

Case Name:

Balancing Pool v. TransAlta Corp.

Between

**Balancing Pool, Respondent, (Applicant), and
TransAlta Corporation, Appellant, (Respondent)**

[2013] A.J. No. 1278

2013 ABCA 409

566 A.R. 116

Docket: 1301-0245-AC

Registry: Calgary

Alberta Court of Appeal
Calgary, Alberta

M.S. Paperny, F.F. Slatter and B.L. Veldhuis JJ.A.

Heard: November 7, 2013.

Judgment: November 28, 2013.

(43 paras.)

Natural resources law -- Public utilities -- Regulation rationale -- Electricity -- Appeal by TransAlta from order permitting Balancing Pool to inspect its generator allowed -- Balancing Pool's powers to determine whether force majeure occurred as TransAlta claimed did not extend to powers of inspection of facility -- Legislative scheme did not expressly provide for right to inspect -- Dispute resolution process would commence if Balancing Pool not satisfied force majeure took place -- Balancing Pool Regulation, s.2.

Statutory interpretation -- Regulations and Orders in Council -- Interpretation -- Appeal by TransAlta from order permitting Balancing Pool to inspect its generator allowed -- Balancing Pool's powers to determine whether force majeure occurred as TransAlta claimed did not extend to powers of inspection of facility -- Legislative scheme did not expressly provided for right to inspect, as it did in other related regulations -- Balancing Pool Regulation, s.2.

Appeal by TransAlta from a finding the Balancing Pool was empowered to inspect the property of a force majeure claimant. TransAlta made such a claim after a generator failure in March 2013. After TransAlta tried to limit the Balancing Pool's access to its facility during the repair process, the Balancing Pool successfully applied for an order permitting it to enter TransAlta's facility to carry out any inspections its saw fit.

HELD: Appeal allowed. The Balancing Pool's duty to determine whether or not a force majeure took place did not require powers of inspection. If the Balancing Pool doubted the occurrence of such an event, a dispute resolution process would ensue, in the context of which TransAlta would bear the burden of proving a force majeure. There was no need for the Balancing Pool to inspect TransAlta's property at the investigation stage. Powers to inspect were not expressly included in the legislative scheme governing the Balancing Pool as they were in other related enactments.

Statutes, Regulations and Rules Cited:

Alberta Utilities Commission Act, SA 2007, c. A-37.2, s. 39, s. 46(1)(a), s. 46(4)

Balancing Pool Regulation, Alta. Reg. 158/2003, s. 2, s. 2(1), s. 2(1)(g), s. 2(1)(h), s. 2(1)(k)

Electric Utilities Act, SA 2003, c. E-5.1, s. 85(1)(f)

Electric Utilities Amendment Act, S.A. 1998, c. 13,

Interpretation Act, RSA 2000, c. I-8, s. 25(2)

Power Purchase Arrangements Regulation, AR 167/2003, s. 6, s. 6(1)

Appeal From:

Appeal from the Judgment by The Honourable Mr. Justice A.D. Macleod. Dated the 23rd day of August, 2013. Filed on the 26th day of September, 2013 (Docket: 1301-08498).

Counsel:

P.L. Roche, J.D. James, for the Respondent.

M.J. Donaldson, S.K. Hayes, for the Appellant.

Memorandum of Judgment

The following judgment was delivered by

THE COURT:--

Introduction

1 This appeal raises a discrete issue requiring statutory interpretation. Does the language of the *Electric Utilities Act*, SA 2003, c E-5.1 (*EUA*) and the *Balancing Pool Regulation*, Alta Reg 158/2003 (*Regulation*) empower the Balancing Pool to inspect the property of a claimant of *force majeure* as part of its investigative powers? The chambers judge concluded that to fulfil its mandate such a power must be implied into the legislation. TransAlta Corporation, the claimant, appeals.

Background

2 TransAlta is a power producer. It operates a generating plant at Keephills and is party to a power purchase arrangement (PPA) under which it sells the electricity generated by the plant to ENMAX Energy Corporation. TransAlta's generator failed. It claimed the event was extraordinary, a *force majeure*, and sought compensation from the

Balancing Pool as provided for under the relevant legislation. The Balancing Pool wished to be present on site while the repairs to the generator were being made, arguing it was entitled to do so by virtue of its statutorily mandated investigative power. TransAlta disagreed. The sole question for determination is whether this right to observe is grounded in the legislation.

3 To frame the analysis, it is necessary to consider the purpose and role of the Balancing Pool.

4 The backdrop to the creation of the Balancing Pool was the deregulation of the electricity market in Alberta in 1998: see the *Electric Utilities Amendment Act*, SA 1998 c 13. The *EUA* unbundled the generation and transmission of electricity and deregulated the generation of new power. The industry was restructured to make use of PPAs, long term contracts that entitle a purchasing party to the electrical output of a power generating unit. The PPA buyer has the right to sell the output directly to consumers or through the Power Pool of Alberta. Buyers purchase the right to participate in a PPA at auction. The *EUA* created the Balancing Pool to handle the proceeds from the auction of PPAs with the proceeds going into the Balancing Pool.

5 As noted above, TransAlta and ENMAX were parties to a PPA from the Keephills plant. When the plant produced above target, ENMAX was to pay an incentive to TransAlta. When the plant produced below target, TransAlta was to pay a penalty. The PPA contains a *force majeure* provision that relieves TransAlta of the obligation to pay penalties to ENMAX during an extraordinary event. For the duration of the *force majeure*, the monthly capacity payment payable by the buyer is reduced and the Balancing Pool pays the difference to the owner.

6 In March 2013, the Keephills plant suffered a generator fault. A formal *force majeure* notice was given on March 25, 2013 to ENMAX and the Balancing Pool.

7 When formal notice is given, the Balancing Pool has a specific statutory role to play. ENMAX is relieved from some of its obligation to pay for electricity it is not receiving. The Balancing Pool is obliged to step in to make up the difference to ensure that TransAlta does not have to bear the entire cost of the event. The Balancing Pool and ultimately consumers, bear that cost.

8 Section 2(1)(g) of the *Regulation* contemplates that when the Balancing Pool receives notice of an extraordinary event, it is to investigate the matter in order to assess and verify the occurrence of the event and the need for payments to be made. The question that arises on this appeal is the extent of the Balancing Pool's investigative powers in these circumstances. Do those powers extend to a right to enter the facilities of the generating plant and observe any repairs being undertaken?

Standard of review

9 The issue is a matter of statutory interpretation, a question of law, and is therefore reviewable on a correctness standard.

Facts

10 Formal notice of *force majeure* was given to ENMAX and the Balancing Pool on March 25, 2013. As a result of the formal notice, the Balancing Pool has been paying capacity payments, approximately \$5.6 million per month, on a without prejudice basis, as required by statute. TransAlta's initial prediction that the outage would last until mid-November, would result in payments of \$47.5 million.

11 Following notice of *force majeure*, TransAlta provided some information to the Balancing Pool and ENMAX regarding the generator. Balancing Pool representatives attended the Keephills plant to view the generator and to meet with plant personnel on March 18, and 19, 2013. At that time, only observations from outside of the generator were possible as the generator's rotor was still in place and the areas were cordoned off. However, TransAlta did provide Balancing Pool representatives with a video of the inside of the generator. A second visit occurred on May 6, 2013 but,

again, *in situ* access to the generator was prohibited, due to asbestos containment.

12 After the second visit, the Balancing Pool demanded that TransAlta give "immediate access to the plant to observe all investigation and repair procedures". TransAlta has taken the position that it has no legal obligation to provide the Balancing Pool access to the plant.

13 The Balancing Pool brought an application seeking a declaration that upon receipt of notice of an extraordinary event, the Balancing Pool has the right to conduct any investigation it deems appropriate, including the right to access and entry to the unit. The Balancing Pool also sought an order directing TransAlta to allow immediate access and entry to its facility on certain terms.

Decision below

14 By the time the matter was heard in August 2013, testing and repair work had already occurred. Nevertheless, the Balancing Pool wanted to ensure that its representative was able to observe the balance of the rewind and repair process. The adopted approach could best be described as pragmatic. The chambers judge stated:

The Balancing Pool is not attempting to carry out an open-ended investigation which might have implications of which TransAlta is not totally aware. TransAlta could have no reasonable expectation other than that the Balancing Pool would need to assure itself that all these criteria exist requiring it to make payments under the legislation. In order for there to be any meaningful investigation in accordance with the regulation, there must be cooperation on the part of the party whose operations were the subject of this alleged extraordinary event; otherwise, there cannot be an investigation. Indeed, this is acknowledged by the very fact that TransAlta has provided the Balancing Pool with much information already.

(ARD: F13/3-17)

15 The chambers judge declared that upon receipt of notice of an extraordinary event, the Balancing Pool has the right to conduct an investigation which it deems appropriate and there is a corresponding obligation on the part of TransAlta to cooperate reasonably. With respect to this particular event, he ordered that TransAlta must give reasonable notice to the Balancing Pool of when repairs are to be undertaken and allow reasonable access and entry to the facility by a representative of the Balancing Pool.

16 TransAlta says that the approach taken by the chambers judge does not accord with the statutory language of the *EUA* and the specific *Regulation*. We agree. Having regard to the wording of the *Regulation* and the statute as a whole, the legislature did not intend to include a right to inspect the claimant's property as a part of Balancing Pool's investigation powers.

Analysis

General Principles of Statutory Interpretation

17 Courts have long adopted Driedger's modern principle as the method to follow for statutory interpretation: "...the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament": E.A Driedger, *Construction of Statutes*, 2nd Ed (Butterworths: Toronto, 1983) at 87; see for example: *Re Rizzo and Rizzo Shoes Ltd*, [1998] 1 SCR 27, 154 DLR (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 SCR 559; *ATCO Gas & Pipelines Ltd v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, 263 DLR (4th) 193 at para 37.

18 In *ATCO Gas v. AEUB*, 2006 SCC 4, [2006] 1 SCR 140 (*ATCO Gas*), Bastarache J noted at para 38 that in the

area of administrative law, statutory bodies obtain their jurisdiction from two sources: (1) express grants of jurisdiction under statute, and (2) by application of the common law doctrine of jurisdiction by necessary implication. In this case, the Balancing Pool relies on both avenues of jurisdiction. The Balancing Pool argues that the statutory language granting its power to investigate an alleged *force majeure* event is sufficiently broad to include the specific power to enter TransAlta's facility to observe repairs, and, that the specific power must necessarily be implied in order to give meaning to the broader power to investigate.

19 In *ATCO Gas*, Bastarache J approached the interpretation of the relevant statutory provisions at issue by looking first at the grammatical and ordinary meaning of those provisions, then at the entire statutory context and the legislative intent, including the applicability of the doctrine of necessary implication. We adopt a similar framework here.

Express Powers: Grammatical and Ordinary Meaning

20 The starting point of the analysis must be the ordinary meanings of the provisions at the center of the dispute. Section 2(1) of the *Regulation* sets out the powers and duties of the Balancing Pool. It includes the following provisions which come into play in the case of an "extraordinary event":

2(1) The Balancing Pool must carry out the following powers and duties in accordance with the [*Electric Utilities Act*], the regulations and any arrangement:

...

- (g) on receipt of notice in respect of an extraordinary event from a party to an arrangement or otherwise,
 - (i) conduct any investigation the Balancing Pool determines appropriate, and
 - (ii) participate to the extent determined appropriate by the Balancing Pool in any dispute resolution process between parties to the arrangement;

- (h) when clause (g) applies,
 - (i) agree with the parties to the arrangement that the extraordinary event has occurred and that there is a need for a payment to be made to or by the Balancing Pool, or
 - (ii) assess and verify the occurrence of the extraordinary event and the need for any payment to be made by or to a party under the provisions of the arrangement, and participate in any dispute resolution proceedings under an arrangement pursuant to subsection (2);

21 The provisions do not expressly set out what is included in the Balancing Pool's duty to conduct an "investigation" and to "assess and verify" the occurrence of an extraordinary event; they do not expressly state that the Balancing Pool has the right to enter a claimant's facility for the purpose of conducting that investigation.

22 As the Balancing Pool points out however, the provisions are broadly worded. Section 2(1)(g), for instance, provides in general terms that the Balancing Pool may conduct any investigation that it "determines appropriate". The central question is whether the legislature intended the Balancing Pool's investigation to include a right to inspect generating facilities for the purpose of observing repairs.

23 The provisions in s. 2 of the *Regulation* are part of a larger statutory scheme which must also be considered. As the Supreme Court has recently stated, "the ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme": *ATCO Gas* at para 49. In this regard, the Supreme Court cited with approval the following comment by Pierre-Andre Côté:

As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" ...

(P.A. Côté, *The Interpretation of Legislation in Canada* (3rd ed 2000, at p. 308))

24 The statutory instruments that govern electricity markets in Alberta include the *EUA*, the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 (*AUC Act*), the *Power Purchase Arrangements Regulation*, AR 167/2003 (*PPA Regulation*), and the *Regulation* at issue here. The Balancing Pool is not the only regulatory player created by the statutory scheme. The scheme also creates the Alberta Utilities Commission (AUC) and the Market System Administrator (MSA), both established under the *AUC Act*. A review of the powers granted under these various instruments is instructive. Particularly helpful is the fact that the legislature has seen fit to include express grants of authority to access the premises of market participants under some of these statutory instruments; authority that is noticeably absent from the *Regulation*. The legislative choice to expressly set out such authority in one part of a statutory scheme and not in another gives rise to the implied exclusion rule of statutory construction: to express one thing is to exclude the other: see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (LexisNexis Canada Inc., 2008) at 243. This rule is based on the presumption that as much as possible, drafters strive for uniform and consistent expression and patterns in legislation are assumed to be intended rather than inadvertent.

25 The MSA, described as the "watchdog" of the Alberta electrical industry, has been granted very specific investigatory powers to allow it to carry out its mandate. Those powers include the express authority to: "enter and inspect the premises of an electricity market participant": *AUC Act*, s. 46(1)(a). Section 46(4) requires the "electricity market participant" or its employees to "co-operate reasonably" with the MSA.

26 The Balancing Pool points out that the mandate of the MSA is quite different from that of the Balancing Pool, and that the MSA fills more of an enforcement role. The MSA's mandate, as set out in s. 39 of the *AUC Act*, includes carrying out surveillance in respect of the supply, generation, transmission of electricity, and investigating, either on its own initiative or as a result of a complaint, contraventions of the statutory scheme or other conduct that does not support the fair, efficient and openly competitive operation of the electricity market. The Balancing Pool argues that any difference in expression between the powers granted to the MSA and those granted to the Balancing Pool can be explained by their differing mandates. The need for an express grant of the power to enter premises to carry out an investigation is greater where the investigating body is looking into potential contraventions of the statutory scheme.

27 To the extent that the distinction is valid as between the MSA and the Balancing Pool, it does not assist when one considers the different expression of powers between the *Regulation* and the *PPA Regulation*, both of which deal with powers granted to the Balancing Pool. As already noted, the *Regulation* provides that the Balancing Pool has a duty to investigate "extraordinary events" for the purpose of assessing and verifying whether payments must be made under a PPA, but there is no express power to enter onto the premises of a generating unit to carry out that investigation. In contrast, s. 6 of the *PPA Regulation* does contain an express provision, in the following terms:

6(1) Where the Balancing Pool offers a power purchase arrangement or derivatives for sale pursuant to the *Balancing Pool Regulation*, the owner of a generating unit to which a power purchase arrangement applies must provide reasonable access to the generating unit and any contractual arrangements and documents relating to the generating unit

(a) to the Balancing Pool ...

28 The Balancing Pool argues that the context of s. 6(1) of the *PPA Regulation* is different because it mandates a due diligence process in the context of a commercial sale of a PPA and has nothing to do with integrative rights in the face of *force majeure*. This distinction is without merit. Both involve the Balancing Pool performing a due diligence function on behalf of consumers of electricity. The power of inspection under s. 6(1) gives access to a generating unit by the Balancing Pool and a person who wishes to become a party to a PPA under the *EUA*. In other words, the power is granted to verify that the owner is a viable generator of power in order to protect consumer interests.

29 In the circumstances, the choice of the legislature to provide an express power to access the generating unit to the Balancing Pool in one regulation and not in the other is a strong indication that the omission from the *Regulation* was deliberate. It would be inappropriate, in our view, to imply a power to access the unit in these circumstances.

The doctrine of jurisdiction by necessary implication

30 The Balancing Pool says that the specific powers of investigation must be implied into the broad grant of authority in s. 2(1)(g) and (h). In this regard, the Balancing Pool points to s. 2(1)(k), which provides that the Balancing Pool must "carry out any other powers or duties that are necessary for the administration and operation of the Balancing Pool". The right to reasonably access facilities for the purpose of completing its investigation is, it says, necessary for the administration and operation of the Balancing Pool.

31 As further support for this argument, the Balancing Pool relies on the doctrine of jurisdiction by necessary implication, described as follows by the Supreme Court of Canada in *ATCO Gas* at para 51:

... the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature. (see *Brown*, at p. 1-16.2; *Bell Canada*, [1989] 1 S.C.R. 1722, at p 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

When the legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

32 A similar principle is set out in s. 25(2) of the *Interpretation Act*, RSA 2000, c I-8, also relied upon by the Balancing Pool:

25(2) If in an enactment power is given to a person to do or enforce the doing of any act or thing, all other powers that are necessary to enable the person to do or enforce the doing of the act or thing are deemed to be given also.

33 The first step in this analysis requires determining the objects of the legislative scheme within the context of both the *Regulation* and the *EUA* as a whole: see *Gravel v. City of St. Leonard*, [1978] 1 SCR 660 at 665-66.

34 The purpose of the *EUA* is the development and promotion of an efficient market for electricity based on fair and open competition.

35 The *EUA* outlines the powers and duties of the Balancing Pool. The most relevant one for the purpose of this

appeal is in s. 85(1)(f), which reads:

85(1) The Balancing Pool has the following duties:

- (f) to participate in regulatory, dispute resolution and other proceedings and processes if, in the opinion of the Balancing Pool, it is necessary or advisable to do so in order to protect the interests of the Balancing Pool and the value of the Balancing Pool's assets;

36 The Balancing Pool is not a true party to the PPA and only becomes involved in a limited number of circumstances, one of which arises when *force majeure* is claimed. Its role is to minimize the risk to consumers by protecting the Balancing Pool's assets.

37 The Balancing Pool submits that to fulfil its mandate a power to inspect as part of its investigative powers is critical. In other words, while the power might not be expressly granted, it is practically necessary for the accomplishment of the object intended. It submits that it must be able to satisfy itself that there has been a *force majeure* and that the repairs are being conducted appropriately and with a view to mitigating the loss. It submits that the legislature's intent to develop an efficient market for electricity on a fair and open competition demands this power.

38 Why this is so is not obvious either from the specific role the Balancing Pool plays at the investigative stage of a *force majeure* or in the context of the broader mandate in the statute. The Balancing Pool is obliged to determine whether or not there has been a *force majeure*. The claimant is obliged to satisfy the Balancing Pool of this and accordingly sends reports and other documentation to the Balancing Pool for this purpose. To the extent the Balancing Pool disagrees with the claimant, it must participate in a dispute resolution process. The burden of proof is on the claimant to establish both the "extraordinary event" and that it mitigated the loss. We see no logical basis why it is necessary to fulfil either its narrow mandate under this particular *Regulation* or its broader mandate under the legislation to include a right of inspection of property at the investigative stage. If the Balancing Pool is not satisfied that there is a *force majeure*, the *Regulation* addresses the next step. While a power to inspect at this stage, might be helpful, it cannot be implied as necessary to the process.

39 Moreover, the broader scheme suggests that this implied power is inconsistent with the legislative intent as indicated by the express inclusion of the powers in the related enactments. The legislature did not include a right to inspect property during the course of an investigation whereas it did expressly provide such a right in related enactments. The application of the doctrine here is inconsistent with the legislative intent when considering the larger statutory scheme.

40 Having regard to the limited role of the Balancing Pool at the investigative stage and the formal dispute resolution process, it is unnecessary to imply the specific power being sought.

Conclusion

41 Both parties point to various legal presumptions that they say assist in their interpretation. These include presumptions that statutes that infringe property rights must be interpreted narrowly, and presumptions about interpreting penal statutes. We do not find these presumptions of assistance in this case. Modern rules of statutory interpretation do not rely on presumptions in the face of a clear expression of intention by legislators.

42 Given that the issue is one of pure statutory interpretation, the arguments advanced as to the reasonable expectations of the parties, and that the assertion of the right to inspect is in effect pre-arbitration discovery, are of no assistance in the analysis either.

43 Thus, for the reasons expressed above, s. 2(1) of the *Regulation* does not authorize the Balancing Pool to inspect the property of a claimant at the investigative stage of the process. Any suggested corresponding obligation to cooperate

on the part of the claimant to facilitate such an inspection is not implied. The appeal is allowed and the application is dismissed.

M.S. PAPERNY J.A.
F.F. SLATTER J.A.
B.L. VELDHUIS J.A.