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Citation: Mangrove Partners (Re), 2019 ONSEC 18
Date: 2019-05-30
File No. 2019-13

IN THE MATTER OF
MANGROVE PARTNERS

- and -

IN THE MATTER OF
TRANSALTA CORPORATION

REASONS FOR DECISION
(Sections 104 and 127 of the *Securities Act*, RSO 1990, c S.5)

Hearing: April 15, 2019

Decision: May 30, 2019

Panel:	D. Grant Vingoe	Vice-Chair and Chair of the Panel
Appearances:	Michael Barrack R. Seumas M. Woods Darren J. Reed	For Mangrove Partners
	Kent E. Thomson Derek Ricci Tristram Mallett	For TransAlta Corporation
	Katrina Gustafson Naizam Kanji Jason Koskela Hanchu Chen	For Staff of the Ontario Securities Commission
	Timothy Robson Tracy Clark Danielle Mayhew	For Staff of the Alberta Securities Commission

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REASONS FOR DECISION

I. OVERVIEW

[1] These reasons relate to a decision to decline to exercise the jurisdiction of the Ontario Securities Commission (the **OSC** or the **Commission**) to hear an application based upon an insufficient nexus between Ontario and the issues in the application where another commission is engaged in the matter.

II. BACKGROUND

[2] In this proceeding, Mangrove Partners (**Mangrove**) applies for a joint hearing before the Alberta Securities Commission (the **ASC**) and the OSC in relation to the 2019 annual and special meeting (the **2019 ASM**) of shareholders of TransAlta Corporation (**TransAlta**) scheduled for April 26, 2019. At the center of Mangrove's complaints is a proposed $750 million transaction (the **Brookfield Transaction**) between TransAlta and Brookfield BRP Holdings (Canada) Inc. (**Brookfield**) pursuant to the terms of an Investment Agreement dated March 22, 2019 (the **Investment Agreement**). Mangrove seeks an order cease trading any TransAlta securities issued pursuant to the Investment Agreement, pending the satisfaction of various conditions.

[3] The applicant, Mangrove, is a Cayman Islands company managed from New York. Mangrove states that it provides investment management services to investment vehicles intended for sophisticated individual and institutional investors. It describes its business as focusing on identifying underfollowed investments and inefficient markets and reviewing the quality of companies' board stewardship.

[4] The respondent, TransAlta, is incorporated under the *Canada Business Corporations Act* (**CBCA**).[1] TransAlta states that it owns and operates hydro, wind, solar, natural gas and coal-fired facilities throughout Canada. Its base of operations and head and registered office are in Calgary, Alberta. TransAlta's common shares trade on the Toronto Stock Exchange (**TSX**) and the New York Stock Exchange. It is a reporting issuer in each Canadian province and its principal regulator is the ASC.

[5] On January 18, 2019, Mangrove disclosed that it was the beneficial owner of 9.4% of TransAlta's common shares. After this disclosure, Mangrove and TransAlta met on several occasions with representatives of TransAlta and other shareholders to discuss TransAlta's strategy.

[6] At a meeting on March 7, 2019, Mangrove informed TransAlta that it had entered into a cooperation agreement with another investor and associated entities. Mangrove indicated at this meeting that TransAlta would benefit from adding new directors to be suggested by Mangrove and the other investor, with which Mangrove was now a joint actor. On March 15, 2019, Mangrove filed a Schedule 13D with the U.S. Securities and Exchange Commission disclosing that, together, Mangrove and its joint actor owned 28,534,296 common shares of TransAlta, or 10% of the issued and outstanding common shares. Mangrove's discussions with TransAlta continued until Friday, March 22, 2019.

[1] RSC 1985, c C-44.

[7] On March 25, 2019, TransAlta announced that it had entered into the Investment Agreement, which involved Brookfield's purchase of two classes of TransAlta securities for an aggregate amount of $750 million. Brookfield's investment included two tranches of TransAlta securities, $350 million in the form of non-voting exchangeable debentures and $400 million in the form of redeemable preferred shares, each bearing a 7% coupon or preferred dividend and each exchangeable, after December 31, 2024, under specified circumstances into equity of a new entity that would hold TransAlta's hydro generation assets located in Alberta (the **Hydro Assets**). The Hydro Assets at the time the Investment Agreement was entered into represented approximately 90% of TransAlta's total hydroelectric power production capacity. This exchange would occur based upon a 13x multiple of the average annual earnings formula specified for these assets. Through this exchange and a top-up option based upon the same multiple, subject to specified conditions, Brookfield could eventually own as much as 49% of the equity in the entity holding the Hydro Assets.

[8] The Investment Agreement also required Brookfield to buy additional TransAlta common shares so that it would own at least 9%, and potentially up to 19.9%, of the common shares, but not more, subject to certain conditions. Brookfield agreed to comprehensively vote its shares in accordance with the recommendations of TransAlta's board of directors (the **Board**) until 36 months after the initial closing of the $350 million tranche of securities.

[9] Under these arrangements, Brookfield received a 1% structuring fee and was entitled to receive an additional 2% fee on the closing of the first tranche of its investment. Brookfield would also be entitled to two nominees on the Board and to participate in a newly formed operating committee, with Brookfield being compensated for its employees' participation in this committee.

[10] The Investment Agreement also included a provision that would ultimately allow for the termination of the Investment Agreement if two non-management nominees were elected to the Board at the 2019 ASM, although TransAlta would be required to pay the 2% fee notwithstanding that Brookfield would not be making its investment. This provision permitting termination would allow TransAlta to consider other alternatives to the Brookfield Transaction, including the status quo. In that sense, this feature could be viewed as allowing the election of dissident directors as a referendum on TransAlta's decision to proceed with the Brookfield Transaction.

[11] On March 25, 2019, TransAlta also announced the support of its largest shareholder, RBC Global Asset Management Inc. (**RBC GAM**), for the management slate of directors. RBC GAM held 12.4% of TransAlta's outstanding common shares. The support agreement signed with RBC GAM was irrevocable until the conclusion of the 2019 ASM.

[12] On April 1, 2019, TransAlta filed its Management Information Circular for the 2019 ASM. On the same day, Mangrove delivered a complaint letter to the ASC and the OSC (the **Commissions**) about the process by which TransAlta entered into the Investment Agreement and the features of the Agreement that it claimed entrenched existing management. On April 4, 2019, following Mangrove's review of the circular, Mangrove delivered a second complaint letter on April 4, 2019, which raised additional questions and issues outlined below.

[13] On April 5, 2019, TransAlta delivered a letter to the Commissions responding to the allegations made in Mangrove's complaint letters.

III. PROCEDURAL HISTORY

A. Mangrove's Application and Request for a Joint Hearing

[14] On April 8, 2019, Mangrove filed an Application seeking relief from both the ASC and the OSC. In its Application, Mangrove requested a joint hearing before the Commissions. Mangrove submitted that each of the ASC and the OSC had jurisdiction over the matters at issue in the Application, given, among other things, where TransAlta is based, its listing on the TSX, the Ontario residency of RBC GAM, and the places where the conduct at issue occurred. I accepted the Application as constituting a motion, in part, for a joint hearing pursuant to Rule 30(2) of the *OSC Rules of Procedure and Forms* (the **Rules**),[2] but instructed the registrar to advise the parties that such a motion requires supporting materials based on the OSC's criteria for joint hearings.

[15] The substantive relief requested in Mangrove's Application included an order cease trading any TransAlta securities issued pursuant to the Investment Agreement, pending the satisfaction of various conditions. Those requested conditions included the following:

a. a vote of disinterested TransAlta shareholders on the Investment Agreement;

b. TransAlta's disclosure of specific details about the Investment Agreement, the RBC GAM support agreement, any other offers to acquire an interest in the Hydro Assets, and the Board's conduct surrounding those events, along with an analysis of the implications of the requested disclosures for the purposes of the shareholder vote;

c. a postponement of the 2019 ASM to no earlier than June 1, 2019;

d. the issuance of a new circular for the 2019 ASM; and

e. TransAlta's release of RBC GAM and any other shareholders who may have provided voting commitments from all voting commitments for the 2019 ASM.

[16] Mangrove's Application also sought an interim order, if necessary, requiring TransAlta to postpone the 2019 ASM.

B. TransAlta Raises a Jurisdictional Issue and Mangrove Amends its Application

[17] TransAlta delivered a preliminary response to the Application by way of a letter to both Commissions, dated April 10, 2019. TransAlta's letter stated that the principal focus of the letter was the narrow jurisdictional question of whether Mangrove met the statutory requirements to bring its Application at all. TransAlta also reserved its right to argue that, in the absence of any uniquely Ontario issues raised by Mangrove's complaints, there was no reason for the OSC to be involved in the dispute and no justification for a joint hearing to be conducted.

[2] (2017) 40 OSCB 8988, r 30(2).

TransAlta stated an intention to contest the need for the OSC's involvement if a hearing was ultimately convened.

[18] The next day, April 11, 2019, Mangrove filed an Amended Application with both Commissions. Mangrove's amendments requested the following additional relief from the OSC, alone:

a. an order cease trading TransAlta's issuance of any series 1 first preferred shares pursuant to the Investment Agreement, until TransAlta had either

i. obtained a receipt for a final prospectus for the issuance of those preferred shares, or

ii. obtained minority approval for the issuance of those preferred shares in accordance with Rule 56-501 – *Restricted Shares*; and

b. an order that the prospectus exemptions under Ontario securities law do not apply to the securities issued, or to be issued, pursuant to the Investment Agreement in Ontario.

C. First Attendance Before the OSC

[19] On April 12, 2019, the parties appeared before the OSC for a first attendance to address scheduling issues relating to the Application. Following submissions, the OSC issued an Order scheduling a hearing to consider two preliminary motions:

a. TransAlta's anticipated motion (filed on April 13, 2019) contending that the OSC should decline to hear the Application because there was an insufficient nexus between Ontario and the issues raised in the Application (the **Nexus Motion**); and

b. Mangrove's motion seeking a joint hearing before the ASC and the OSC (the **Joint Hearing Motion**, and together with the Nexus Motion, the **Motions**).

[20] Considering the short period of time before the 2019 ASM, the parties agreed to an abridged schedule for the exchange of written motion materials over the following weekend. This allowed for the Motions to be argued before the OSC on the next business day, April 15, 2019.

[21] It was also agreed that ASC Staff would be heard on the Motions in addition to OSC Staff, which participated as of right.

D. Other Motions Not Heard by the OSC

[22] The Order resulting from the first attendance before the OSC also addressed the scheduling of two other preliminary motions:

a. a motion by Mangrove seeking the production of documents from TransAlta; and

b. any motion for intervenor status by non-parties seeking to participate in the proceeding.

[23] Intervenor motions were ordered to be heard in writing. In the event that the OSC decided to exercise its jurisdiction to hear the Application, a further joint hearing with the ASC was scheduled to commence shortly thereafter to address Mangrove's motion for the production of documents and the scheduling of the next steps in the proceeding.

[24] Although written materials were delivered for both the motion for production and a motion for intervenor status, neither motion was ultimately heard or determined by the OSC due to the results of the Motions.

IV. ISSUES

[25] On April 15, 2019, I heard submissions on the Motions, which raised the following issues:

a. whether the OSC should exercise its jurisdiction to hear Mangrove's Application; and

b. if the OSC exercises its jurisdiction, whether the Application should proceed as a joint hearing of both the ASC and the OSC.

[26] After reading and hearing submissions from Mangrove, TransAlta, OSC Staff and ASC Staff, I issued an Order declining to exercise the OSC's jurisdiction to hear Mangrove's Application. These are the reasons for that Order.

V. ANALYSIS

A. Introduction

[27] Neither of the Motions questions whether the OSC possesses jurisdiction to hear the Application. The OSC's jurisdiction under s. 127(1) of the Ontario *Securities Act* (the **Act**)[3] over a transaction where it is in the public interest to intervene was recognized by all parties. In this case, the foundation for the OSC's jurisdiction is clear, given that TransAlta's securities are listed on the TSX, it is a reporting issuer in Ontario and it has Ontario investors.

[28] Instead, the various factors concerning the presence of a nexus with Ontario are relevant to a consideration of whether there are compelling circumstances warranting the exercise of that jurisdiction, concurrently with the ASC, bearing in mind the principle of promoting harmonization and co-ordination of securities regulation regimes, as set out in s. 2.1, paragraph 5, of the Act.

[29] As noted above, the parties in this case were clear that the preliminary issue was whether the OSC should participate in a joint hearing with the ASC, provided that the ASC Panel also decided to participate in a joint hearing with the OSC. I therefore did not consider the issue of whether the OSC should hold a separate hearing on any of the elements of the Application. My decision to decline to hear the Application, and these reasons for that decision, should not be read as suggesting that in this case there was an insufficient nexus for the OSC to hear the Application outside of the context of a joint hearing. It was an important consideration that the ASC was prepared to hear preliminary matters arising from the Application in short order following the OSC's hearing of the Motions.

B. The Law on Joint Hearings

[30] In Ontario, the OSC can order a joint hearing pursuant to s. 3.5(2) of the Act and Rule 30 of the Rules. Rule 30 provides as follows:

> **(1) Joint hearings with other securities administrators**
> A panel may hold a hearing in or outside Ontario jointly with

[3] RSO 1990, c S.5.

another body that is authorized by statute or regulate trading in securities, commodities or derivatives.

(2) Request for a joint hearing A request for a joint hearing shall be made by motion using the form in Appendix B and shall state the reasons for the request.

[31] This rule regarding joint hearings came into effect in its present form on October 31, 2017. The prior rule referred to such hearings as "simultaneous hearings" and enumerated factors to be considered including whether: (1) the issues and arguments are substantially the same in the jurisdictions; (2) there are urgent business reasons; and (3) the issue is novel, such that the public interest favours a simultaneous hearing to promote consistency across jurisdictions.[4]

[32] The factors relevant to holding a joint hearing must also be evaluated in light of the principle set out in s. 2.1 of the Act that "[t]he integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes."

[33] Contrary to TransAlta's submissions at the hearing, a "joint" or "simultaneous" hearing does not involve multiple commissions pooling their panels such that they issue a joint decision or pool their decision-making authority. Each panel is separately constituted and renders its own decision after a hearing that is made more efficient since the panels hear the evidence and submissions at the same time within the scope of the joint hearing. In the interest of promoting co-ordination, but not requiring a common decision, panels in joint hearings typically announce at the outset of such a hearing that they will deliberate separately and, if useful, may also hold common deliberations among the panels. However, each panel remains independent and will reach its own decision. The Act does not allow for a delegation of decision-making authority such that a "joint decision" of the commissions can be assured. This was true before and remains true after the adoption of Rule 30. In OSC proceedings there is no difference in decision-making processes between a "simultaneous hearing" and a "joint hearing" and these terms are interchangeable.

C. No Compelling Circumstances Warranting the Exercise of Jurisdiction

[34] The sole respondent in the Application, TransAlta, is a CBCA corporation with its head office in Calgary. The ASC has a long regulatory history as the principal regulator of TransAlta. The Hydro Assets, which are at the core of this dispute, are located in Alberta. Personnel of TransAlta based in Calgary were central participants in the negotiation of the Investment Agreement and in discussions with Mangrove. The ASC possesses very similar public interest jurisdiction to that possessed by the OSC under s. 127(1) of the Act.[5]

[35] The factors pointing to an assertion of Ontario jurisdiction (*e.g.* TSX listing, Ontario reporting issuer status and Ontario investors) would be present in many cases and if adopted as a basis for an expansive assertion of involvement in a joint hearing would result in the OSC being involved in many disputes involving

[4] *Ontario Securities Commission Rules of Procedure* (2014), 37 OSCB 4168, r 13.1.
[5] *Securities Act*, RSA 2000, c S-4, s 198.

TSX-listed companies where an applicant seeks to utilize s. 127(1). The OSC's involvement in that range of disputes, in addition to other commissions with stronger connections, would be unnecessary and unduly costly.

[36] Additional factors, including the presence in Ontario of certain non-respondents: Brookfield, as the other party to the Investment Agreement, and RBC GAM, as a significant shareholder supporting both the Brookfield Transaction and the management Board slate, are not as compelling as the Alberta factors. The Ontario connections are routine enough that their use to tip the balance in favour of an assertion of jurisdiction where another commission with stronger connections is engaged would likely require the same result in many potential cases involving TSX-listed companies.

[37] To the extent that issues arise under OSC Rule 56-501 – *Restricted Shares* in connection with Mangrove's Amended Application, the underlying public policy concerns can potentially be addressed under the ASC's public interest jurisdiction, through a complaint to the OSC Director as specified in Part 4 of Rule 56-501,[6] or through a much more limited application to the OSC regarding those issues. Mangrove also raised the possibility of a potential hearing and review of a decision of the TSX related to the issuance of a new class of stock, which was said to arise from the voting agreement included with the Investment Agreement. However, no such decision and application for a hearing and review was before me, and there was no compelling reason to abridge the process by circumventing the usual requirement that the TSX first have an opportunity to make a decision. It is therefore premature to consider this possibility.

[38] In deciding not to assert jurisdiction by way of a joint hearing, the OSC stated the following in *AbitibiBowater Inc (Resolute Forest Products) (Re)*:[7]

> In our view, a simultaneous hearing should only be held in compelling circumstances. Such hearings may not advance the harmonization and co-ordination of securities regulatory regimes and they may create added costs and complexity for the parties …. The issues raised by the Application are not so fundamentally important to Ontario investors or Ontario capital markets, or so notorious, as to outweigh the considerations referred to [elsewhere in our reasons]. Our decision with respect to this question may have been different if the applicable Ontario securities laws were not substantially the same as the securities laws of the Province of Québec or if Ontario investors or capital markets were being affected in a fundamentally different or unique way.

[39] The Panel in *AbitibiBowater* founded its decision on the strictures provided by the Supreme Court in *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*[8] regarding the use of the

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[6] OSC Staff stated at the Hearing that the Rule 56-501 element of the Application was being treated as a complaint to the OSC Director that would involve a separate process to address this issue.

[7] 2012 ONSEC 12, (2012) 35 OSCB 3645 at para 56 [***AbitibiBowater***].

[8] 2001 SCC 37 [***Asbestos***].

Commission's discretion to appropriately limit the application of its public interest authority, stating:[9]

> The Supreme Court of Canada recognized in *Asbestos* (SCC) that there are circumstances in which it is appropriate for the Commission not to assert its jurisdiction where other Canadian securities regulators are engaged in a matter or where a regulatory proceeding in another Canadian jurisdiction will be held. In this respect, the Court stated that:
>
> > [T]he integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes. A transaction that is contrary to the policy of the Ontario *Securities Act* may be acceptable under another regulatory regime. Thus, the OSC's insistence on a more clear and direct connection with Ontario in this case reflects a sound and responsible approach to long-arm regulation and the potential for conflict amongst the different regulatory regimes that govern the capital markets in the global economy.

[40] Joint hearings may not promote harmonization and co-ordination since the possibility exists for conflicting decisions with equal legal authority such that the jurisdiction with the less compelling regulatory interest could nonetheless issue a decision that may affect a transaction in a decisive manner. This possibility can materialize in our present system of provincial and territorial securities regulation, whether through joint or separate hearings. However, the OSC should not thrust itself into a dispute that is being addressed by another Canadian securities commission unless the connecting factors with Ontario, or differences in rules or public policy, provide non-routine, compelling reasons for doing so.

[41] A decision to hold a joint hearing must be mutual, and the OSC was asked to make a decision regarding a joint hearing before the ASC indicated whether it was willing to participate in one. ASC Staff's written submissions did not take a position regarding whether the OSC should assert jurisdiction in these circumstances, but submitted, as did the parties, that if the OSC did assert jurisdiction, it should do so by way of a joint hearing rather than in a separate hearing.

[42] OSC Staff submitted, in essence, that the involvement of the Commission in addition to the principal regulator is the exception to the general practice and requires compelling circumstances. OSC Staff agreed with TransAlta that the nexus with Ontario did not support the OSC's involvement where the ASC was otherwise prepared to address the matter, at least on a preliminary basis, as it was in this case later the same morning that we heard arguments on the Motions.

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[9] *AbitibiBowater* at para 52, citing *Asbestos* at para 62.

[43] There are two recent examples of joint hearings in which Ontario has participated. Both can readily be distinguished from the Application.

[44] In *Hecla Mining Company (Re)*,[10] the securities commissions of Ontario and British Columbia held a joint hearing to establish a framework for assessing whether a particular private placement adopted in the context of a hostile bid was an inappropriate defensive tactic under the guidance in National Policy 62-202 – *Take-Over Bids – Defensive Tactics*. This was the first case to consider the application of the policy on defensive tactics to a private placement in the context of a take-over bid following major and uniform changes in the rules governing take-over bids in Canada, including the introduction of a minimum 50% tender requirement. All parties consented to a joint hearing, unlike the current case.

[45] In *Aurora Cannabis Inc (Re)*,[11] the securities commissions of Ontario and Saskatchewan, following a joint hearing, cease-traded a shareholder rights plan that was adopted following the implementation of a bid made under the new take-over bid requirements. The securities commissions were required to address the issue of the role of tactical shareholder rights plans after the rebalancing that occurred through those amendments, as well as novel issues related to whether persons were joint actors for purposes of the applicable rules and other specific interpretative issues related to the rules governing take-over bids. Again, all parties consented to a joint hearing.

[46] These cases followed many years without joint hearings involving the OSC. Joint hearings have remained the exception to the general approach where matters are addressed by the principal regulator. In *Hecla* and *Aurora*, joint hearings were appropriate to consider novel issues arising from very recent pan-Canadian take-over bid reforms and with the consent of all parties. These are not the only circumstances that will justify an exercise of jurisdiction through a joint hearing concurrently with another regulator, but an applicant will bear the burden of demonstrating compelling circumstances. In this case, no such compelling factors exist requiring Ontario, in addition to Alberta, to consider whether to exercise its public interest jurisdiction in connection with the Investment Agreement and the 2019 ASM.

VI. STANDING OF A PRIVATE PARTY UNDER SECTION 127 (1) OF THE ACT

[47] Only OSC Staff can proceed under s. 127(1) as of right. Private parties require standing. The determination of whether to exercise jurisdiction on nexus grounds and joint hearing factors is analytically separate from the issue of whether the applicant as a private party should be granted leave to commence a proceeding under s. 127(1). The issue of standing by a private party would, in this case, only be dealt with at a joint hearing with the ASC considering that, as Mangrove's counsel put it, none of the parties were asserting that "separate, parallel and duplicate of hearings concerning Mangrove's section 127 application should take place both in Alberta and here" and TransAlta's position that separate hearings should not be held. In other words, both Mangrove and TransAlta, as well as ASC Staff and OSC Staff, conceded that the ASC should proceed alone if the OSC declined to exercise its jurisdiction to participate. Since

[10] 2016 ONSEC 31, (2016) 39 OSCB 8926 [***Hecla***].
[11] 2018 ONSEC 10, (2018) 41 OSCB 2325 [***Aurora***].

the OSC is not asserting jurisdiction to hear the Application based on the nexus and joint hearing analysis, I do not need to address Mangrove's standing as a private party to bring this Application.

VII. CONCLUSION

[48] For the foregoing reasons, I declined to exercise the OSC's jurisdiction to hear Mangrove's Application.

[49] I also adopt the same caveats set out in the concluding paragraph of the *AbitibiBowater* reasons:[12]

> Our decision not to assert jurisdiction in these circumstances does not, of course, restrict our discretion to address in the future any additional or other issues that may arise out of this matter that may affect Ontario investors or Ontario capital markets or engage our public interest jurisdiction. Any such assertion of our jurisdiction would, however, be subject to the principles and considerations discussed in these reasons.

Dated at Toronto this 30th day of May, 2019.

"*D. Grant Vingoe*"

D. Grant Vingoe

[12] *AbitibiBowater* at para 60.