Challenge of regulatory decision was res judicata

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In *ENMAX Corporation v Independent System Operator* (Alberta Electric System Operator), 2024 ABCA 83 (ENMAX v AESO), the Alberta Court of Appeal (ABCA) confirmed that the principle of *res judicata* bars parties from bringing an application seeking relief with respect to a regulatory decision that was not appealed and involved the same parties.

Background

In 2005, the Alberta Electric System Operator (AESO) implemented a rule for calculating and recovering transmission line losses from market participants (the 2005 Line Loss Rule). AESO and Calpine Energy Services Canada Partnership and Calpine Power LP (collectively, Calpine) were parties to two supply transmission service agreements (the STS Agreements) in respect of a power generation asset. During the period that the 2005 Line Loss Rule was in effect, Calpine assigned its interest in the STS Agreements to Calgary Energy Centre No. 1 Inc. by way of an Assignment, Assumption, and Novation Agreement (the AA&N Agreement).

Calpine was dissolved in December 2007. In 2008, ENMAX Corporation and ENMAX Energy Corporation (collectively, ENMAX) acquired the shares of Calgary Energy Centre Holdings Inc, which was the holder of the power generation asset that was the subject of the STS Agreements.

After extensive litigation before the AUC and the ABCA, the 2005 Line Loss Rule was found to be in contravention of the *Electric Utilities Act* and the *Transmission Regulation*. This meant that the AUC had to retroactively recalculate the transmission line losses and credits that had been unlawfully imposed and send revised invoices to the affected parties.[1]

The AUC held a proceeding to determine who the AESO should send the revised invoices to (the Module C Decision). The AUC concluded that to satisfy its statutory obligation, the invoices should be issued to the *original* cost causers and savers (in this case, Calpine) because they were the parties advantaged or disadvantaged by the unlawful interim rates.[2] At the time of the Module C Decision, Calpine had been dissolved and ENMAX advised it did not intend to revive Calpine to recover the credit

amounts. ENMAX also did not appeal the AUC's decision to issue invoices to the original cost causers and savers exclusively.

ABKB decision

On December 13, 2021, AESO sought clarification from the AUC on how to proceed with issuing refunds where the payee of the original invoices was a dissolved corporation. Two days later, ENMAX filed an originating application in the Alberta Court of King's Bench (ABKB) seeking an order directing AESO to pay the proceeds to ENMAX, or alternatively, for a declaration that ENMAX is the lawful recipient and assignee of the approximately $11M credit.

As part of the application, ENMAX challenged the AUC's jurisdiction to provide guidance to AESO because it was being asked to determine a private contractual matter over which it had no authority, and which was otherwise the subject of an application before the ABKB.

The ABKB applications judge dismissed ENMAX's application on the ground of *res judicata*, finding that the tripartite test from *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, had been met. The applications judge found that the Module C Decision had determined that only the original cost causers and savers were entitled to receive the credit, that decision was final and had not been appealed by ENMAX, and the chambers hearing involved the same parties that were subject to the Module C Decision.[3]

ABCA decision

On appeal, the ABCA dismissed ENMAX's appeal, upholding the ABKB's decision. The Court of Appeal agreed with the applications judge's conclusion that the Module C Decision had appropriately resolved which parties were entitled to the credit, and the AA&N Agreement between Calpine and ENMAX did not affect this outcome.[4] In other words, whatever rights ENMAX may have or may have had against Calpine in respect of the credit stemming from the 2005 Line Loss Rule did not extend to AESO.[5]

The Module C Decision clearly determined that ENMAX did not have a right to claim the credit directly from AESO. While the Module C Decision and Calpine's dissolution created a practical problem for ENMAX as they were unable to claim the credit which would have been paid to Calpine, this was not a basis on which the Court would refuse to apply the doctrine of *res judicata*.[6]

Takeaways

The decision in *ENMAX v AESO* confirms that parties that disagree with a regulatory decision must follow statutory mechanisms of appeal, as a failure to do so may prevent them from relitigating the same issue in the future. For more information on the *ENMAX v AESO* decision or assistance in appealing a regulatory decision, please reach out to one of the key contacts below.

Footnotes

[1] *ENMAX Corporation v Independent System Operator (Alberta Electric System Operator)*, 2024 ABCA 83 at para 4 [*ENMAX v AESO*].

[2] *ENMAX v AESO* at para 12.

[3] *ENMAX v AESO* at para 20.

[4] *ENMAX v AESO* at paras 27-30.

[5] *ENMAX v AESO* at para 31.

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