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ALBERTA COURT OF APPEAL

Enmax Corporation v. Independent System Operator (Alberta Electric System Operator), 2024 ABCA 83
Electricity - Appeal

Application

This was an appeal of a chambers judge decision (“Decision”) dismissing the originating application of ENMAX Corporation, ENMAX Energy Corporation and Calgary Energy Centre No. 2 Inc. (collectively, “Appellants” of “ENMAX”) for an order directing the respondent, the Alberta Electric System Operator (“AESO”), to pay the Appellants a credit of \$8,343,537.15 owing to two partnerships, which are dissolved.

Decision

The Alberta Court of Appeal (“ABCA”) applied the correctness standard and held that the chambers judge’s conclusion that *res judicata* applied in this matter was correct and that no appellate intervention was warranted. The ABCA dismissed the appeal.

Pertinent Issues

ENMAX argued that the chambers judge erred in reaching the Decision by: misstating and misapplying the legal test for *res judicata*; misinterpreting or failing to properly analyze the Alberta Utilities Commission (“AUC”) Decision 790-D06-2017 (“Module C Decision”); ignoring and failing to give effect to the Assignment, Assumption and Novation Agreement between Calpine (as assignor),

Calgary Energy Centre No. 1 Inc (as assignee) and the AESO (“AA&N Agreement”); and ignoring or failing to properly consider the AUC Decision 27048-D01-2022 (“Guidance Decision”).

In 2005, the AESO implemented a line loss rule for calculating transmission loss factors (“2005 Line Loss Rule”). On April 16, 2014 in Decision 2014-110, the AUC determined that the 2005 Line Loss Rule was unlawful, which meant that the AUC had to retroactively re-calculate those transmission line loss charges and credits that had been unlawfully imposed and that it had to administer adjusted line loss charges and credits.

In 2007, the interests of Calpine Energy Services Canada Partnership and Calpine Power LP (collectively, “Calpine”) in supply transmission service agreements relative to the Calgary Energy Centre No. 2 Inc. (the “Facility”) were formally transferred to the Calgary Energy Centre No. 1 Inc. via the AA&N Agreement. In December 2007, Calpine was dissolved. In 2008, ENMAX acquired the shares of Calgary Energy Centre Holdings Inc., which, in turn, held all the shares of the Facility. The Facility was the successor by amalgamation of the Calgary Energy Centre No. 1 Inc.

In the Module C Decision, the AUC held that invoices for final rates to replace interim rates must be issued to the original cost causers and cost savers, not only because they were competitors of each other, but because they were the parties unjustly and unduly advantaged or disadvantaged by the unlawful interim rates.

**ABCA re ENMAX v. AESO**

In furtherance of the Module C Decision, the AESO calculated a total refund of \$11,349,353.36 owing in relation to the Facility. Of that total, it refunded \$3,055,816.20 to ENMAX as the party that paid invoices from the AESO in respect of the Facility for the period January 1 to July 31, 2007, in accordance with an agreement between ENMAX and Calpine. The AESO attempted to refund the balance to Calpine as the holder of the supply transmission service agreements between February 1 to December 31, 2006, but Calpine had been dissolved.

ENMAX proceeded with a Court of King's Bench application for an order directing the AESO to pay the full amount of the credit to ENMAX or a declaration that ENMAX is the lawful recipient and assignee of the credit under agreements with the previous owner of the Facility. ENMAX's application was dismissed on the grounds of *res judicata* (issue estoppel). The chambers judge found that the AUC's Module C Decision had determined that only the "original cost causers and cost savers" were entitled

to receive the credit amount, which decision was final since it was not appealed.

To the extent the chambers judge found that, between the AESO and ENMAX, the Module C Decision determined the legal effect of the AA&N Agreement on which ENMAX relied to claim the full credit amount, the ABCA agreed. Regardless of any rights ENMAX may have or have had against the previous owner of the Facility in respect of the credit in question, it did not have a right to claim the credit directly from the AESO. While the ABCA recognized that the combination of the Module C Decision and Calpine's dissolution in 2007 created a practical problem for ENMAX, this was not a basis on which to refuse to apply the doctrine of *res judicata*. Doing so would undermine the essence of the Module C Decision. The ABCA upheld the decision of the chambers judge concluding that the Module C Decision clearly determined the rights and obligations between the AESO, on the one hand, and assignor and assignees of the AA&N Agreement, on the other.