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Total Claims that its ROFR Rights Were Violated in the Sale of Teck's Interest in the Fort Hills Project

By: Nigel Bankes

Case commented on: *TotalEnergies EP Canada Ltd v Suncor Energy Inc*, 2023 ABKB 59 (CanLII).

Suncor, Total, and Teck all owned interests in the Fort Hills Oilsands Project (54%, 24.4%, and 21.5%, respectively). Teck agreed to sell its interest in the project to Suncor. The sale triggered a right of first refusal (ROFR) in the relevant agreement. The sale included some of Teck's other assets (the other assets) but the sale was also subject to a condition precedent that required Teck to vote in favour of a proposed operating budget for the Project (the budget approval covenant). Suncor's proposed operating budget had been hotly contested among the three partners for a number of years. Total and Teck had repeatedly voted against Suncor's budget proposals, with the result that those budgets were not approved and operations had to revert to the last approved budget of 2021.

The agreed sale price was $1 billion. The purchase and sale agreement (PSA) between the parties allocated a nominal $5.00 for the other assets, with the balance allocated to the Fort Hills Assets.

The ROFR provisions were as follows:

> (11(1) b) Right of First Refusal: … if a Limited Partner …wishes to Transfer all or a portion of its Partnership Interest, the following provisions shall apply:
>
> (i) The Transferring Partner shall, by notice (the "ROFR Notice"), advise each other Partner of its intention to make the disposition, including in such notice a description of the Partnership Interest proposed to be disposed (such Partnership Interest together with its Corresponding Shares being herein called the "ROFR Interest"), the identity of the proposed assignee, the price or other consideration for which it is prepared to make such disposition, the proposed effective date and closing date of the transaction and any other information respecting the transaction which it reasonably believes would be material to the exercise of the other Partner's rights hereunder.
>
> (ii) If the consideration described in the ROFR Notice cannot be matched in kind and the ROFR Notice does not include the Transferring Partner's bona fide estimate of the value, in cash, of such consideration, the other Partners may, within seven (7) days of their receipt of the ROFR Notice, request the Transferring Partner to provide such estimate to them, whereupon the Transferring Partner shall provide such estimate in a timely manner and the

> election period provided herein to the other Partners shall be suspended until such estimate is received by them. If there is a Dispute as to the reasonableness of an estimate of the cash value of the consideration described in the ROFR Notice provided, the matter shall be dealt with in accordance with the Dispute Resolution Procedure and the election period provided herein to the other Partners shall be suspended until such matter is resolved by settlement or determination.
>
> (iii) Within the later of: (i) ninety (90) days from the receipt of the ROFR Notice, as modified by any suspension pursuant to Section 11.1(b)(ii); or (ii) if applicable, fifteen (15) days from any determination or settlement reached pursuant to Section 11.1(b)(ii), a Partner may give notice to the Transferring Partner that it elects to purchase the ROFR Interest described in the ROFR Notice for the applicable price (in this Article called a "Notice of Acceptance"). A Notice of Acceptance shall create a binding contractual obligation upon the Transferring Partner to sell, and upon the Partner giving a Notice of Acceptance to purchase, for the applicable price, all of the ROFR Interest included in such ROFR Notice on the terms and conditions set forth in the ROFR Notice. However, if more than one Partner gives a Notice of Acceptance, each such Partner shall purchase the ROFR Interest to which such notice of acceptance pertains in the proportion its Participating Percentage bears to the total Participating Percentages of all such accepting Partners. (*TotalEnergies EP Canada Ltd v Suncor Energy Inc*, 2023 ABKB 59 (CanLII) at para 6, emphasis added)

Total served a notice of dispute with the other parties with respect to the ROFR but also elected to proceed by way of originating notice to ask the court to declare that the ROFR notice was not a valid ROFR notice, and, without a valid notice, the intended transfer would be void. Total also sought "[i]n addition, or in the alternative" a declaration that its dispute notice served to suspend the ROFR election period "until resolution of the dispute as to the reasonableness of the estimate of the Cash Value of the consideration for the purchase of the ROFR assets." (at para 14)

The parties commissioned expert evaluations of Teck's other assets. Total's expert valued the other assets at somewhere between $17 and $76 million while Teck/Suncor's expert put the valuation at somewhere between negative $198 million and negative $391 million. At least part of the difference in valuation seems to have turned on the implications of what is referred to as an adverse tariff agreement with Keystone. The judgment does not provide further details on this matter other than to note that a "Toll Settlement Agreement [had been] reached between Suncor and Teck to ameliorate the effect of the high tariff in Teck's agreement with Keystone." (at para 27)

Teck and Suncor both took the position that resolution of the matter required a trial and that the dispute could not be resolved on the basis of an originating notice. Justice Robert Hall disagreed and resolved all issues in favour of Suncor and Teck.

Justice Hall's principal conclusions were as follows.

First, it was not necessary for him to come to any determination as to what might be the appropriate valuation of the other assets in order to resolve the issues on this application. The onus was on Total to show that the asset allocation determined by Teck/Suncor had been arrived at in bad faith:

C*hase Manhattan Bank of Canada v Sunoma Energy Corp* 2001 ABQB 142 (CanLII). The mere existence of competing valuations was not sufficient to demonstrate bad faith.

Second, the budget approval covenant was not itself part of the ROFR notice. Justice Hall seems to have reasoned that while the covenant might have affected what Suncor was prepared to pay for the Fort Hill project assets, "[t]he existence of the Budget Approval Covenant is of no consequence to TEPCA [i.e. Total], in terms of its ability to exercise its ROFR." (at para 39)

Third, Justice Hall effectively concluded that Teck and Suncor had no case to answer in terms of the allocation of asset values since clause (ii), and in particular the portion of clause (ii) that I have underlined above, was not applicable to the facts of this dispute. There are two elements to this conclusion. The first element is that all parties agreed that the present transaction was an all-cash deal; it was not an asset swap and as such the first sentence of clause (ii) had not been triggered (at para 46). As for second element, while the second sentence of clause (ii) (the underlined text above) might be read as speaking to any dispute as to the reasonableness of a cash valuation, that was not the case if this second sentence were read in the context of the entire clause (ii). On that reading the procedure described in the underlined sentence only applies to a dispute arising under the first sentence (at paras 47 – 57).

I think that this conclusion is sound, but only in light of the concession that the transaction did not fall within sentence one of clause (ii).

As a result of these conclusions, the case was ripe for determination and Justice Hall concluded that Total's application must be dismissed.

Observations

On my first read of this decision I was surprised not to see any reference to the Supreme Court's recent decisions on the duty of good faith in the implementation of contractual obligations, namely: *Bhasin v Hrynew*, 2014 SCC 71 (CanLII), [2014] 3 SCR 494 and *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 (CanLII). I am still surprised by that absence but I don't think it fatal. While a party must formulate a ROFR notice in good faith (that was the law prior to *Bhasin*), the Supreme Court's recent decisions have not reversed the onus of proof. The onus is still on the party seeking to overturn the validity of the ROFR notice to show, on the balance of probabilities, that it is flawed – in this case by bad faith. Since there were explanations for the (massive) differences in valuation, Total was unable to cross that threshold.

But was the budget approval covenant evidence of bad faith? While this clause is perhaps unusual, I don't think that the inclusion of the covenant on its own is evidence of bad faith. The covenant was disclosed as part of the PSA that was shared with Total.

Perhaps the more interesting question relates to the conclusion, apparently adopted by all parties and Justice Hall, to the effect that the first sentence of clause (ii) was not applicable. It is true that this was not an asset swap arrangement, but the first sentence does not speak in such narrow terms. Looked at more broadly, the budget approval covenant was surely part of the consideration moving from Teck to Suncor and increased the total price that Suncor was prepared to pay. While the

covenant was framed as condition precedent to any transfer, and while it was *functus* before any closing, the agreement of the parties and Justice Hall's decision denies the covenant *any* role in the question of valuation. That seems counter intuitive. If this conclusion stands up on appeal (if there is an appeal), there is some risk that it will give licence to creative drafters to artificially isolate some elements of value behind a condition precedent. But that itself (i.e., the use of a condition precedent to disguise the allocation of value) may well be evidence of bad faith in the implementation of contractual obligations.

In any event, and separate and apart from the question of good faith, I think that the language of the first sentence of clause (ii) was broad enough to permit scrutiny of this aspect of the deal. Or at the very least, the matter deserved more detailed consideration. Because if the first sentence is applicable, then Total had done enough to trigger the second sentence.

The final point relates to Total's motive in pursing this matter. Given Total's expressed interest in disposing of its own oilsands assets, it is hard to imagine that Total was really interested in purchasing Teck's share of the Fort Hills Mine at any price, even one discounted by the most optimistic valuation of Teck's other assets. One is left to conclude that Total's real beef here is that it is going to have to pay its share of what is presumably an enhanced approved operating budget. It remains to be seen whether Total has other options open to it to contest the validity of the budget decision. That was apparently and expressly not at issue before Justice Hall (see para 40).

This post may be cited as: Nigel Bankes, "Total Claims that its ROFR rights were violated in the sale of Teck's interest in the Fort Hills Project" (February 13, 2023), online: ABlawg, http://ablawg.ca/wp-content/uploads/2023/02/Blog_NB_Fort_Hills.pdf

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