were given the opportunity to resubmit under FIT program 2.0. These filed applications included applications submitted with review still pending as well as applications that had been screened and were awaiting a contract.

In addition to the rules the applicants also relied on statements made by the then Minister of Energy referring to a "right to connect" and both general statements made by OPA and correspondence with OPA referring to the processing of their applications. It was an important part of the applicants' case that (at para 17):

> Applications submitted to the OPA were time-stamped and assessed on a first-come, first-served basis. FIT Contracts were to be offered in the order applicants applied, subject to eligibility and availability on the transmission and/or distribution system to connect the project and subject to OPA's general and other rights in the FIT Rules.

The application

The applicants sought declarations that OPA and the Minister acted unreasonably in failing to process the application in accordance in the phase 1.0 rules and an order directing the respondents to do so.

The issues

The principal issues in addition to the standard of review (reasonableness, paras 48 – 49) were as follows: (1) Was the FIT process a tender process and if so did OPA and the Minister breach the rules relating to tender processes? (2) Did the actions of the Minister and OPA frustrate the legitimate expectations of the applicants? (3) Did the actions of the Minister and OPA interfere with the vested rights of the applicants such that their applications should be processed in accordance with version 1.0 of the rules? (4) Did the changes to the rules have an impermissible retroactive effect on the applicants?

Overall approach

Justice Nordheimer's unanimous decision for the Ontario Divisional Court is at pains throughout to emphasise the broad discretion that the overall scheme reserved to the Minister and to the OPA. For example, at para 53, Justice Nordheimer observed that:

> …. the applicants had to be aware, given the public nature of the entities with which they were dealing, that there was no firm and unalterable commitment by the Minister or the OPA that that would occur. In addition to the very broad discretion that the OPA had within the FIT Rules, any number of public policy considerations outside of the four corners of the FIT Rules could have reasonably caused the Minister and/or the OPA to decide not to permit such a connection. The applicants cannot reasonably claim that they were unaware of, or exempt from, the ever present reality that government policies and priorities can change.

Similarly, in response to the applicants' arguments to the effect that the FIT rules and program should be characterized as a commercial tendering process Justice Nordheimer observed as follows (at para 59):

> I do not accept [the] characterization of the FIT Program, the FIT Rules and the application process in which the applicants were engaged [as an entirely commercial program]. The FIT Program arose out of the desire of the Government of Ontario to increase the amount of energy provided in this Province from renewable sources. The Government also wished to create within this Province a favourable location for the development of renewable energy industries. Those objectives are evident from the statements made by the Minister at the time that the *GEA* was enacted.

In light of these statements as to the general approach it is perhaps easy to predict how the Court might come down on each of the four main issues.

(1) Was the FIT process a tender process and if so did OPA and the Minister breach the rules relating to tender processes?

The Court concluded that this was not a tender process (and thus the applicants did not get to first base) principally on the grounds that there were too many discretionary variables that had to be satisfied before a contract could be awarded. But this way of framing the case also begs the question, "so what"? After all, a failure in a tender process typically results in a private law action for damages (in which a plaintiff will be put to the proof of its damages); this was an application for judicial review and given the standard of review the job of counsel was to demonstrate that OPA had acted unreasonably not that it had breached judicially created rules

(on which the most recent authority is *Tercon Construction v British Columbia*, [2010] 1 SCR 69) in relation to tenders.

(2) Did the actions of the Minister and OPA frustrate the legitimate expectations of the applicants?

Quoting from the test laid down in *Canada (Attorney General) v Mavi*, [2011] 2 SCR 504, the Court emphasised that the principle of legitimate expectations is a procedural and not a substantive doctrine and can only be triggered where government makes representations that are "clear, ambiguous and unqualified" to an individual. That was not the case here. The ministerial representations on which the applicants relied were statements of general application and had to be read in the context of the entire FIT program rules. Neither could the applicants rely on the specific timelines for processing applications which were contained in the rules. Those timelines were not hard and fast, and, as the applicants well knew, the OPA was simply overwhelmed by the response. Furthermore, the applicants had taken no action when it first became apparent that timelines could not be kept. In sum (at para 72):

> …. applicants did not have any legitimate expectations regarding the specific time by which the ECT would be run of the type that would give rise to any remedy contemplated in the judicial review framework. However, even if such legitimate expectations did arise, I would conclude that the applicants have waived any entitlement that they may have had for relief, in the nature of mandamus or otherwise, because of the delay in seeking it.

(3) Did the actions of the Minister and OPA interfere with the vested rights of the applicants such that their applications should be processed in accordance with version 1.0 of the rules?

The applicants also failed to persuade the Court on this branch of their argument. Referring to both *Dikranian v Quebec (Attorney General)*, [2005] 3 SCR 530 and *Gustavson Drilling (1964) Ltd v MNR*, [1977] 1 SCR 271, the Court questioned whether the doctrine of vested rights could apply to a change in policy rather than to a change in legislation, but in any event concluded that at no point did the applicant acquire rights that were "tangible, concrete and distinctive" since at most they had (at para 77) "the prospect of obtaining one or more contracts to provide renewable energy to the Province."

(4) Did the changes to the rules have an impermissible retroactive effect on the applicants?

Here again, the Court, referring to both retroactive effect and retrospective effect, and acknowledging a degree of overlap with the vested rights argument, concluded that the applicants had not progressed to the point where they could be said to have acquired vested rights. The applications that were the subject of these proceedings were applications where the applicants had, for the most part, merely properly completed and filed their applications. The applicants were aware that the terms of the FIT program might be changed as indeed they had been on several occasions. Thus, the claim of vested rights was simply too premature. "The applicants [at para 82] did not have any rights arising under the FIT Program. At its highest, the applicants had the opportunity to have their existing applications considered by the OPA. The rules to be applied to those applications have to be the rules that are in effect when the consideration occurs." Equally problematic from the Court's perspective was the suggestion (at

para 83), and implicit in the application, that "once a government program is announced and a person applies under it, the government is precluded from making any changes to the program for those persons who have submitted applications even though those applications have not yet been considered or approved. Such a concept is untenable in relation to government programs."

Comment

Many governments are pursuing aggressive policies to reduce carbon emissions in the energy sector. Those policies often provide incentives to investors to pursue particular forms of generation. But governments clearly find it difficult to predict the detailed results of such policies. Thus it is difficult for them to predict the level of uptake of the incentive programs but it is also difficult for them to assess the public's reaction to the implications of adopting new forms of generation. This reaction can include noise and aesthetic concerns in relation to wind generation, and concerns over the conversion of productive agricultural land to industrial uses to accommodate different forms of generation. Both types of uncertainties may cause government to react by withdrawing or scaling back incentives in order to protect the fisc or taking other measures in order to meet the concerns of voters. This means that in practice governments need to be flexible and responsive in implementing new energy policies. But on the other hand, a reputation for reactive change to political and economic pressures may deter potential investors in the future. The trick for governments is to balance these competing concerns and to think of ways in which governments can retain some flexibility while offering potential developers sufficient certainty that they will undertake the preliminary planning and project design required to participate in programs such as these.

In this case the Court is very deferential to government and dismissive of the claims of the investors but the supporting reasoning all seems supportable when viewed within the narrow procedural frame of domestic administrative law. I am not sure that we can expect the same level of deference and accommodation of the government's desire for flexibility if the same types of arguments are presented by an eligible investor before an international investment tribunal - but this time couched in the more substantive and outcome oriented terms of investment law rather than the standards of administrative law. In this context it will be interesting to follow both the Mesa power arbitration (above) and the more advanced arbitral proceedings launched in another FIT case by investors in Spain, see here.

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