**CITATION:** Alectra Utilities Corporation v. Solar Power Network Inc., 2018 ONSC 4926
**COURT FILE NO.:** 18-CL-596447
**COURT FILE NO.:** 18-CL-594374
**DATE:** 20180817

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Alectra Utilities Corporation, Applicant

**AND:**

Solar Power Network Inc., Respondent

**AND RE:** Solar Power Network Inc., Applicant

**AND:**

Alectra Utilities Corporation, Respondent

**BEFORE:** Wilton-Siegel J.

**COUNSEL:** *Gavin MacKenzie* and *Brooke MacKenzie*, for Alectra Utilities Corporation

*Simon Bieber* and *Iris Graham*, for Solar Power Network Inc.

**HEARD:** May 9, 2018

## ENDORSEMENT

[1] In these proceedings, Alectra Utilities Corporation ("Alectra") seeks an order setting aside an arbitration award of the Honourable Frank Newbould dated February 23, 2018, awarding damages of $12,337,655 in favour of Solar Power Network Inc. ("SPN") (the "Award"). In a companion application, SPN seeks an order enforcing the Award.

## Factual Background

[2] SPN and a predecessor of Alectra, PowerStream Inc. ("PowerStream"), entered into an agreement dated October 25, 2015 (the "PAMA") to participate in a round of contracts to be awarded pursuant to the Government of Ontario's Fee-In Tariff Programme (the "FIT Programme").

[3] The PAMA contemplated that SPN would apply for FIT contracts in the name of Alectra and would develop and operate the sites, while Alectra would finance and own the projects. The parties were awarded 69 FIT contracts for sites governed by the PAMA.

### *Relevant Provisions of the PAMA*

[4] The following provisions of the PAMA are relevant to the issues in these proceedings.

[5] "Damages" are defined in section 1.1(15) as follows:

> "Damages" means, any and all loss, liability, cost, claim, interest, fine, penalty, assessment, damages available at law or in equity, expense, including the costs and expenses of any action, application, claim, complaint, suit, proceeding, demand, assessment, judgement, settlement or compromise relating thereto ... and diminution in value, *but shall not include any special, consequential, punitive or aggravated damages or damages for loss of profit or lost opportunity*, except to the extent an Indemnified Party is liable to a third Person for special, incidental, punitive or exemplary damages. [Emphasis added.]

[6] Section 2.3(3) provides for a right in favour of Alectra, as the Purchaser under the PAMA, to deliver a Defunct Project Notice – Purchaser (herein, a "Defunct Project Notice") and reads as follows:

> (3) if the Purchaser determines, in its sole discretion, that:
>
> (A) it does not wish to continue to develop one or more Projects,
>
> (B) that one or more Projects cannot generate an economic return sufficient for the Purchaser to achieve the Target IRR, or
>
> (C) one or more of the conditions precedent set forth in Section 2.5(1) that have been inserted for the benefit of the Purchaser are not capable of being satisfied on or before the Longstop Date,
>
> then in any such case the Purchaser may deliver written notice to the Vendor:
>
> (a) advising that the Purchaser deems each such Project(s) a Defunct Project and reasonably detailed reasons therefor; and
>
> (b) if such written notice is delivered before the Closing Date, directing the Vendor to either (at the Purchaser's option):
>
> (i) within one hundred eighty (180) days following receipt of the Defunct Project Notice – Purchaser, pay to the Purchaser the product obtained when $0.10/w DC is multiplied by the Estimated Capacity of the Project, or
>
> (ii) immediately assign and transfer to the Purchaser Compensatory Leases with a deemed value equivalent to the amount calculated pursuant to (i);

[7] A significant issue in these proceedings is the proper interpretation of section 2.3(8), which reads as follows:

(8) for greater certainty, the delivery or [sic] a Defunct Project Notice – Purchaser or Defunct Project Notice – Vendor, as the case may be, shall not be subject to dispute by the receiving Party. Each Party hereby acknowledges and agrees with the other:

(a) that this Agreement has been executed and delivered in strict reliance upon this Section 2.3(8), and that the breach of the same may result in substantial damage and irreparable harm to the delivering Party, both financial and otherwise; and

(b) to the granting of interim or permanent injunctive or other equitable relief in favour of the delivering Party, without proof of actual damages, in addition to any other remedy to which the delivering Party may be entitled.

[8] The issue of SPN's entitlement to damages for loss of profits turns in part on the operation of sections 5.2, 5.3, 5.4 and 5.8:

5.2 Each Party (an "Indemnifier") shall indemnify the other Party (together with its directors, officers, employees, Affiliates and agents, collectively, the "Indemnified Party") and defend and save the Indemnified Party fully harmless against, and will reimburse them for, any Damages arising from, in connection with or related in any manner whatsoever to:

(a) any inaccuracy or misrepresentation in any representation or warranty of the Indemnifier contained in this Agreement; and

(b) any breach of any covenant on the part of the Indemnifier contained in this Agreement.

5.3(1) Subject to Section 5.3(2), the maximum aggregate liability of either Party herein shall not exceed the total potential Consideration payable hereunder.

(2) Section 5.3(1) shall not apply to claims for indemnification made by the applicable Indemnified Party against the applicable Indemnifier in respect of:

(a) any inaccuracy or misrepresentation in any of the Fundamental Representations; or

(b) any inaccuracy or misrepresentation in any representation or warranty of the Indemnifier arising as a result of fraud or willful misconduct of the Indemnifier.

(3) Notwithstanding any other provision of this Agreement, the Indemnifier shall not be liable for any Claims by an Indemnified Party for consequential, special, incidental or punitive damages, including damages for loss of profit or lost opportunity suffered by such Indemnified Party.

5.4 If an Indemnified Party becomes aware of any act, omission or state of facts that may give rise to Damages in respect of which a right of indemnification is provided for under this Article 5, the Indemnified Party shall promptly give written notice thereof (a "Notice of Claim") to the applicable Indemnifier. Such notice shall specify whether the potential Damages arise as a result of a claim by a Person against the Indemnified Party or any of its successors (a "Third Party Claim") or whether the potential Damages do not so arise (a "Direct Claim"), and shall also specify with reasonable particularity (to the extent that the information is available):

> (a) the factual basis for the Direct Claim or the Third Party Claim, as the case may be; and
>
> (b) the amount of the potential Damages arising therefrom, if known.

5.8 With respect to a Direct Claim, the Indemnifier shall have a period of 10 Business Days from receipt of a Notice of Claim in respect thereof within which to investigate and respond to the Indemnified Party in writing to such Direct Claim. If the Indemnifier does not so respond within such period, the Indemnifier shall be deemed to have rejected such Direct Claim, in which event the Indemnified Party shall be free to pursue such remedies as may be available to it pursuant to this Agreement.

[9] The relevant arbitration provisions are sections 7.1 and 7.2, which read as follows:

7.1 Subject to and in accordance with the provisions of this Article 7, any and all differences, disputes, claims or controversies between the Vendor and the Purchaser arising out of or in any way connected with this Agreement, whether arising before or after the expiration or termination of this Agreement, and including, its negotiation, execution, delivery, enforceability, performance, breach, discharge, interpretation and construction, existence, validity and any damages resulting therefrom or the rights, privileges, duties and obligations of the parties under or in relation to this Agreement (including any dispute as to whether an issue is arbitrable) (a "Dispute") shall be resolved [sic] the manner described in this Article 7.

7.2 In the event of a Dispute, upon written notice from one party to the other parties of such Dispute (a "Dispute Notice"), the senior management personnel from all parties shall meet and diligently attempt in good faith to resolve the Dispute for a period of thirty (30) days following the receipt of such Dispute Notice. If any party refuses or fails to meet, or the Dispute is not resolved by negotiation within the applicable time period, the Dispute may be referred by any party to arbitration under the *Arbitration Act, 1991* (Ontario).

***The Arbitration***

[10] The parties commenced negotiations for PowerStream's acquisition of SPN's interest in the projects for which the parties had been awarded FIT contracts. However, the negotiations were not concluded. Instead, on September 14, 2016, Alectra delivered a notice pursuant to section 2.3(3) of the PAMA (the "Alectra Defunct Project Notice"). The Alectra Defunct Project Notice read as follows:

> You are hereby notified that PowerStream has deemed each of the Projects (other than the Failed Applications) a Defunct Project because, *inter alia*:
>
> (a) one or more of the conditions precedent set forth in Section 2.5(1) of the PAMA has not been satisfied, namely no EPC Contracts or Financing Arrangements, in form and substance satisfactory to PowerStream, acting reasonably, have been executed and delivered by the applicable counterparties thereto;
>
> (b) PowerStream has not been satisfied that the applicable Projects can generate an economic return sufficient for PowerStream to achieve the Target IRR; and
>
> (c) PowerStream has determined that it does not wish to develop the applicable Projects;

[11] On November 2, 2017, SPN delivered a Notice of Arbitration pursuant to Article 7 of the PAMA alleging "improper delivery of the Defunct Project Notice" and claiming damages of $29.5 million.

[12] On November 29, 2017, Alectra delivered a Statement of Defence and Counterclaim, which was followed by a Reply and Statement of Defence to Counterclaim of SPN dated December 5, 2017.

[13] The arbitration was heard between January 24 and February 5, 2018. As mentioned, the arbitrator released the Award on February 23, 2018 dismissing Alectra's counterclaim, granting SPN's claim, and awarding SPN damages of $12,337,655 plus interest and costs.

***The Award***

[14] After a review of the factual and contractual background, the arbitrator began his analysis with a consideration of whether the provisions of section 2.3(8) were available to a purchaser who delivered a Defunct Project Notice in bad faith. He concluded that it would not be available.

[15] In reaching this conclusion, the arbitrator applied the well-established principles of contractual interpretation to determine the intention of the parties. He concluded that a Defunct Project Notice could be challenged notwithstanding section 2.3(8) if a party acted outside of the PAMA in delivering the Notice, such as delivering a Defunct Project Notice out of time or for a ground not provided for in the PAMA. He considered that any other interpretation would be a "commercial absurdity". The arbitrator concluded that "[w]hile section 2.3(3) provides that if a

party 'in its sole discretion' determines one of the three grounds to exist, the parties cannot have intended that the discretion could be exercised in bad faith."

[16] In reaching this conclusion, the arbitrator referred to the decision of the Supreme Court in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 484 and, in particular, to Justice Cromwell's recognition therein at para. 50 of the doctrine that, where one party exercises a discretionary power under a contract, a court will imply a contractual term to exercise that discretion in good faith, at least in the circumstances where it is necessary to give business efficacy to an agreement.

[17] The arbitrator then turned to the question of whether PowerStream acted in bad faith in delivering the Alectra Defunct Project Notice. The arbitrator found that PowerStream did not act in good faith in putting forward any of the three bases upon which PowerStream asserted its entitlement to deliver the Alectra Defunct Project Notice. For present purposes, the relevant finding of the arbitrator is that PowerStream did not act in good faith in asserting the third ground for termination – that it had determined that it did not wish to develop any of the FIT projects for which the parties had been offered contracts.

[18] With respect to this ground, the arbitrator found that it was clear "that PowerStream wanted to develop the PAMA projects both before and after the Defunct Project Notice was delivered." He concluded as follows on this issue:

> While PowerScreen [sic] clearly wanted to proceed to buy-out SPN's interest in the PAMA projects, it wanted to protect itself if the terms of the buy-out could not be agreed with SPN or if the transitional board did not approve the deal, and the way to do that was to deliver the Defunct Project Notice. That however was not a proper purpose of the Defunct Project Notice. It was not open to PowerScreen to deliver the Defunct Project Notice, stating that it determined that it did not wish to develop the applicable Projects, because it wanted better terms to proceed with the acquisition of SPN's FIT 4 projects, which it clearly wanted to do.

[19] The arbitrator found that, therefore, PowerStream unlawfully terminated the PAMA.

[20] The arbitrator also briefly addressed SPN's alternative arguments. He rejected the argument that PowerStream owed an *ad hoc* fiduciary duty to SPN. However, he found that the relationship between PowerStream and SPN constituted a partnership. The arbitrator concluded that the obligation of good faith owed by one partner to the other constituted an alternative ground to the contractual duty of good faith for his finding that PowerStream terminated the PAMA.

[21] The arbitrator then addressed SPN's damages arising from PowerStream's termination of the PAMA. Before addressing the quantum, the arbitrator addressed PowerStream's position that, under the PAMA, SPN was not entitled to claim loss of profits and therefore he lacked jurisdiction to make such an award.

[22] The arbitrator first held that indemnity claims that are asserted under section 5.4 of the PAMA are subject to a specific resolution process in sections 5.4 and 5.8 that differs from the resolution process for all other disputes which are, instead, governed by the arbitration process in

Article 7. Because the language in section 7.1 does not use the defined term "Damages", the arbitrator concluded that an arbitrator would have the authority under the PAMA to award damages for loss of profits if a dispute was not subject to the specific resolution process in sections 5.4 and 5.8 but was, instead, subject to resolution under the arbitration process in Article 7.

[23] The arbitrator then held that SPN's claim was not a claim subject to resolution under sections 5.4 and 5.8 because it was not a claim for breach of a covenant by PowerStream. The following is his reasoning:

> Alectra contends that SPN's claim is for breach of a covenant by PowerScreen [sic]. I do not see that. A covenant is usually taken to mean a promise to do or refrain from doing something. That is not the basis of the claim by SPN. PowerScreen was given a right in the PAMA to deliver a Defunct Project Notice in certain circumstances and the claim of SPN is that the right was improperly exercised by PowerScreen.

[24] Accordingly, the arbitrator concluded that he had the jurisdiction under the PAMA to award damages to SPN for loss of profits. Based on an analysis of what was reasonably foreseeable, the arbitrator found that SPN's damages amounted to $12,337,655 together with pre-judgment and post-judgment interest.

**Applicable Legal Standard**

[25] Section 7.8(1) of the PAMA provides that there shall be no appeal from the determination of an arbitrator to any court. It further provides that judgment of any award rendered by an arbitrator may be entered in any court having jurisdiction thereof.

[26] SPN's application in these proceedings is made pursuant to s. 50 of the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "Act"), the relevant provisions of which are as follows:

> (1) A person who is entitled to enforcement of an award made in Ontario or elsewhere in Canada may make an application to the court to that effect. ...
>
> (3) The court shall give a judgment enforcing an award made in Ontario unless,
>
> ...
>
> (b) there is a pending appeal, application to set the award aside or application for a declaration of invalidity;
>
> (c) the award has been set aside or the arbitration is the subject of a declaration of invalidity;

[27] Alectra's application in these proceedings is brought principally pursuant to s. 46(1)3 of the Act, although it also refers to ss. 46(1)6 and 7. These provisions read as follows:

> 46 (1) On a party's application, the court may set aside an award on any of the following grounds: ...
>
> > 3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement. ...
> >
> > 6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator.
> >
> > 7. The procedures followed in the arbitration did not comply with this Act.

[28] Alectra asserts that the standard of review for the purposes of s. 46(1)3 is correctness. It relies in particular on the decisions in *Smyth v. Perth and Smiths Falls District Hospital*, 2008 ONCA 794, 92 O.R. (3d) 656 and *MJS Recycling Inc. v. Shane Homes Ltd.*, 2011 ABCA 221, 510 A.R. 292. In each case, the court held that a correctness standard applied to the question of an arbitrator's jurisdiction. I note that, while these decisions post-date the decision of the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, they also pre-date the decision of the Supreme Court in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654.

[29] SPN submits that the standard of review is reasonableness, relying on the decision of the Supreme Court in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50 and 53. In that decision, the Supreme Court held that contractual interpretation involves questions of mixed fact and law, except in circumstances of an extricable question of law, and, as such, should attract a reasonableness standard of review. In addition, at para. 106, in addressing circumstances similar to the present case, Rothstein J. stated that:

> In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (*Alberta Teachers' Association*, at para. 30).

[30] The exercise of addressing each of the jurisdictional issues raised in these proceedings requires, of necessity, the contractual interpretation of the PAMA. As such, I incline to the view that the appropriate standard of review is reasonableness based on *Sattva Capital*. I also think the view of the Supreme Court regarding jurisdictional issues expressed in *Alberta Teachers*, although not in the context of an application under legislative provisions similar to s. 46(1)3 of the Act, reinforces this conclusion.

[31] However, in the present circumstances, it is not necessary to reach a conclusion on this issue for the reason that I would reach the determinations herein regardless of whether the applicable standard is reasonableness or correctness.

**Analysis and Conclusion**

[32] Both of the issues raised in these proceedings pertain to the jurisdiction of the arbitrator. Alectra's position is that the arbitrator lacked jurisdiction: (1) to consider the impact of any bad faith exercise of PowerStream's right under section 2.3(3) of the PAMA by virtue of the provisions of section 2.3(8) thereof; and (2) to award damages for loss of profits. I will consider each in turn after first addressing two procedural submissions of SPN.

***Procedural Submissions of SPN***

[33] In reaching his conclusion on the first jurisdictional issue, the arbitrator stated that former counsel for Alectra had conceded during argument that section 2.3(8) would not be available to it if bad faith were to be established on its part. The parties dispute the extent of this concession. Alectra says that the concession was made only in the context of a finding of an *ad hoc* fiduciary duty. SPN submits that the concession was more general and that, therefore, Alectra has conceded the arbitrator's jurisdiction and cannot raise the issue on this application.

[34] With respect to Alectra's alleged concession, which pertains specifically to the first jurisdictional issue, I cannot conclude on the evidence before the Court that the former counsel for Alectra made the general concession alleged by SPN notwithstanding the language of the arbitrator in the Award. It is just as likely that the concession was limited to the context of a concurrent finding of the existence of an *ad hoc* fiduciary duty. In any event, while the arbitrator makes reference to Alectra's position, it is clear that he did not base his decision on the alleged general concession. For these reasons, I have disregarded this alleged concession in reaching the conclusions below.

[35] SPN also submits that Alectra waived its right to assert that the arbitrator lacked jurisdiction to address the issues in these proceedings by failing to raise the two jurisdictional matters in its Notice of Arbitration or before the arbitrator. I do not accept this submission for the following reasons.

[36] First, the fact that, in its Amended Statement of Defence and Counterclaim (the "Defence"), Alectra accepted the statement in paragraph 49 of SPN's Notice of Arbitration is hardly dispositive. The pleading in that paragraph does no more than state the relevant provisions of sections 7.4 and 7.6 of the PAMA.

[37] Second, SPN says that the Opening Statement of Alectra, specifically in the Overview section, fails to assert that the arbitrator lacked jurisdiction and, therefore, by inference, Alectra must be taken to have accepted that the arbitrator had jurisdiction to decide the issues enumerated therein. However, in the Overview section, Alectra specifically raises the issue that SPN's claim might be "unsustainable because the PAMA precludes it". This issue raises both jurisdictional issues even if not expressly stated in those terms.

[38] Third, in addition, paragraph 30 of the Defence expressly raises the issue of whether section 2.3(8) precluded any claim by SPN and, therefore, necessarily raises the issue of the arbitrator's jurisdiction in respect of the bad faith issue. Similarly, paragraph 24 of the Defence raises the issue of the absence of any entitlement to damages for loss of profits and, therefore, of an arbitrator's jurisdiction to make such an award.

[39] Fourth, and more generally, SPN asserts a distinction between issues of contractual interpretation and issues of jurisdiction which I consider to be a false distinction. The fact that the foregoing issues may have been raised as matters of contractual interpretation does not exclude the jurisdictional consequences that arise depending upon the interpretation found to apply. Moreover, it is clear that the arbitrator was aware of, and addressed, the jurisdictional implications of these issues of contractual interpretation.

[40] Lastly, SPN does not suggest that it was prejudiced either at the arbitration or on this application by Alectra's alleged failure to raise the two jurisdictional issues. Nor is there any evidence of any such prejudice before the Court.

***The Arbitrator's Jurisdiction In Respect Of Section 2.3(3) of the PAMA***

[41] The arbitrator interpreted the PAMA to impose a duty of good faith on PowerStream in the exercise of its right under section 2.3(3). Alectra argues that, in doing so, the arbitrator exceeded his jurisdiction, both in reaching his interpretation of that provision of the PAMA and in proceeding to hear the arbitration in reliance on such interpretation. Alectra says that the arbitrator erred in disregarding both the broad discretion in section 2.3(3) as reflected in the words "its sole discretion" and the express language of section 2.3(8) that "the delivery [of] a Defunct Project Notice – Purchaser ... shall not be subject to dispute by the receiving Party".

[42] Among other submissions, SPN argues, in reliance on the language of section 7.5(a) of the PAMA, that the arbitrator had the authority to determine any question of good faith. However, this provision only grants an arbitrator the authority to determine "any question of good faith ... arising in the disputes". It therefore only grants an arbitrator the authority to determine questions of good faith in respect of a dispute for which the arbitrator otherwise has the jurisdiction to determine the dispute, that is, in respect of a "dispute" which is arbitrable under section 7.1. Section 7.5(a) does not, and cannot, confer jurisdiction where none existed.

[43] The issue therefore turns on the interpretation of section 2.8. The arbitrator was required to interpret that provision in order to determine whether he had the jurisdiction to hear the dispute raised in SPN's Notice of Arbitration. Section 2.8 is subject to two possible interpretations. The first, and broader, interpretation is that espoused by Alectra. It argues that section 2.8 excludes any inquiry or dispute whatsoever regarding the exercise of the Purchaser's right under section 2.3(3), including any issue of bad faith. The second, and narrower, interpretation would exclude any inquiry regarding compliance with the provisions of section 2.3(3) other than bad faith or willful default. In this case, the issue is limited to the question of bad faith.

[44] The PAMA was entered into as of October 15, 2015. It post-dates the decision in *Bhasin v. Hrynew*. The parties were therefore well aware of the principles articulated in that decision to the extent they are novel, although I suggest that the particular principle in *Mitsui & Co. Canada Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187, identified by Cromwell J. in *Bhasin* and applied by the arbitrator in this case, was already well established in the common law.

[45] In these circumstances, I think that, if it had been intended that any dispute regarding an alleged bad faith exercise of a right under section 2.3(3) was to be insulated from any arbitration,

the parties would have used more explicit language to exclude such dispute. Further, if as Alectra effectively suggests, the parties intended that PowerStream had an unqualified option to terminate its involvement by delivering a Defunct Project Notice, the parties would not have narrowed that option by stipulating the three specific grounds in section 2.3(3)(A)-(C) for its exercise and requiring PowerStream to assert reliance on one or more of such grounds in delivering such Notice.

[46] Accordingly, I consider that the arbitrator's interpretation was not only reasonable but also that it was correct. On this basis, I conclude that the arbitrator had jurisdiction to hear the issue of whether PowerStream validly exercised its right under section 2.3(3) of the PAMA to deliver the Alectra Defunct Project Notice.

***The Arbitrator's Jurisdiction to Award Damages for Loss of Profits***

[47] The arbitrator concluded that the dispute raised in the Notice of Arbitration was a dispute that was arbitrable under Article 7 and that, in such an arbitration, the arbitrator had the jurisdiction to award damages for loss of profits. I agree that the dispute was arbitrable under Article 7 but I do not agree with the arbitrator's conclusion regarding his authority to award damages for loss of profits. The arbitrator's conclusion on this second issue was based on two specific findings set out below. In my view, those two findings are unreasonable with the result that the arbitrator's conclusion regarding his jurisdiction to award damages for loss of profits was also unreasonable.

Sections 5.4 and 5.8 Do Not Create a Separate Dispute Resolution Scheme

[48] The arbitrator drew a distinction between the resolution procedure for breaches described in sections 5.4 and 5.8 of the PAMA, on the one hand, and the resolution procedure for all other disputes, on the other. He concluded that disputes under these two provisions were not subject to arbitration under Article 7 and that all other disputes, including the dispute in these proceedings for the reasons discussed below, were subject to Article 7 under which an arbitrator had the authority to award damages for loss of profits. I do not think that there is any basis for such a distinction. In this regard, the following considerations are relevant.

[49] While a claim for a breach of a covenant requires compliance with the provisions of sections 5.4 and 5.8 of the PAMA, these provisions stop short of providing a separate dispute resolution procedure. To the contrary, section 5.8 provides only that "[i]f the Indemnifier does not respond within [the period provided for in section 5.8], the Indemnifier shall be deemed to have rejected such Direct Claim, in which event the Indemnified Party shall be free to pursue such remedies as may be available to it pursuant to this Agreement."

[50] It is clear that, in this context, a "response" means an acknowledgement of the Indemnifier's obligation to indemnify the Indemnified Party for its "Damages" as defined in the PAMA. Because a failure of an Indemnifier to respond is deemed to be a rejection, it necessarily follows that an actual denial or rejection of a claim by the Indemnifier also constitutes a "failure to respond" for the purposes of section 5.8. Accordingly, in the event that an Indemnifier does not acknowledge its obligation to indemnify the other party for its "Damages", the Indemnified Party "shall be free to pursue such remedies as may be available to it *pursuant to this*

*Agreement*" (emphasis added). In other words, the Indemnified Party would be free to invoke the arbitration provision in Article 7, except to the extent that it is otherwise prevented from doing so pursuant to other provisions of the PAMA which is not at issue in respect of this question.

[51] However, the arbitrator proceeded on the basis that the arbitration provisions in Article 7 of the PAMA provide for the resolution of "all other disputes", that is, disputes not governed by the procedures in sections 5.4 and 5.8. In my view, there is no basis in the very general and all-encompassing language of section 7.1 for the concept of "other disputes". Section 7.1 speaks to "any and all differences, disputes, claims or controversies between the Vendor or the Purchaser". It does not refer to "other disputes" in any manner.

[52] Given this language, if the parties had intended otherwise, they would have provided for a specific carve-out from the provisions of Article 7 for disputes described in sections 5.4 and 5.8. Further, and significantly, given that section 5.8 stops short of providing a manner of resolving a Direct Claim, it would have been necessary in Article 5 to specify both the forum in which any such dispute would be determined and the rules that would govern the resolution of the dispute.

[53] Accordingly, viewing the entirety of the PAMA, a claim described in section 5.2 of the PAMA is a subset of the total class of claims that could be addressed by an arbitrator pursuant to Article 7. The significance of the distinction between such claims and any other disputes is that claims that are described under section 5.2 will be subject to the monetary limitation in section 5.3(3). Accordingly, notwithstanding the use of the undefined term "damages" in section 7.1, an arbitrator hearing a dispute that constitutes a claim that is described in section 5.2 lacks the jurisdiction to award "consequential, incidental or punitive damages, including damages for loss of profit or loss of opportunity suffered by [the] Indemnified Party" by virtue of section 5.3(3).

[54] To be clear, I accept the arbitrator's reading of section 7.1 to the effect that use of the undefined term "damages" gives an arbitrator the jurisdiction to award damages for loss of profits in an arbitration thereunder. However, such jurisdiction exists only to the extent that such an award would not contravene any other provision of the PAMA. Section 7.1 does not provide the authority to award such profits to the extent that the parties have otherwise agreed to exclude them. In particular, it does not override the limiting provisions in section 5.3(3) in respect of claims or disputes described in section 5.2. Accordingly, while it was not specifically raised, I consider it clear that the more specific language in section 5.3(3) applies in respect of the subset of claims described by section 5.2 to the extent they are arbitrated pursuant to Article 7 notwithstanding the language of section 7.1. Put another way, section 5.3(3) is a substantive provision that the arbitrator must take into consideration in any arbitration under section 7.1.

[55] Based on the foregoing, I conclude that the arbitrator's conclusion that he had the jurisdiction under the PAMA to hear the arbitration was reasonable but his conclusion that the monetary limitation in section 5.3(3) did not limit his authority to award damages for loss of profits in the case of a dispute described in section 5.2 was unreasonable.

SPN's Claim is Based on a Breach of a Covenant

[56] Given the foregoing, the critical issue is whether SPN's claim is based on a breach of a covenant of PowerStream that falls within section 5.2(b) of the PAMA. The arbitrator held that it did not. I do not think this determination is reasonable for the reasons set out below.

[57] The arbitrator described a covenant as "a promise to do or refrain from doing something". He then described the present claim of SPN as a claim that PowerStream improperly exercised a right in its favour. On this basis, the arbitrator concluded that SPN's claim did not constitute a claim that PowerStream refrained from doing something that it was contractually obligated to do, namely to act in good faith. In my view, the arbitrator's characterization of SPN's claim in the consideration of his jurisdiction to award damages for loss of profits is contrary to his characterization of that claim in the consideration of his jurisdiction to find PowerStream liable for a breach of the PAMA.

[58] The arbitrator's finding of jurisdiction to hear the issue of the validity of PowerStream's exercise of its right under section 2.3(3) was based on the existence of a contractual duty of good faith that the arbitrator found was an implied term of the PAMA. That duty of good faith is expressed as the duty of PowerStream to act in good faith in the exercise of its right under section 2.3(3).The duty of good faith based on the existence of a partnership is similarly described. Accordingly, SPN's claim is a claim that PowerStream breached an implied contractual obligation or covenant in the PAMA to act in good faith in exercising its right under section 2.3(3). In this regard, the following considerations are relevant.

[59] With respect to the contractual duty of good faith, the doctrine to which Justice Cromwell referred, and upon which the arbitrator relied, does not create or imply a free-standing obligation existing outside of, or independently of, a contractual relationship. It implies an obligation into the relevant contract to act in good faith in the exercise of the right or to refrain from acting in bad faith in such exercise. In either case, however, the duty of good faith is constituted as a covenant within the relevant contract, in this case the PAMA.

[60] Similarly, with respect to the duty of good faith that the arbitrator held arose by virtue of the existence of a partnership, such duty cannot be a free-standing duty for two reasons. The arbitrator expressly excluded the existence of both an *ad hoc* fiduciary duty, which might exist outside the PAMA. Instead, the arbitrator found that a duty of good faith existed that was based in the obligations owed by one partner to the other in the context of a partnership relationship. However, a partnership is inherently grounded in a contractual relationship between the parties thereto. In this case, the partnership that the arbitrator found existed was established in, and governed by, the terms of the PAMA. Therefore, to the extent a duty of good faith existed as between PowerStream and SPN by virtue of the PAMA, it necessarily follows that such term must be implied as a term of the PAMA. Accordingly, a breach of such a term is also a breach of a covenant of the PAMA for the reasons described above.

[61] The arbitrator's determination on this issue therefore requires an interpretation of section 5.2(b) that restricts the operation of that provision to breaches of a covenant expressly stated in the PAMA. I do not think that this is a reasonable interpretation of that provision nor is it

actually the basis of the arbitrator's finding that section 5.2(b) was not applicable in the present circumstances.

Conclusion Regarding the Arbitrator's Jurisdiction to Award Damages for Loss of Profits

[62] Based on the two foregoing determinations, I think that it necessarily follows that the arbitrator's interpretation of the PAMA to the effect that PowerStream's actions did not constitute a breach of a covenant described by section 5.2(b) of the PAMA to which the provisions of section 5.3(3) applied was unreasonable. Under the PAMA, SPN's claim falls squarely within the provisions of section 5.2(b) as a claim based on a breach of a covenant on the part of PowerStream contained in the PAMA. While such claim is arbitrable under Article 7, as there is no separate dispute resolution process for claims asserted under sections 5.4 and 5.8, it is subject to the monetary limitations in section 5.3(3).

[63] Accordingly, I conclude that the arbitrator lacked the jurisdiction under the PAMA to award SPN damages for its loss of profits. I therefore also conclude that, in awarding such damages, the arbitrator made a decision on a matter that was beyond the scope of the PAMA for the purposes of s. 46(1)3 of the Act.

[64] I would add that I think that this conclusion is consistent with the intentions of the parties for the following reasons.

[65] The parties are both sophisticated commercial parties who had the benefit of legal counsel in the negotiation of the PAMA and related documentation. The parties agreed on broad rights in favour of each party to deliver a Defunct Project Notice or its equivalent in the case of SPN. The parties also agreed upon language in both the definition of "Damages" and in the monetary limitation set out in section 5.3(3) that states expressly that the parties have bargained for a waiver of any claim for loss of profits that might otherwise arise on the termination of the PAMA.

[66] The arbitrator's interpretation has the result that, in the case of a Defunct Project Notice, SPN is entitled to damages for loss of profits in the event of bad faith but would not be so entitled in the absence of bad faith. However, the financial impact on SPN is the same under either scenario. There is no obvious commercial principle that supports this distinction in the present circumstances.

[67] In particular, the delivery of a Defunct Project Notice does not terminate the PAMA. In such circumstances, the PAMA provides, among other things, that Alectra is obligated to assist SPN if it so chooses to the extent necessary to allow SPN to continue to develop the projects for which FIT contracts have been awarded. It also provides for the termination of the site licenses in favour of PowerStream in respect of the projects for which FIT contracts were awarded. Accordingly, Alectra could not deliver a Defunct Project Notice with a view to taking the benefit of the FIT contracts awarded to the parties for itself.

[68] Moreover, more generally, an agreement to exclude damages for loss of profits is a commercially reasonable arrangement in the present circumstances given that termination occurred prior to commencement of construction of the projects and the fact that PowerStream

was the party providing the financing for the advancement of the projects to the date of termination. A limitation on damages to sunk costs and an exclusion of damages for loss of profits is a reasonable, and not unusual, approach to damages in such circumstances.

**Conclusion**

[69] Based on the foregoing, the application of Alectra is granted, the application of SPN is denied, and the Award is set aside in respect of the award of damages to SPN. Given that Alectra was therefore substantively the successful party in these proceedings, it is awarded costs in the agreed amount of $20,000.

**Recent Development**

[70] After the hearing of these proceedings, counsel for Alectra advised the Court of certain developments pertaining to the cancellation of the FIT contracts at issue by the Province of Ontario. In a conference call with counsel, I advised the parties that I had arrived at the decision in this Endorsement prior to receiving such correspondence and that, in any event, I do not consider these developments to be relevant to the issues in these proceedings. I wish to confirm those statements in this Endorsement.

Wilton-Siegel J.

**Date:** August 17, 2018