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Leave to Appeal Denied on the AUC's Jurisdiction to Create an Effective Remedy in the Line-Loss Saga

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Case Commented On: *Capital Power Corporation v Alberta Utilities Commission*, 2018 ABCA 437 (CanLII)

There are previous posts on ABlawg dealing with the line-loss issue including a post on the Alberta Utilities Commission's (AUC) 2015 decision at issue in this case. In that decision, the AUC concluded that it had jurisdiction to order an effective remedy to deal with the fact that the Alberta Electric System Operator's (AESO) line-loss rule in effect between 2005 and 2012 was unlawful and invalid, and that it could do so even though the result would be retrospective rate making. Some generators would receive rebates and some would receive invoices for past transmission losses.

Some generators sought permission to appeal, but those applications were put on hold until the AUC had issued its decision on the actual remedies that it would order (see *Capital Power Corporation v Alberta (Utilities Commission)*, 2015 ABCA 197 (CanLII)). The AUC made that decision in December 2017 (and for comment on ABlawg see here). That decision triggered the revival of the permission to appeal the threshold jurisdictional decision as well as a number of permission to appeal applications of the remedies decision itself.

Both sets of applications were heard in May 2018. In this decision rendered on December 20, 2018, Justice Brian O'Ferrall concluded that the applications in respect of the threshold jurisdictional decision (at para 78) "do not raise questions of law or jurisdiction which require an appeal to the Court of Appeal." In fact (at para 77), "the argument that there is a jurisdictional question as to whether the Commission had the power to order a retroactive tariff-based remedy does not accord with the jurisprudence or the *Electric Utilities Act* [SA 2003, c E-5.1], no matter what version is relied upon" - a conclusion which seems to contradict Justice O'Ferrall's observation earlier in his reasons to the effect (at para 40) that:

> Clearly, the Commission in this case was deciding a jurisdictional question. Having found the 2006 ISO line loss rule to be unlawful, it was called upon to decide what, if any, remedy or relief it could grant. However, the fact that the Commission was engaged in deciding a jurisdictional question does not automatically mean that its decision raises a question or doubt about the Commission's jurisdiction.

For what it is worth, I was and am completely convinced by the AUC's decision that it could create an effective remedy without engaging in impermissible decision-making. For me this was principally because the AESO rule-making power that was engaged in this case was effectively a

complaint based system (described by Justice O'Ferrall as a disallowance scheme). Justice O'Ferrall is similarly convinced, and takes some 78 paragraphs and 21 pages of text to make that case. But I think the real questions are these: (1) what test (or tests) was Justice O'Ferrall applying when he decided not to grant leave; and (2) has he, in the course of these lengthy reasons that he clearly pondered for nearly seven months, arrogated to himself the question or questions that should have gone to a panel of three? Long reserves and long decisions that are short on criteria (see Justice O'Ferrall's evident scepticism of criteria at paras 30 – 38) inevitably raise the suspicion that the single judge in chambers is deciding that which the legislature decided should go to the court.

My colleagues Shun Fluker and Drew Yewchuk have raised this question before in the context of permission to appeal issues, and it is perhaps time that a panel of three members of the Court of Appeal offered some clearer guidance.
Meanwhile, Justice O'Ferrall still has "the permissions to appeal" the remedies decision under reserve, but with the promise that it (at para 80) "should be out in due course".

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