

Court reaffirms application of *res judicata* and issue estoppel to commercial arbitrations

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Introduction

The recent Alberta Court of Appeal decision in *Enmax Energy Corporation v TransAlta Generation Partnership*(1) confirms that the legal principles of *res judicata* and issue estoppel can, as a matter of law, apply to commercial arbitrations. Although *Enmax Energy* involved legal questions relating to a domestic arbitration, its findings are consistent with other decisions across the Canadian provinces and with the law in England and Wales, including as set out in *1041 Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich*.(2)

Facts

TransAlta Generation Partnership was a power producer and party to a power purchase arrangement with Enmax Energy Corporation, which purchased the power produced by TransAlta for use at its own plant. The arrangement contained statutorily regulated content and its terms were approved by the Alberta Energy and Utilities Board (as it was then known). The arrangement required certain payments to be made by Enmax to TransAlta to cover specified capital costs and costs of operation. The arrangement required the use of Statistics Canada indices in order to escalate the payments to present-day values.

In 2009 a dispute arose between the parties about the application of certain of the indices by TransAlta in its billings to Enmax. The arrangement provided for "final, binding and non-appealable" arbitration of disputes and the parties referred the matter to arbitration. The tribunal issued an award determining which indices should be used for the payment calculation and how those indices were to be applied to set the price payable.

Another dispute arose between the parties in respect of how the indices were to be applied to the price payable when the content of the indices were updated by Statistics Canada in 2010. TransAlta asserted that the relevant provisions in the arrangement had already been considered in substantially similar facts during the 2009 arbitration, and that Enmax was now estopped by reason of *res judicata* and issue estoppel from re-litigating the issue.

The arrangement provided that questions of law could be referred to court. The first-instance judge concluded that "*res judicata* does not apply to private arbitrations", basing the decision on a 1981 labour relations case. However, he concluded that it would be for the tribunal to decide whether a prior arbitration decision was admissible as evidence and relevant, and what weight it should be given. TranAlta appealed.

Decision

The Alberta Court of Appeal observed that the arrangement provided that decisions of an arbitration

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tribunal on disputes in respect of the arrangement were "final, binding, and non-appealable". Similarly, the provincial Arbitration Act provides that an arbitration award binds the parties unless it is set aside or varied in specific circumstances enumerated in the act (which did not apply here). With no indication to the contrary, the court held that the parties were bound by the final award arising issued in the 2009 arbitration.

The court then reviewed the doctrine of *res judicata*, explaining that it prevents parties from re-litigating an issue that has previously been decided in litigation between them. The court noted ample authority from England and across Canada for the proposition that *res judicata* applies to arbitration proceedings. The court held that the lower court had erred in applying principles from a 1981 labour relations case, which had unique facts and was subject to a specific statutory regime, to commercial arbitrations generally.

The court considered whether the preconditions to issue estoppel could be met on the facts alleged, noting that the doctrine of issue estoppel required that:

- the same question be decided;
- in an earlier final decision; and
- between the same parties.

The court noted that issue estoppel is determined by comparing the pleadings (or initiating documents) between the two proceedings, which in this case resulted in the proper application of issue estoppel, and that the parties were estopped from re-litigating the issues decided in the 2009 arbitration.

Comment

Enmax Energy provides appellate authority in Canada that *res judicata* and issue estoppel are matters of law that may be applicable to commercial arbitrations. The decision sends a strong warning to parties with ongoing commercial relationships to avoid bringing serial litigation or arbitrations involving similar issues which may give rise to *res judicata* and issue estoppel, operating to prevent 're-arbitrating' such issues.

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Endnotes

(1) 2015 ABCA 383.

(2) [2003] UKPC 11.

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