

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Brooklyn Power Corporation v. Nova Scotia Power Incorporated, 2007
NSSC 374

Date: 20071224
Docket: SH 289589
Registry: Halifax

Between:

Brooklyn Power Corporation

Applicant

v.

Nova Scotia Power Incorporated

Respondent

Judge: The Honourable Justice Glen G. McDougall

Heard: December 20, 2007, in Halifax, Nova Scotia

Written Decision: December 28, 2007

Counsel: Alan V. Parish, Q.C. and Jennifer Ross, Ll.B., for the applicant
Thomas P. Donovan, Q.C. and Joseph Burke, Ll.B., for the respondent

By the Court:

[1] The applicant, Brooklyn Power Corporation (hereinafter “BPC”), and the respondent, Nova Scotia Power Incorporated (hereinafter “NSPI”), are parties to a Power Purchase Contract (hereinafter the “Contract”).

[2] Clause 13.4 of the Contract contains a provision that prevents BPC from changing its voting control without first obtaining the written consent of NSPC (now NSPI). BPC has entered into a contract to sell its shares. NSPI refuses to give its consent to the transfer of BPC’s shares to Bowater Mersey Paper Company Inc. unless certain conditions are met. BPC is not willing to comply with the NSPI conditions and seeks to have the issue resolved by way of arbitration.

[3] Clause 14 of the Contract provides a dispute resolution mechanism requiring the parties to submit to arbitration in the event of a dispute or disagreement arising under the Contract. In the event that the parties to the Contract cannot agree on the appointment of a single arbitrator, the Contract permits either party to apply to the Court to appoint an arbitrator pursuant to the *Arbitration Act*, R.S.N.S., 1989, c. 19 as amended. By virtue of section 59 of the *Commercial Arbitration Act*, S.N.S. 1999, c. 5 (hereinafter the “*Act*”), it is this statute, not the *Arbitration Act*, that actually provides the mechanism for the appointment of an arbitrator in this particular instance.

[4] Section 12 of the *Act* states:

12 (1) The court may appoint the arbitral tribunal, on the application of a party, if

(a) the arbitration agreement provides no procedure for appointment of the arbitral tribunal; or

(b) the person with power to appoint the arbitral tribunal has not done so within the time provided in the agreement or after a party has given the person seven days' notice to do so, whichever is later.

(2) There is no appeal from the appointment of the court of the arbitral tribunal.

(3) Subsections (1) and (2) apply to the appointment of individual members of arbitral tribunals.

(4) An arbitral tribunal composed of three or more arbitrators shall, and an arbitral tribunal composed of two arbitrators may, elect a chair from among the arbitrators.

[5] The *Act* also describes the duties of an arbitrator at sub-section (1) of section 13. It states:

13 (1) An arbitrator shall be independent of the parties and impartial as between the parties.

[6] Sub-section (2) of section 13 is also instructive. It states:

(2) Before accepting an appointment as an arbitrator, a person shall disclose to all parties to the arbitration any circumstances of which that person is aware **that may give rise to a reasonable apprehension of bias.** [Emphasis added]

[7] Both BPC and NSPI have advanced the names of two potential arbitrators who they feel are competent and qualified and also independent and impartial as between the parties. The curriculum vitae of each of the four nominees has been provided. A review of their respective qualifications makes it abundantly clear that each one of these four individuals has the requisite education, training and experience to fulfil the role of arbitrator taking into consideration the nature of the issue that needs to be resolved.

[8] Each counsel has advanced cogent and reasoned arguments why one or the other of his client's nominees should be favoured over those nominated by the other side.

[9] Counsel for NSPI contends that it would be best to nominate an arbitrator from outside the Greater Toronto Region to avoid potential conflicts given BPC "corporately resided in Toronto" and "its principal shareholders are major Canadian insurance / financial companies which are also headquartered there." [Thomas P. Donovan, Q.C., brief, p. 3].

[10] For this reason and also to find someone with energy related experience NSPI's counsel has suggested the names of two very prominent and highly qualified legal counsel from Western Canada. There is no question that each of these two nominees would be excellent choices. Unfortunately, neither of them is completely independent of the parties.

[11] One of them represented NSPI in a previous arbitration involving Shell. The other chaired an arbitration panel in which NSPI was a party. Given the confidentiality issues involved, NSPI's counsel is unable to disclose the details of this dispute. The nominee in disclosing his prior involvement in this arbitration described it as a gas pricing issue. It settled after the hearing but before the award. Counsel for BPC is rightly concerned that this nominee would likely have heard from NSPI witnesses some of whom might have to be called as witnesses in the impending arbitration. As such, he could possibly have developed certain preconceived notions about the company and its employees. Compounding the problem is the lack of details regarding the nature of the dispute that was arbitrated before the panel. This is not a criticism of NSPI's counsel. He is correct in not divulging the details without the consent of the other party to the dispute. However, counsel for BPC is also correct in objecting to the appointment of this nominee. BPC "is entitled to a sustained

confidence in the independence of mind of those who are to sit in judgment on him and his affairs”. [Szilard v. Szasz, [1955] S.C.R. 3, at para. 16]

[12] Both nominees of NSPI could give rise to an apprehension of bias. The first nominee because he had at one time acted as counsel for NSPI in an arbitration and the second because he previously sat on an arbitration panel involving NSPI, the exact nature of which cannot be disclosed in detail due to confidentiality commitments.

[13] BPC’s two nominees like those of NSPI’s have outstanding track records and would possess all the qualifications needed to do the job. Counsel for NSPI expresses concerns with their impartiality. One of the nominees indicated that he had worked for one of BPC’s corporate shareholders in the summer of 1948. Also, about eight years ago, he had advised the same company’s Board of Directors on a problem they were experiencing. He further advised that while lacking any specific recollection he was probably further involved with the same company and as many as three other BPC corporate shareholders over the course of his 30 plus years as a lawyer, 20 years as a Superior Court Judge in Ontario and approximately the last 10 years as an arbitrator and mediator.

[14] BPC’s second nominee identified three previous occasions in which he or members of his firm were involved not with BPC but with NSPI. One matter took place in 1997. It was a referral from another Halifax law firm not the one now representing NSPI in this matter. His firm acted for the other side.

[15] The second matter involved a sublease in which NSPI was also on the other side. Both the lawyer handling the matter and the client left the firm about four years ago.

[16] Finally, the nominee had previously been selected to chair a three-person panel in an arbitration involving NSPI. The issue was resolved before pleadings were even exchanged.

[17] In all there were only two occasions when other members of his firm acted for parties opposite NSPI. The nominee himself was not involved and since the aborted arbitration barely got off the ground it is not likely that this would give rise to an apprehension of bias.

[18] In my estimation, NSPI's concerns about the previous involvement of one of BPC's nominees with as many as four of the shareholders of BPC is reasonable. Given this individual's twenty years experience as a Superior Court Judge he would, no doubt, be able to put aside any inside knowledge or preconceived notions he might have regarding the owners of BPC. But that is not the issue. The issue is whether this might give rise to a reasonable apprehension of bias. I believe it could. As such BPC's first nominee should be rejected.

[19] Its' other nominee besides having considerable experience, albeit not as extensive as the first, is the author of a text on arbitrations. He is extremely well qualified for the role. He, personally, has had no direct involvement with either of the two parties to the arbitration. He meets the requirements of independence and impartiality required of an arbitrator under sub-section 13(1) of the *Act*. There is nothing in his background that could give rise to an apprehension of bias.

[20] The Court therefore appoints Mr. J. Brian Casey, LL.B., a partner in the Toronto office of Baker & McKenzie, Barristers and Solicitors, and a member of ADR Chambers International as arbitrator pursuant to the provisions of the Contract between BPC and NSPI and also pursuant to section 12 of the *Act*.

McDougall, J.