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BCUC File 57732

AQR file no. 18-095
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British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

attention: Commission Secretary

filed online

Dear Mesdames/Sirs:

Re: FortisBC Energy Inc. British Columbia Utilities Commission (the Commission) Decision and Order G-161-15
Application for Removal of the Restriction on the Location of Data Servers Providing Service to FEI (the 2015 Data Order)

1. This is MoveUP's Final Argument on Jurisdiction, submitted pursuant to Exhibit A-6 in this proceeding. We will be succinct, and to that end we say that the fact that we are not addressing the many arguments made by FEI in Exhibit B-3 should not be taken as agreement with their propositions.

Section 44 of the Utilities Commission Act and the Employee Data

2. Fundamentally, this is an exercise in statutory interpretation and it calls for a careful reading of the actual text of the provision. Section 44 is not complex. It reads as follows:

> **Duty to keep records**
>
> **44** (1) A public utility must have in British Columbia an office in which it must keep all accounts and records required by the commission to be kept in British Columbia.
>
> (2) A public utility must not remove or permit to be removed from British Columbia an account or record required to be kept under subsection (1), except on conditions specified by the commission.

3. There is now no dispute that the employee records, maintained and used for purposes including providing evidence to the Commission in matters relevant to rate-

setting and financial reporting, are by nature within the general category of "all accounts and records required by the commission" for the purposes of s. 44(1). FEI concedes at paragraph 7 in Exhibit B-3 that "There is no question that the Commission's rate setting mandate requires the Commission to have access to information on pension costs."

4. From that it follows that these records are subject to s. 44(2). The utility must not remove them from the province, or permit their removal, "except on conditions specified by the commission." The capacity of the utility to site the data outside of BC only arises if the Commission has made an order which specifies conditions upon which that may be done.

5. That has occurred, in the form of Order G-161-15.

Scope of Commission Jurisdiction and Duty to Make Decisions in Accordance with the Law

6. The UCA places no explicit restrictions upon what kinds of conditions the Commission may specify, or based on what interests or considerations. The legislature has left it to the best judgment of the Commission to determine what the conditions will be.

7. FEI now "agrees that section 44, although old, should be read in light of modern circumstances" [Ex B-3 p. 2]. In a sense, this concession drives the outcome of this dispute.

8. Fortis suggests that the absence of an explicit reference to privacy interests in s. 44(2) means that "the Legislature has consciously avoided" bringing those considerations within the ambit of the provision. The fallacy of that argument is shown by noting that the legislature has not stipulated *any* considerations for the Commission to apply to its orders under this section of the Act.

9. The Legislature certainly did not stipulate that one permissible consideration is to "maintain transparency", which FEI says is the only permissible one, and the entire ambit of s. 44(2). Indeed, it is difficult to see how the physical location of the data is primarily a *transparency* issue, especially in our era of electronically-retrievable records. But be that as it may, there is no basis to argue that transparency is the *only* permissible consideration.

10. It is beyond dispute that whatever conditions the Commission may attach to an order under s. 44(2), at a bare minimum those conditions must comply with the law. That is to say, the Commission should not permit the unlawful management of s. 44(1) records.

11. The Commission is an expert tribunal with broad discretion to make determinations within its sphere of expertise. However, that does not mean that it may not be called upon to make determinations on issues that lie outside of its special expertise.

12. FEI seeks to distinguish between the specialized jurisdiction of the Commission (as partially articulated in the *ATCO* decision) and the law of judicial review of tribunals like the BCUC (as elaborated in *Dunsmuir* and the line of authority flowing from it). With respect, this distinction is fallacious.

13. To apply a simple metaphor, the scope of tribunal jurisdiction is overseen by the courts, like a referee overseeing a player. The rule-book applied by the referee determines what is in-bounds and what is out-of-bounds in the player's actions on the field. *Dunsmuir* tells us how the tribunal jurisdictional rule-book operates. *ATCO* provides an analysis of the "regulatory compact" at the core of specialized regulatory principle, but is not the full story. *Dunsmuir* tells us how to understand the scope of jurisdiction of administrative tribunals like the Commission, with respect to matters within and also beyond their special expertise. The law of judicial review is the law of jurisdiction.

14. *Dunsmuir* tells us that there are essentially two kinds of issues, two kinds of decisions, that arise in tribunals' performance of their statutory functions. One is matters lying within their special expertise. With respect to those matters, the courts recognize broad latitude, and deference to a tribunal's judgment. So long as decisions are within the range of reason, they will not be disturbed.

15. However, tribunals are also called upon to make decisions that concern issues beyond that sphere of special expertise. *Dunsmuir* tells us that the courts will give less deference and more readily step in if they apprehend that such a decision is not *correct*. But as we argued in Exhibit C1-2, that does not at all mean that the tribunal is somehow restricted in its scope of jurisdiction to its specialized sphere.

16. The general, axiomatic requirement that statutory decisions be made in accordance with the law demands that the Commission and other tribunals apply other, or general legal principles. This duty extends throughout the range of Canadian law, up to and including its pinnacle in our constitution and *Charter of Rights and Freedoms* . . . let alone provincial privacy protection laws.

17. None of these observations are novel.

18. Accordingly, where the Commission makes a s. 44(2) order related to the extra-provincial retention of s. 44(1) records, it must take care that the end result is lawful.

19. Commissions, boards and tribunals make decisions all the time that touch on privacy issues, whether or not privacy law is part of their own sphere of special expertise. As we have pointed out, nothing in the *Personal Protection Privacy Act* reserves its content to the exclusive domain of the Information and Privacy Commissioner. It is part of the general law of the province.

20. We respectfully submit that the Commission has the jurisdiction to enter into the inquiry – to ask itself whether privacy protection measures should attach to these regulatory records stored beyond the borders of British Columbia. The proper outcome of that inquiry is a separate issue from the question of jurisdiction. That is where the debate properly resides.

The History of Order G-161-15

21. We will not re-state what is already set out in Exhibit C1-2, other than to emphasize that MoveUP does not rely only, or even principally, on the principle of "attornment" in relation to the history of Order G-161-15.

22. More emphatically and decisively, FEI not only *consented* to the Commission's *jurisdiction to make that order*, not only *consented to the actual order*, but it *asked the Commission to make it*. In doing so, it inferentially asserted at the time that protection of privacy interests was "in bounds" jurisdictionally for the purposes of s. 44(2).

23. Fortis said, "You can and should make this order pursuant to section 44 and we ask you to do it." It now wants to resile from its own position, on the very same wording of the very same order.

24. On reflection, this is not really an instance of *attornment*, in the sense of conferring jurisdiction on the Commission to hear and determine a matter by consent. Rather, it is a matter of *acknowledgment of a particular understanding and interpretation* of the scope of section 44(2).

25. There is no question that the Commission has the jurisdiction, indeed apparently the duty, to attach conditions upon a s. 44(2) order. That subject matter lies explicitly within the Commission's authority. The only question is *what kinds of factors* may it apply when exercising that statutory authority, in order to ensure that, in the end result, the course of action it authorizes the utility to follow is lawful. The legislature has left that question to the Commission to determine.

All of which is respectfully submitted.

Yours truly,

ALLEVATO QUAIL & ROY

per **Jim Quail**
Barrister & Solicitor