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Arbitrations Added to the PPA Soup

By: Nigel Bankes

Case Commented On: *TransCanada Energy Ltd v Balancing Pool*, 2016 ABQB 658 (CanLII)

The power purchase arrangements (PPA) dispute in the Province continues to evolve along a number of different tracks. As noted in a previous post, the negotiation track seems to be producing some positive results with a number of tentative settlements announced. As a second track, ENMAX has its application to determine the effective date of termination of the Battle River PPA (this application is discussed at para 5 of the current decision). This application had been adjourned *sine die* but ENMAX has recently applied to have the application set down for a hearing. As a third track, the Province, through the Attorney General (AG), continues to maintain its judicial review application. The decision that is the subject of this post reveals a fourth track, that of arbitration actions commenced by some of the PPA buyers (although perhaps some of these arbitrations might be withdrawn under the terms of the tentative settlements referenced above). This decision of Chief Justice Neil Wittmann deals with whether or not the arbitrations were properly commenced (i.e. had a dispute crystallized?) and the interaction between the judicial and arbitral tracks.

TransCanada Energy (TCE) and the ASTC Power Partnership (ASTC) are buyers under various PPAs: TCE for Sundance A, Units 1 and 2 and Sheerness, and ASTC for Sundance B Units 3 & 4. On March 7, 2016 both parties advised the Balancing Pool that they had determined that they were entitled to terminate and were terminating their respective PPAs pursuant to the change of law clause in these arrangements and its notorious *Errata* (i.e. the addition of the "or more unprofitable" language, see discussion here) and on account of the increased charges that fall on generators under the *Specified Gas Emitter Regulation*, Alta Reg 139/2007 and that was passed on to them as buyers under the terms of the PPAs. The Balancing Pool (BP) advised TCE and ASTC that it would conduct an investigation under sections 2(1)(g) and (h) of the *Balancing Pool Regulation*, Alta Reg 158/2003. These provisions contemplate that in the event of a claimed "extraordinary event" (defined to include "termination" in accordance with the terms of a PPA) the BP shall investigate the matter, participate in any dispute resolution pertaining to the matter and commence making payments as if the PPA were terminated pending resolution. The BP's response triggered a further notice from TCE and ASTC to the effect that there was now a deemed dispute between the parties under Article 19 of the PPA (the dispute resolution procedure) which ultimately led TCE and ASTC to refer the matter to arbitration in July. TCE and ASTC consider that there is both a dispute and a deemed dispute in their relations with the BP. The dispute relates to the timing or termination; the deemed dispute relates to the question of whether or not TCE and ASTC were in a position to terminate.

Given that there were a number of PPAs at issue, TCE and ASTC commenced no less than three arbitrations and appointed their three nominees: Marshall Rothstein and Ian Binnie (both former judges of the Supreme Court of Canada) and Clifton O'Brien (a former judge of the Court of Appeal of Alberta). The BP failed to make any of its appointments to the panels and accordingly TCE and ASTC were bringing this application to have the Court make the appointments. The BP

contested the application and also, in the alternative, brought a cross-application to have the arbitration stayed pending the outcome of the AG's application. The AG was granted leave to file argument in support of the BP's cross-application.

The BP's argument on the merits was effectively that the issue was premature and had not yet ripened into a dispute since it still had the matter under active consideration. The BP's argument on the stay was that the matters at issue in the AG's application go to the heart of the issues that the arbitration panels would have to determine.

Chief Justice Wittmann granted the applications of TCE and ASTC and denied the BP's cross-application. He found (with no further assessment of the record) that there was a deemed dispute. He denied the application for a stay because he simply disagreed with the BP's assertion that (at para 67) "it would be manifestly unfair to the BP to require it to participate in arbitration while the AG Application is outstanding." Chief Justice Wittmann reasoned as follows (at para 67):

> There are sufficient built-in mechanisms within the PPAs' dispute resolution process – specifically section 19.4(i) – for the question of law to be referred to the court. Section 19.4(i) of the PPAs allows either party to "refer a question of law to a court of competent jurisdiction for final and binding determination notwithstanding that it may be part of a dispute before the board of arbitrators." Very able arbitrators have been appointed. The arbitration panels may or may not decide the Errata question of law is necessary for their decision. The Errata question of law can be decided by the arbitrators if they see fit. But in any event, a party may refer the Errata question of law to this Court.

Clause 19.4(i) of the PPAs referenced in this quotation reads as follows: "either Party may refer a question of law to a court of competent jurisdiction for final and binding determination notwithstanding that it may be part of a dispute before the board or arbitrators." Counsel for the BP had indicated to Chief Justice Wittmann while his decision was under reserve that the BP would take advantage of this provision were the arbitrations to proceed. The availability of this course of action seems to have been important to the Chief Justice. However, there may be more uncertainty here. Reference to a court under cl.19.4(i) will not work an automatic stay of the arbitrations and Chief Justice Wittmann certainly seems to think that the panels may have to consider the *Errata* question. In the face of parallel proceedings, section7 of the *Arbitration Act*, RSA 2000, c. A-43 clearly favours staying the court proceeding so as to allow the arbitration to continue and it is not clear to me how this presumption will interact with cl.19.4(i) of the PPAs. Certainly the matter would be much cleaner were the arbitral proceedings to be stayed pending the outcome of the AG's application.

If the arbitrations do proceed they will proceed as three separate arbitrations with the result that we may get conflicting decisions. This has happened before with PPA arbitrations (see the discussions in *Transalta Generation Partnership v Capital Power PPA Management Inc*, 2015 ABQB 793 (CanLII) and *Enmax Energy Corporation v TransAlta Generation Partnership*, 2015 ABCA 383 (CanLII)) and points to the difficulty if not absurdity of allowing and even favouring arbitration in these sorts of circumstances (standard form contracts/statutory arrangements imbued with a public interest). Section 8(4) of the *Arbitration Act* authorizes consolidation of arbitrations but only on the application of all of the parties. So again we have inconsistent arbitral awards as well as a decision. In international law this is referred to as the problem of fragmentation (see the Fragmentation Report of the International Law Commission). It is perhaps an inevitable part of international law given its horizontal nature. The hierarchical nature of

domestic law allows us to minimise or avoid the problem; but in the case of the PPAs we have deliberately re-introduced the problem.

Given the history of PPA arbitrations, the one thing that I looked at first in the draft term sheet for the contracts for difference arrangements to be developed by the AESO under Bill 27, the *Renewable Energy Act* (see post here), was the dispute settlement clause. I am happy to report that it contemplates resolution of disputes by the courts and not by way of arbitration. Clause 33 provides as follows:

> In the event of a dispute, the parties' representatives will attempt to resolve the dispute within 10 days after a request by either party, failing which either party may commence litigation.

I hope that it survives in this or a similar form. It is in the public interest that we have consistent and authoritative interpretations of these standard form contractual arrangements.

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