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Ontario Court of Appeal clarifies the duties of parties to a right of first refusal

DECEMBER 6, 2022 6 MIN READ

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The recent decision of the Court of Appeal for Ontario in *Greta Energy Inc. et al. v. Pembina Pipeline Corporation et al*., 2022 ONCA 783, clarifies the limits of duties among participating parties in the sale of an asset bound by a right of first refusal (ROFR). This decision will be of interest to any party with an interest in ROFR-burdened assets, either as a buyer, a seller or a ROFR holder.

On November 17, 2022, the Court of Appeal dismissed the plaintiffs' appeal from the earlier decision of the Ontario Superior Court, granting motions for summary judgment in favour of the defendants Pembina Pipeline Corporation (Pembina) and BluEarth Renewables Inc. (BluEarth). In that decision, the Court rejected the plaintiffs' allegations that the defendants had manipulated the allocated pricing of a package of assets in a bad faith attempt to prevent the plaintiffs from exercising their ROFRs over two of the assets. The Court went on to clarify the content of the duty of good faith that the seller of an asset owes to a ROFR holder, emphasizing a legitimate process regardless of what the ROFR holder may consider a "fair market value" price.

Background

Prior to the disputed asset sale, Veresen Energy Infrastructure Inc. (Veresen), later amalgamated into Pembina, owned majority interests in three wind farms. Two of these wind farms (GV1 and GV2) were owned through limited partnerships with the plaintiffs, Greta Energy Inc. (Greta) and Great Grand Valley 2 Limited Partnership ("GGV2"), respectively. Although the structure of Veresen's partnership with each plaintiff varied, each agreement provided a ROFR for the respective plaintiff in the event Veresen sold its interest in the asset. Veresen's third wind farm (SCELP) was also owned pursuant to a limited partnership agreement, in this case with 2177958 Ontario Inc., which had a consent right over the sale of Veresen's interest.

In August 2016, Veresen announced its intention to sell various energy assets, including Veresen's interest in the three wind farms. Veresen's preference was to sell all of these assets as a package, rather than asset-by-asset.

In January 2017, BluEarth submitted a $599 million bid for a portfolio of several of Veresen's assets, including the three wind farms, following which the parties began negotiating a purchase and sale agreement (the Sale Agreement). The terms of the Sale Agreement required BluEarth to provide a *bona fide* price allocation for each of the specific assets in the portfolio, for the purpose of providing ROFR notices to the plaintiffs.

In February 2017, BluEarth provided an initial allocation – indicating that it would be subject

to further revision. Two days later, BluEarth reallocated $5 million from SCELP to GV2. BluEarth and Veresen then signed the Sale Agreement with the final allocation prices.

Veresen proceeded to send timely ROFR notices to the plaintiffs. Greta and GGV2 subsequently sent Veresen notices exercising the ROFR on GV2 and waiving the ROFR on GV1. Shortly thereafter, they commenced an action against Veresen and BluEarth alleging that the price allocation in the Sale Agreement had been improperly "gamed" in violation of the plaintiffs' ROFRs.

In the action, the plaintiffs sought damages for breach of contract and breach of fiduciary duty against Veresen, damages for inducing breach of contract against BluEarth, and damages for conspiracy against both defendants.The plaintiffs and both defendants brought motions for summary judgment. The defendants sought dismissals of the plaintiffs' claims.

The Superior Court decision

On November 17, 2021, Justice Gilmore granted the defendants' motions for summary judgment and dismissed the plaintiffs' claims in their entirety. She held that Veresen established a legitimate process to sell its assets and therefore met its duties to the plaintiffs of good faith and honest performance. Veresen was entitled to solicit offers on a package of assets, seek a *bona fide* price allocation, and accept its best offer.

Justice Gilmore clarified that, while the holder of a ROFR must be given a clear opportunity to pay the price offered by a third party and accepted by the seller, this does not entitle them to a price that coincides with their understanding of a "fair market value". Justice Gilmore accepted Veresen's argument that there is no correct price for a ROFR and that a legitimate price is "what the vendor offers and the purchaser is willing to accept." Justice Gilmore further noted that it is not commercially unreasonable for a buyer to offer a price that pressures a ROFR holder not to exercise its rights, provided that the price for that asset is binding on the buyer. According to the terms of the Sale Agreement, even if the sale of some assets did not close, BluEarth would have been required to purchase the remaining assets at the prices it allocated to each individual asset.

Justice Gilmore rejected the plaintiffs' arguments that Veresen owed the plaintiffs an *ad hoc* fiduciary duty, finding that there was no evidence that Veresen had undertaken to forsake its own interests in favour of the plaintiffs' interests.

Justice Gilmore also rejected the plaintiffs' argument that the defendants had conspired to frustrate the plaintiffs' exercise of their ROFRs. There was no evidence in the case of facts that could have amounted to an actionable conspiracy.

Justice Gilmore further rejected the plaintiffs' claim that BluEarth induced Veresen to breach its contract. The essence of this claim was that BluEarth owed a duty of good faith to Greta. Justice Gilmore found that no such duty existed and that BluEarth was entitled to act in its own self-interest.

The Court of Appeal decision

On appeal, the plaintiffs claimed that Justice Gilmore had erred on a number of different issues, including that she held the plaintiffs to "too high a standard by requiring them to prove a specific intention to 'eviscerate' the ROFR", as per the test in *GATX Corp. v Hawker Siddeley Canada Inc.,* [1996] OJ No. 1462. In addition, the plaintiffs contended that Justice Gilmore had failed to achieve the "necessary appreciation of the evidence".

A unanimous panel of the Court of Appeal upheld Justice Gilmore's findings, stating that "it is not this court's role to revisit these findings on appeal". Specifically, the Court noted that Justice Gilmore "found no evidence that the price was deliberately manipulated to prevent the exercise of the ROFRs or harm the appellants" and that the appellants had failed to establish "any palpable and overriding error in the [Justice Gilmore's] findings". Accordingly, the appeal was dismissed.

Key takeaway

This case is a useful development in the law relating to ROFRs in the context of a sale of a package of assets. A situation in which a ROFR notice is given is a competition between the prospective purchaser and the ROFR holder, and there is no objectively "correct" or "fair market value" price for the asset. As may arise particularly in the sale of a package of assets, where a purchaser is willing to commit to a *bona fide* price that may (in the opinion of the ROFR holder) overvalue the ROFR-burdened asset, the ROFR holder will be faced with either paying the offered price or waiving the ROFR.

Mark A. Gelowitz and Sandy Hay of Osler represented Pembina/Veresen in this litigation.