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Reference: 46369/163

September 21, 2009

Ontario Energy Board
P.O. Box 2319, 26th Floor
2300 Yonge Street
Toronto, Ontario
M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Re: Application for an Electricity Generation Licence
Board File Number EB-2009-0007

We are counsel for Ontario Lottery & Gaming Corporation ("**OLG**") in connection with the above-captioned application by OLG for an Electricity Generation Licence. We wish to advise that pursuant to a decision of the Ontario Superior Court of Justice issued on September 11, 2009, a copy of which is attached, Buttcon Energy Inc. is no longer the operator of the facility. OLG has retained Angus Consulting Management Limited as the new operator of the facility.

Please note that following the release of his decision, Mr. Justice Edward Belobaba advised us by E-mail that the decision contained two typographical errors. A copy of Mr. Justice Edward Belobaba's E-mail is attached.

OLG is in the process of updating the above-captioned application and will be submitting an amended application shortly.

Yours truly,

Bryson Stokes

Encl.
BAS/olx

COURT FILE NO.: CV-09-385931
DATE: 20090911

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Buttcon Energy Inc. et al and Ontario Lottery & Gaming Corporation et al

BEFORE: Justice Edward Belobaba

COUNSEL: Michael Miller and Thomas Arndt for Buttcon et al / Moving parties

R. Seumas M. Woods and Bryn Gray for OLG et al / Responding parties

HEARD: August 28 and September 3, 2009

ENDORSEMENT

Motion by Buttcon for Interim Injunctive Relief

Overview

[1] Buttcon ("B") won an RFP in 2006 to design/build, own and operate a power co-generation facility to power the "west block" expansion of the Windsor Casino. The parties refer to the facility as the Windsor Energy Centre ("WEC"). Any surplus electricity would be sold into the power grid.

[2] At the time of the RFP - when relations between them were still good - both sides reasonably expected that in due course the D/B, O and O agreements would be finalized and executed. This was not guaranteed of course, but this was the expectation. As it turned out, however, only the D/B agreement was executed. Whether because of legitimate differences or because of the sudden change in senior management at the OLG, the Ownership and Operating agreements were not completed. The WEC facility was built and B continued on as the de facto interim operator under a letter of intent. The LOI was to be incorporated into a formal Interim Operation and Maintenance Agreement but the latter agreement was also not concluded. The LOI provided that B would be paid a monthly fee to operate the WEC for eighteen months ending September 1, 2009.

[3] The LOI has now expired and the OLG, as owner, wants B to vacate the premises. The OLG has made arrangements with another experienced contractor, Angus Consulting, to operate the WEC pending further decisions. The OLG says that it has lost confidence in B and no longer wants to be involved in a business relationship.

[4] B says that it has done all that was required and that it was the OLG who breached an explicit contractual obligation to negotiate in good faith. B points to a 2007 MOU and more recently to a June, 2009 email that clearly sets out the obligation to negotiate in good faith. By failing to do so, says B, it has lost the opportunity to own and operate the WEC for a significant term that would have ranged from 18 to 38 years. The resulting damage, both financial and reputational, says B, is extensive and irreparable. B has filed a Notice of Action against OLG, its former CEO Kelly McDougald, and current Senior VP Larry Flynn, claiming millions of dollars in damages and a range of interim, interlocutory and permanent injunctions.

[5] The OLG denies that it failed to negotiate in good faith. It takes the position that the 2007 MOU was not legally binding and in any event has now expired. The promise of good faith that is set out in the June, 2009 email is not enforceable and even if enforceable has not been breached. Furthermore, says the OLG, injunctive relief is not available here because the loss of a commercial opportunity to operate the WEC for a fixed term of years, although significant and no doubt lucrative, is fully compensable in damages. In other words, damages are a completely adequate remedy.

Motion for interim relief

[6] The motion before me is limited to B's request for interim relief pending the hearing of its motion for interlocutory relief. B has filed six affidavits; OLG has filed three affidavits. B says it needs at least 30 days and would prefer 60 days to cross-examine on the affidavits. In the meantime, B asks for five interim orders:

(i) an interim declaration that the LOI that expired on September 1, 2009 be extended so that B can continue on as interim operator;

(ii) an interim injunction prohibiting the OLG from negotiating the Ownership and Operating agreements with anyone else;

(iii) an interim injunction prohibiting the OLG and any subcontractors it employs [such as Angus] from utilizing the intellectual property that is owned by B and that B has incorporated into the design and operation of the WEC;

(iv) an interim declaration that B can file an application for a generator licence; and.

(v) an interim order prohibiting Kelly McDougald, Larry Flynn and OLG employees in general from making disparaging comments about B's character or reputation.

[7] I will only deal with the first two items. The third, fourth and fifth items will be deferred and dealt with at the hearing for interlocutory relief when the evidentiary record may be more complete. The problem with the third item, the request for the IP injunction, is that it is not clear from the record that the ownership of the so-called "purple box" or related IP has been contractually retained by B – indeed the documentation before me appears to suggest otherwise. A more focused argument with more evidence is needed. The same can be said about items four and five. Strictly speaking, I am dismissing these three requests for interim

relief on the understanding that they can be re-litigated at the hearing of the motion for interlocutory relief.

Analysis

[8] I begin with the basic proposition that interim remedies are granted to preserve rights pending the hearing of the motion for interlocutory relief. Before we turn to the three-part test of *RJR-MacDonald* the first question that needs to be answered is whether B can show a right that has been breached by the OLG.

[9] The LOI has expired, and in any event, has not been breached. The MOU containing a provision promising good faith negotiation, if binding, has also expired. Neither of these agreements provide B with any basis for alleging a breach of rights. B points to several other examples in the documentation where expressions of good faith negotiation were made. But only one of these amounts to what could arguably be described as an existing contractual commitment to negotiate in good faith – the exchange of e-mails in June, 2009.

[10] The June 19, 2009 email from OLG's general counsel to B provided in part as follows:

> Finally, I confirm that BEI has agreed to immediately undertake the repairs mentioned above on the understanding that (i) OLG will continue to negotiate the terms of the interim O&M Agreement in good faith; (ii) upon signing of a mutually acceptable O&M Agreement, OLG will present BEI with a proposal for the long-term ownership and sale back to OLG of energy from the WEC; and (iii) if such proposal is unacceptable to BEI, OLG will participate in mediation with respect to the proposal described in (ii).

[11] By return email on June 20, 2009, B confirmed receipt and agreed that this e-mail captured the agreement between the parties. B's submits that these e-mails imposed a contractual obligation on the OLG to negotiate the interim O & M agreement in good faith. Had the OLG done so, then this would have led to the finalization of the all-important Ownership and Operating/Supply agreements. If there were difficulties with the latter, then the parties would have gone to mediation. In other words, because the OLG breached its obligation to negotiate the first agreement in good faith, B has lost a significant opportunity to secure the two larger agreements that would have allowed them to own and operate the WEC under a long-term arrangement.

[12] The OLG argues on a number of grounds the this "agreement" is unenforceable: that it fails for want of consideration; that it's merely an agreement to agree and therefore unenforceable; and that, even if enforceable, this is a case where damages are an adequate remedy. The OLG also submits that the interim relief being requested is tied not to this e-mail but to the LOI and thus there is a fatal "disconnect" between the breach that is being alleged and the agreement that is the focus of this motion.

[13] Putting it more directly, B is not asking for an interim or interlocutory order requiring the OLG to negotiate the remaining agreements in good faith but for an interim order extending the expired LOI. Hence, says the OLG, the "disconnect."

[14] For the purposes of this motion, and in the interest of releasing my decision as quickly as possible, I will not address in detail the various submissions made by the OLG that the e-mailed agreement in question is not enforceable. Instead, I will accept B's argument at its highest: that the June e-mails were an enforceable agreement that required the OLG to negotiate the terms of the interim O & M Agreement in good faith.[1] I will also assume that the OLG failed to do so and that this agreement has been breached. As a result, as already noted, B lost a reasonable, and perhaps excellent, chance or opportunity, to own and operate the WEC for some 18 to 38 years.

[15] But here is the key point. What B lost was not the right to own and operate the energy facility for a fixed term of years, but only the chance to do so. This chance was not contingent on a number of factors –the successful completion of the interim O & M agreement and the successful negotiation or, if necessary, mediation, of the Ownership and Operating agreements. The present value of the lost chance to finalize these agreements and make X profits over Y years of ownership and operation is not easily calculated but can be reasonably estimated and presented as a viable damages claim. I note that in the opening paragraph of its Notice of Action, B actually claims $100 million for "loss of opportunity and damage to business reputation." Evidently, B believes that this loss of opportunity is compensable.

[16] I also note that Buttcon itself claimed damages for the loss of an opportunity to negotiate a contract in *Buttcon Limited et al v Toronto Electric Commissioners*, (2003) 65 O.R. (3d) 601, [2003] O.J. No. 2796 (Ont. Sup. Ct. Jus.)

[17] Courts have considered and awarded damages for loss of an opportunity. An example is *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993) 12 O.R. (3d) 675 (C.A.). The plaintiff in that case was a land developer which had agreed with a home builder to use its best efforts to have a plan of subdivision registered by a specific date. The trial judge found that the developer had failed to use its best efforts to register the plan. The trial judge refused to award specific performance of the contract and instead awarded the builder damages based on his assessment of the chances of the plan being registered within the contractual time period had the builder used best efforts. The Court of Appeal approved the approach followed by the trial judge, but concluded that on the evidence the trial judge had erred in his assessment of the chances that the plan would have been registered within the contractual period.

[18] In my view, this is, in essence, a lost opportunity case. I am not persuaded on the material before me that damages would not be an adequate and appropriate remedy. To repeat again, the breach about which the plaintiffs complain is not a breach of any agreement to

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[1] I hasten to add that I may well have found for B in any event on these points. In my view, there was "fresh consideration" given by B to the OLG for the June 19th promise – specifically, the commitment to expedite the repairs and do them immediately. I may also have been persuaded, contrary to the decisions cited by the OLG, that an express promise to negotiate a particular agreement in good faith is at least as specific and justiciable as the promise to use best efforts, which courts have found to be enforceable. But I leave these issues for another day.

operate the Energy Centre – that agreement has expired - it is an alleged breach of the e-mail agreement to negotiate in good faith. The affidavit evidence about safety concerns that might arise from a transfer of operation to Angus, or about the loss of business opportunities in Wyoming and Bermuda if B is required to vacate the premises, focus on the need to extend the LOI and not on the irreparable harm that flows from the breach of rights that is being alleged. The latter, again, is the loss of the chance to make money and enhance one's business reputation, which as I have already concluded on the material before me is in this case a compensable, not irreparable, injury.

[19] This court will not force a business party to enter into a new agreement or extend the life of an agreement that is now expired. This is not a case where a party is alleging wrongful termination of an existing contract. This is a case where the agreement has ended under its own terms. The LOI is no more. B has no further right to remain on the premises as the interim operator. But it does have the right to bring a motion for interim relief forcing the OLG to negotiate in good faith (this was not done in this case and likely would not have succeeded) and failing that, to sue for significant damages for lost opportunity.

[20] Much of the analytical difficulty in this case stems from what counsel for the OLG calls a "disconnect" between the right that was allegedly breached and the interim orders that are now being sought. Here is how counsel for the OLG put it:

> There is a fundamental disconnect between the relief sought ... namely an interim injunction ordering the Buttcon Group to continue to operate the Energy Centre ... and the contract they are now alleging forms the basis for their claim. The email may well speak of negotiations on an Interim O&M Agreement, but it says nothing about the operation of the Energy Centre while those negotiations are underway. Logically, what the plaintiffs should be seeking is an order requiring OLG to negotiate a potential contract, something that has little or nothing to do with who operates the Energy Centre in the meantime. The fact that the relief actually claimed is based on the LOI rather than the email only reinforces this disconnect between what is sought and the argument which the plaintiffs are currently making, as does the plaintiffs' submission that the Court must preserve the status quo. The status quo is that BEI no longer has any contractual right to remain in the Energy Centre. What the plaintiffs now want is to remain in control of the Facility without any such contractual right, something that has nothing to do with the obligation they claim OLG has breached... If the alleged agreement is enforceable and was breached, the appropriate remedy is not an injunction, it is damages. The breach about which the plaintiffs now complain is not a breach of any agreement to operate the Energy Centre, it is an alleged breach of a separate alleged agreement to negotiate. That breach is unrelated to operating and maintaining the Energy Centre. To remedy the alleged breach, at most, the plaintiffs are entitled to monetary compensation which places them in the position they would have been in had the breach not occurred. That is a loss of opportunity calculation ...

[21] I agree with this characterization of the matter before me. I also agree that damages are an adequate remedy. The motion for interim relief is therefore dismissed.

[22] I should add that even if B had presented this motion as a request for an adjournment to allow for cross-examination, I would have acceded but on the condition that in the meantime the operation of the WEC be transferred back to the OLG, its rightful owner.

Disposition

[23] The motion for interim relief is dismissed.

[24] B shall vacate the premises and co-operate with the OLG and Angus to transfer operation of the WEC, smoothly and safely, within the next two and a half days and no later than midnight on Sunday September 13, 2009.

[25] If any difficulties arise in trying to meet the deadline for the safe and proper transfer of operational control, the parties may contact me on short notice by e-mail or telephone for further direction.

[26] If costs need to be addressed at this stage of the proceedings, the parties should forward their submissions to me as follows: the OLG within 15 days and B within 10 days thereafter.

[27] I am very grateful to counsel for their ongoing assistance.

Belobaba J.

DATE: September 11, 2009

STOKES, BRYSON

From: GRAY, BRYN
Sent: Friday, September 11, 2009 4:08 PM
To: STOKES, BRYSON
Cc: WOODS, SEUMAS
Subject: FW: Two typos in Buttcon v OLG released today

FYI Bryson - minor wording changes with no substantive impact on the judgment.

Bryn Gray
Dir: 416-863-3305

From: Belobaba, Mr. Justice Edward (SCJ) [mailto:Edward.Belobaba@scj-csj.ca]
Sent: Friday, September 11, 2009 4:01 PM
To: WOODS, SEUMAS; Michael Miller; GRAY, BRYN; tarndt@aylaw.com
Cc: Mercuri, Joanne (JUD)
Subject: Two typos in Buttcon v OLG released today

Please make these two changes: (1) para. 15, line 2, from "not contingent" to "contingent" and (2) para. 22, line 3, from "be transferred" to "is transferred." Thanks.

Mr. Justice Edward Belobaba
Superior Court of Justice
Court House
361 University Ave
Toronto M5G1T3

(416) 327-3315
Edward.Belobaba@scj-csj.ca

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