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ENMAX PPA Terminates Under the Change of Law Clause When the Buyer Provides the Balancing Pool with Notice of Termination

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Case Commented On: *ENMAX PPA Management Inc v Balancing Pool*, 2017 ABQB 605 (CanLII)

In this decision Justice Paul Jeffrey concluded that ENMAX terminated (as against the Balancing Pool (BP)) its Battle River Power Purchase Arrangement (PPA) on the effective date of the termination notice that it had sent to the BP. ENMAX sent its termination notice on December 11, 2015 and prescribed an effective date and time of termination as January 1, 2016 at 12:01 a.m. The BP took the view that termination did not become effective until it was legally able to take over the buyer's responsibilities under the PPA. This did not happen in this case until the BP was able to appoint an agent to act for it with respect to the technical tasks associated with offer control. The BP could not do this until it had obtained the approval of the Alberta Utilities Commission (AUC) to permit sharing of records as required by section 2(f) of the *Fair Efficient and Open Competition Regulation*, Alta Reg 159/2009. The BP did not get that approval until June 28, 2016 (see AUC Decision 21406-D01-2016) and did not assume offer control through its appointed agent (Capital Power Generation Services Inc) until July 13, 2016. Accordingly, the BP took the position that ENMAX's termination only became effective on that date i.e. July 13, 2016. In this application for a declaration brought by ENMAX Justice Jeffrey rejects the BP's position and finds decisively in favour of ENMAX.

It is perhaps important to observe at the outset that all that this judgment decides is the termination date as between ENMAX and the BP. The BP had not objected to the termination itself and indeed had accepted ENMAX's termination notice as a valid termination – it merely questioned its effective date. It will be recalled however that the right to terminate is very much still an issue as between the Province of Alberta and ENMAX and the BP. The Province has commenced an application before the courts contesting the terms of the PPA (the "more unprofitable" issue), the interpretation of the PPA (was the PPA unprofitable/more unprofitable by reason of the Province's carbon levy or for other market reasons) and the BP's decision to accept the termination as a valid termination. For previous posts on this litigation see here, here, here and here. Justice Jeffrey does not mention this litigation and presumably this judgment cannot touch the issues that lie at the heart of those proceedings although no doubt parties will still try to make something of phrases here and there in Justice Jeffrey's admirably crisp and elegant judgment. In fact it's hard to resist the temptation myself—I can't help but note that Justice Jeffrey (at para 8) quotes the un-amended version of section 4.3(j) of the PPA—but I suspect we cannot attach any significance to that especially as Justice Jeffrey acknowledges the "amendment" at para 37. ENMAX in turn will likely take comfort from para 57 of Justice Jeffrey's judgment in which he emphasizes that in drafting the PPA and especially the change of law clause "the legislators endeavoured to provide as much certainty as possible to potential

buyers and relieve them of non-market related risks" (but of course the effect of including the "more unprofitable language" is potentially to accord the Buyer relief from market risks as well as non-market risks).

Justice Jeffrey began by considering the applicable interpretive approach. Should the PPA be interpreted as a contract or some sort of statutory arrangement? Recall that the "A" in PPA stands for "arrangement" and not "agreement". Justice Jeffrey noted that there was some difference of judicial opinion on the point before referring to the opinion that the AUC expressed in its TAU PPA-related market manipulation decision (*MSA v TAU, Kaiser & Connolly*, AUC Decision 3110-D01-2015) in which the AUC characterized the PPAs as "a component of a statutory scheme enacted to ensure the fair, efficient and openly competitive operation of the electricity market in Alberta." Justice Jeffrey concluded that the AUC's opinion on characterization was entitled to a high degree of deference but he also believed it to be correct for the following reasons (at paras 34-37): the wording of the PPAs was finalized "by legislative act"; PPAs are lacking in some of the essential elements of a contract; PPAs are not stand alone documents—they can only be understood and interpreted within their statutory context; the text of the PPAs makes this statutory context clear; and ENMAX itself (which proposed the contractual approach) relies on the regulatory and statutory context to incorporate the all-important "or more unprofitable" language into the PPA. It followed from this characterization of the PPA that the court should approach the interpretation of the PPA keeping in mind both *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC) and the *Interpretation Act*, RSA 2000, c I-8 and especially s 10:

> An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Justice Jeffrey gave seven reasons for concluding that ENMAX was entitled to succeed. The balance of this post summarizes those grounds.

1. Section 4.3(j) of the PPA simply states that "the Buyer may terminate this Arrangement". Unlike other provisions of the PPA it does not provide for a notice period. While the clause does not say "immediately" that can be inferred in light of the other termination provisions in the PPA (paras 44-47).
2. Section 4.3(j) of the PPA contemplates that the Buyer will bear any cost consequences from a Change in Law termination and this suggests that termination should have immediate effect—if not the Buyer will suffer cost consequences (para 48).
3. The *Balancing Pool Regulation*, Alta Reg 158/2003 contemplates an interim payment mechanism to cover the period between notice and the BP's assessment of the validity of the notice. This mechanism would be superfluous if the BP's interpretation were correct (paras 49-52).
4. Section 96(3) of the *Electric Utilities Act*, SA 2003, c E-5.1 when read in conjunction with the *Balancing Pool Regulation* also supported the immediate termination approach (paras 53-54).
5. The report of the Independent Assessment Team (IAT) also supported immediate termination.

6. The whole purpose of the Change in Law Termination was to relieve the Buyer of non-market related risks. The BP's preferred interpretation would mean that the Buyer would bear some non-market risk until the BP was in a position to assume offer control. This interpretation is inconsistent with the overall purpose of the clause. The fact that the BP had not maintained its own capability to provide offer control service since 2006 should not affect that conclusion.
7. The BP's interpretation creates uncertainty as to the effective date of termination and makes it dependent to some extent on the BP's own previous actions and decisions (e.g. to cease maintaining its own offer control capability). This level of uncertainty is inconsistent with the overall purpose and intent of the Change in Law clause.

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