Court of Appeal File No. CA32708

COURT OF APPEAL

IN THE MATTER OF THE *UTILIITIES COMMISSION ACT*, RSBC 1996, c.473

AND IN THE MATTER OF JANUARY 27, 2005, AND FEBRUARY 17, 2005, ORDERS OF THE BRITISH COLUMBIA UTILITIES COMMISSION

BETWEEN:

GSX CONCERNED CITIZENS COALITION,
BRITISH COLUMBIA SUSTAINABLE ENERGY ASSOCIATION,
SOCIETY PROMOTING ENVIRONMENTAL CONSERVATION

Appellants

AND:

BRITISH COLUMBIA UTILITIES COMMISSION
BRITISH COLUMBIA HYDRO AND POWER AUTHORITY
DUKE POINT POWER LIMITED PARTNERSHIP

Respondents

MEMORANDUM OF ARGUMENT OF GSXCCC, et al
APPLICATION TO VARY AN ORDER OF A JUSTICE

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Part I: Statement of facts

1. This is an application pursuant to s.9(6) of the *Court of Appeal Act* for an order (a) discharging the April 12, 2005, decision of a Justice, and (b) granting to the Applicants GSXCCC, *et al* leave to appeal a decision of the Respondent Utilities Commission.
2. GSXCCC, *et al* adopt the statement of facts set out in their Memorandum of Argument in the Leave Application (at Tab 5).

Part II: Points in issue

3. This application raises two main issues:
   (1) whether the learned Justice erred in dismissing the application for leave to appeal by rejecting the 'reasonable apprehension of bias' ground on its merits, rather than examining whether the appeal has some prospect of success; and
   (2) whether the Justice misconceived the facts pertinent to the reasonable apprehension of bias argument.

Part III: Argument

Standard of review on application to discharge or vary

4. The test on an application for review of a decision of a single justice is whether he or she erred in law or in principle, or misconceived the facts. *Croll v. Brown*, [2003] B.C.J. No. 378.

Decision on the merits, rather than on 'some prospect of success'

5. The Justice discussed the standard of review applicable to the application for leave to appeal (paras.23-28[1]) – but did not apply it in his analysis of the reasonable apprehension of bias argument (paras.51-56).
6. Instead, after setting out the principles applicable to reasonable apprehension of bias in para.53 (with which GSXCCC, *et al* take no issue), the Justice explicitly rejected the reasonable apprehension of bias argument *on its merits*, in para.54. He states:

> [54] I agree with the respondents that a full consideration of the context in which the remarks were made does not demonstrate bias or anything that would lead a reasonable observer, reasonably informed, to conclude that the Committee "would not decide fairly."

[1] References are to paragraph numbers in the Reasons for Judgment, Tab 2, unless noted otherwise.

7. This is an unqualified application of the test for the *merits* of a reasonable apprehension of bias argument. The Justice simply did not apply, and did not purport to apply, *any* leave application test in rejecting the reasonable apprehension of bias argument.
8. Moreover, the wording of the Justice's conclusion tracks the reasoning of the Commission itself, which acknowledged that the Chair's impugned remarks in isolation *do* support a concern of reasonable apprehension of bias. The Commission states:

> The Commission Panel acknowledges that if certain isolated portions of the transcript are taken alone and not put in their context, there might be a concern as to whether the Commission Panel members had closed their minds to persuasion before all the evidence and argument had been heard. [Page 5, Appendix B to BCUC Letter No. L-10-05, Leoni Affidavit, Exhibit W]

9. Thus, the *merits* of the reasonable apprehension of bias argument ultimately turn on whether the plain meaning of the impugned remarks was *contradicted* by the context, as the Commission and the Justice concluded, or *exacerbated* by the context, as GSXCCC, *et al* contend. In either case, the impugned remarks establish some prospect of success of the reasonable apprehension of bias argument.
10. Another example where the Justice made a decision on the merits, rather than on 'some prospect of success,' concerns the fact that the matters discussed by the Commission and BC Hydro in the *in camera* session were not confidential even though the only rationale for the *in camera* session was for the Commission to discuss confidential matters. The Justice states:

> [52] While it is open to the applicants to make that argument, the counter-argument has greater validity. …

11. As is discussed below, GSXCCC, *et al* maintain that the Justice's "counter-argument" is based on a misconception of the facts. The point here, however, is that the Justice acknowledged that the '*in camera* discussion of non-confidential matters' argument is "open to the applicants to make," but then rejected the argument on the merits.
12. To be clear, it is not necessary for this court to resolve whether the Justice's statement that "it is open to the applicants to make that argument" constitutes, in and of itself, a finding that would meet the proper test for leave to appeal. This is one of a number of points that together support the reasonable apprehension of bias argument and establish that the argument has some prospect of success.

Misconception of the facts

13. In para.54 (quoted in full above), the Justice dismisses the reasonable apprehension of bias argument by stating that "a full consideration of the context in which the remarks were made does not demonstrate bias…" GSXCCC, *et al* respectfully submit that the Justice's "full consideration of the context in which the remarks were made" is vitiated by at least four fundamental errors of fact.

1. Misconception that the *in camera* session was about the winning bid

14. First, the Justice misconceives the essential topic of the *in camera* session. The Justice implies, incorrectly, that purpose of the *in camera* session was merely to improve the winning bid for the benefit of the customers. The Justice states:

> [16] The transcript shows that the chairman was concerned that the best "portfolio" within the winning bid should proceed. It appeared to him that this was not what was occurring. … [para.16, underline added]

15. The underlined phrase is completely incorrect. The project that the Chair concluded was "the best 'portfolio'" (Duke Point with duct firing) was *not* the winning bid, nor was it "within the winning bid." It was an *unsuccessful* bid, made by the same company that made the winning bid (Duke Point without duct firing).

16. As a result of this misconception, the Justice *reversed* the import of the dialogue between the Commission Chair and the Hydro witness. The Justice states:

> [17] … The transcript of the *in camera* hearing, at page 1741, contains a discussion as to whether duct firing was better customer value than "Pristine without duct firing." The following was then said by the chair:
>
> > This may be an area where I can add some value to customers. And I thought your answer would be just what it is, that but for the rules of the CFT [calls for tender], you would have chosen Pristine [Duke Point] with duct firing. It may be – I don't know enough about this yet, but it may be that the coincidence that both portfolios are the same proponent is helpful in moving us to the outcome that's in the customers' best interest.
> >
> > So you know now what I want to try to do. I need your help in telling me how I can get there.
>
> A Hydro witness then testified, agreeing with the chair that steps should be investigated to be sure that the Agreement was the one that was in the "customers best interests." … [para.17, underline added]

17. In fact, the Chair and the witness were *not* agreeing that "steps should be investigated to be sure that the Agreement was the one that was in the "customers best interests." On the contrary, the

Chair and the witness were agreeing with each other that the Agreement – for the Duke Point *without* duct firing project – was *not* in the customers' best interests. They were agreeing that the Duke Point *with* duct firing project – for which Hydro did not have an electricity purchase agreement – *was* in the customers' best interests.

18. In that dialogue, the Chair was articulating to Hydro the Chair's desire to "mov[e] us to the outcome that is in the customers best interests," namely, an electricity purchase agreement (between Hydro and Duke Point) for the Duke Point *with* duct firing project. That was the outcome about which the Chair said "So you know now what I want to try to do. I need your help in telling me how I can get there."
19. This point is crucial; the Chair was expressing a desire to move toward a certain outcome, before having heard all of the evidence. He had prejudged the outcome. There is no hint of conditionality as to the Chair's view that the particular outcome is the desirable one. Tellingly, the Chair's only expressed uncertainty was "how to get there". (Parenthetically, the Chair's words "It may be – I don't know enough about this yet" relate to whether or not "the coincidence that both portfolios are the same proponent is helpful" in achieving the desired outcome – not to whether the outcome is desirable. This is confirmed by the next sentence: "<u>So you know now what I want to try to do</u>.")

2. Error in concluding that "This was not the principal issue before the Commission."

20. The Justice's second fundamental error is his conclusion that "This was not the principal issue before the Commission." [para.52] This conclusion is important because it is supposed to support the claim that even though the Chair acknowledged that he desired a particular outcome, and wanted Hydro's help in achieving it in the absence of the intervenors, there is no reasonable apprehension of bias because the outcome he wanted to achieve was somehow unimportant.
21. First, using the plain meaning of the term "principal issue," the notion that the Chair's stated view as to the desired outcome of the proceeding is not the principal issue before the Commission is absurd. How could the Chair's desired outcome of the proceeding be anything other than the principal issue before the Commission?
22. Second, the Justice's statement that "This was not the principal issue before the Commission" is contradicted by the statement in his very next sentence that the Chair "wanted to be sure that the Commission secured <u>the most cost-effective result</u>." That is precisely "the principal issue," i.e., "Is Tier 2, Tier 1 [the EPA], or No Award <u>the most cost-effective option</u>…?"

23. Third, the Justice misconceived the evidence that during the *in camera* session the Hydro witness testified that the EPA was *not the most cost-effective option* for meeting Vancouver Island's electricity needs. This testimony *flatly contradicted* the core of Hydro's opening position, i.e., that the EPA should be accepted as filed because it *is* the most cost-effective option. In para.51, the Justice mischaracterized the GSXCCC, *et al* argument on this point, saying:

> (This refers to the explanation that I summarized in the previous section regarding Tier 1 v. tier 1.) [para.51, brackets in the original, underline added]

24. That is incorrect. The GSXCCC, *et al* argument referred to the fact that after the *in camera* session the Chair dismissed a motion to recall the Hydro witness for cross-examination regarding her *in camera* evidence that the Duke Point without duct firing project (i.e., the EPA) was *not the most cost-effective option for meeting electricity needs on Vancouver Island*. The request deliberately tracked the exact wording of "the principal issue" as the Commission had previously defined it. The Chair dismissed the motion, not because the witness had not addressed "the principal issue" during the *in camera* session, but, on the contrary, because "the apparent purpose was no more than to once again confirm what she had already stated." [Page 7, Appendix B to BCUC Letter No. L-10-05, Leoni Affidavit, Exhibit W, underline added] This confirms that significant testimony regarding "the principal issue" was received during the *in camera* session, contrary to the Justice's conclusion that the *in camera* session did not involve "the principal issue."

25. Lastly on this point, the conclusion which the Justice apparently drew from his incorrect finding that the *in camera* session was not about "the principal issue" – i.e., that the contents of the *in camera* session were unimportant, thereby negativing the reasonable apprehension of bias argument – is directly contradicted by the Chair's statement "this is an important issue" [T8:1755[2]] in support of his desire to have *additional in camera* sessions.

3. Misconceiving the significance of the non-confidentiality of the *in camera* session

26. The Justice's third fundamental error is in characterizing the (incorrect) assertion that "This was not the principal issue before the Commission" as "the counter-argument" to the fact that most of the content of the *in camera* session was not confidential.

[2] The transcript of the *in camera* session, "T8," is at Tab "S" of the Leoni #1 Affidavit.

27. The fact that most of the content of the *in camera* session was not confidential goes to the second of the two prongs of the reasonable apprehension of bias argument, i.e., "that the Panel has indicated that it favours BC Hydro by providing special advantages not provided to other parties and by expressing an intention to help BC Hydro (T13:2671-2)." [Leave Decision, Reasons, para.18, quoting the Commission, quoting counsel for GSXCCC, *et al*]
28. This topic starts with the Justice's statement, echoing that of the Commission in its dismissal of the disqualification motion, that "No objection was taken" [para.16] when the Chair said he intended to go into the *in camera* session, excluding all the parties except BC Hydro. This leaves the fundamentally incorrect impression that GSXCCC, *et al* and other intervenors *consented* to anything and everything that later occurred behind closed doors and so they should not be heard to complain about it later.
29. Nothing could be further from the truth. The intervenors had previously expressed deep concern about the potential for misuse of *in camera* sessions, but they were fully aware that there are certain narrow circumstances in which such a session would be perfectly lawful. The intervenors had nothing to rely upon except *trust* that the contents of an *in camera* session would be constrained to the narrow circumstances that justify a procedure that would otherwise blatantly violate natural justice.
30. That *trust* was betrayed. When the *in camera* session began, the Chair immediately obtained confirmation that the confidential financial figures being examined by the Chair and the witnesses did indeed support the conclusion that the Chair had reached. Whether or not that exchange had to occur *in camera*, once the Chair's conclusion had been confirmed and he stated – "<u>So you know now what I want to try to do. I need your help in telling me how I can get there.</u>" – there was certainly no legitimate reason for the ensuing discussion to be conducted *in camera*.
31. The fact that there was no legitimate reason for the ensuing discussion to be conducted *in camera* is proven by the fact that the discussion was not confidential, which itself is proven by the fact that the transcript was publicly released. The Justice states that the "counter-argument" is that "This [the topic of the *in camera* session] was not the principal issue before the Commission." That, with respect, indicates a fundamental misconception of the facts. The intervenors *trusted* that nothing that was not properly confidential would be discussed in the *in camera* session. That trust was blatantly violated. The legal issue (on the merits) is whether this

(in combination with the other circumstances) gives rise to a reasonable apprehension of bias. It would hardly be a counter-argument to say that a violation of the elementary principles of a fair hearing was acceptable because of something to do with the *topic* of the otherwise unacceptable discussion.

4. Misconceiving the role of the Chair

32. This leads to the fourth fundamental error. The Justice quotes with apparent approval the assertion by the respondent Duke Point Power to the effect that it was only at the *end* of the *in camera* session that the Chair realized that the contents of the discussion had not been confidential, that the Chair then realized that the content of the *in camera* discussion should be continued in the public hearing, and that it was the Chair who caused the transcript of most of the *in camera* session to be made public. Each of these assertions is contrary to the evidence.

33. The Chair knew before entering the *in camera* session that the purpose was to tell BC Hydro the Chair's desired outcome and to obtain BC Hydro's "help in telling me how I can get there." [para.17] Nothing in the transcript indicates that the Chair was the least bit surprised by the content of the ensuing conversation or that the Chair made any attempt to constrain the conversation to confidential matters.

34. Next, when the *in camera* session neared the end and the discussion turned to 'where to go next,' the Chair, far from steering the non-confidential dialogue back to the public hearing, actually proposed to *continue* the discussion at *additional in camera* sessions. The following excerpt from the transcript shows the witness wrapping up a comment on a *policy* issue and the Chair saying the topic should be continued at *another in camera* session:

> MS. HEMMINGSEN: A: … It sets a policy direction going forward that possibly is a good thing, as well as B.C. Hydro, in designing its contracts put in those provisions to have the option to secure that extra capacity or output on a first right of refusal basis. So it's not necessarily a bad policy directive. I mean, I agree with Mr. Sanderson that we'd want to consider that further.
>
> THE CHAIRPERSON: I think we should. So I'd ask you to do that. <u>That means that we'll need to have another in-camera session in order to do that</u>. [T8:1751-1752]

35. The transcript shows that counsel for BC Hydro immediately spoke *against* any need for further *in camera* sessions and diplomatically proposed returning the issue to the public record:

> MR. SANDERSON: Mr. Chairman, there is an element of cost-effectiveness here, so maybe we can deal with this again at the end of Panel 4. As well, <u>I think this debate should be on the record</u>. That is, I think <u>we should find a way to have this discussion, as much as we can, off the confidential record</u>, and I don't have a suggestion right

> here as to how we can do that, but I think we need to find a way, if we're going to have this debate, to make it a public debate, because I think it's -- you know, it's a pretty central issue. And it's not really unique to this particular outcome. So we need to find a way to let people make submissions on this in argument, I think. [T8:1752-1753]

36. The Chair then appears to agree, stating "it may not be breaching confidence for the disclosure of the fact that there is a bid that is optimal for customers than the winning bid, and I think that opens it up for public comment…" [T8:1753] Nevertheless, the Chair then resumes his discussion of the non-confidential policy issue with the Hydro witness.

37. Next, counsel for the Commission expresses his concerns:

> MR. FULTON: I did want to say on the record that I share Mr. Sanderson's concerns about a certain amount of this having to be on the public record, to the extent that we can, because otherwise I think it is very problematic, and it may well be that ultimately after Mr. Sanderson's taken his instructions, that he and I can come to a -- come up with a proposal that will be satisfactory to the Chair, and will involve the other participants to these proceedings. [T8:1755]

38. Again, the Chair appears to acknowledge the fairness concerns, stating:

> THE CHAIRMAN: Yeah. I think, it's my impression, anyway, that everyone agrees, fully agrees with any effort to disclose what is not confidential. And to do in a way that makes this a public debate. [T8:1755]

39. But then the Chair simply returns to the idea of having yet more *in camera* sessions:

> … this is an important issue. And it's one that may call for us to have more than one In Camera session during this proceeding, subject to what's the outcome of the next In Camera session. [T8:1755-1756]

40. Counsel for the Commission immediately warns *against* having additional *in camera* sessions, stating:

> MR. FULTON: Mr. Chairman, I do want to speak to the point of having more than one In Camera session, and it's to this effect -- that we've indicated that there are potentially two In Camera sessions. My concern would be that if we start adding In Camera sessions to this proceeding, that we can't accomplish in the two, that there will be a heightened level of concern from the other participants, and the public, that decisions are being made outside the public process. So to the extent that we can keep the number of In Camera sessions to two, that would be my preference and my recommendation. [T8:1756]

41. Intent on maintaining his non-public dialogue with BC Hydro, the Chair then proposes exchanges of confidential *written* communications between the Commission and BC Hydro as

an alternative to having more than one additional *in camera* session. Even at that, his concluding sentence indicates that he would really prefer to have a series of *in camera* sessions:

> THE CHAIRMAN: Maybe to assist that, then -- so that we can try to accomplish that, although I think the public interest always trumps that; but nevertheless, if you were to respond in writing, Mr. Sanderson, as a result of the issues that are -- or with respect to the issues that are raised now in confidence, that will give the panel an opportunity to review that so that the next In Camera session may very well be the last one. And we can -- and if there are issues that arise as a result of that, that lead to us issuing a confidential letter, that may be preferable, Mr. Fulton, if that's your advice, to a series of In Camera sessions. Replace a series of In Camera sessions with some confidential document exchanges. I find this much more helpful, though. I mean, it's much more dynamic. [T8:1756-1757]

42. Finally, counsel for BC Hydro stalled the Chair's plans for further confidential written exchanges or *in camera* sessions by suggesting that he and counsel for the Commission jointly "come up with a suggestion as to what the best way to proceed is…" [T8:1757] There were no further *in camera* sessions or exchanges of confidential communications between the Commission and BC Hydro. Counsel for the Commission and for BC Hydro, not the Chair, selected the portions of the transcript that were publicly released.

43. In conclusion regarding this fourth fundamental error, the transcript contradicts the scenario adopted by the Justice. The Chair did not suddenly realize at the end of the *in camera* session that most of the content had been non-confidential, and it was not the Chair who selected the bulk of the transcript for release. The Chair tried persistently to steer the discussion into additional *in camera* sessions even after acknowledging that the content was not confidential. GSXCCC, *et al* respectfully submit that it cannot be said that the Justice conducted "a full consideration of the context in which the [Chair's] remarks were made."

'Adequate supply of electricity' is not at stake

44. In his opening, the Justice states:

> [2] … The need for haste arises out of the expressed concern that whatever project is undertaken to secure a continued adequate supply of electricity to Vancouver Island is now behind schedule. … [para.2]

45. With respect, that is not correct. The Duke Point project is not behind schedule to be operational (if the EPA is allowed) in time for the projected 2007-2008 Vancouver Island capacity shortfall for planning purposes. In addition, there are various feasible short-term options that would meet the projected shortfall if the Duke Point project does not proceed.

46. That said, GSXCCC, *et al* acknowledge that it is in the commercial interests of the Respondent Duke Point Power to have an expeditious resolution of the applications for leave to appeal and potentially the appeals themselves. GSXCCC, *et al* will continue to cooperate in that regard.

Conclusion

47. GSXCCC, *et al* respectfully submit that the Justice made two reviewable errors in his analysis of the reasonable apprehension of bias ground of appeal.

    (1) First, the Justice openly and explicitly decided the reasonable apprehension of bias argument on its merits, rather than on the standard of review appropriate for an application for leave to appeal.

    (2) Second, the Justice misconceived the relevant facts on which the reasonable apprehension of bias argument is based.

Part IV: Nature of order requested

48. The Applicants GSXCCC, *et al* request an order discharging the April 12, 2005, decision of the Justice and granting leave to appeal to the Court of Appeal for British Columbia from the January 27 and February 17, 2005 orders of the Respondent British Columbia Utilities Commission.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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William J. Andrews,
Solicitor for the Appellant

May 2, 2005
North Vancouver, BC

Part V: Table of Authorities

Authority	**Paragraph(s) in which Authority referred to**
Committee For Justice And Liberty et al. v. National Energy Board et al., 68 D.L.R. (3d) 716 (S.C.C.), reversing 65 D.L.R. (3d) 660, De Grandpre, J., dissenting	
Croll v. Brown, [2003] B.C.J. No. 378	4
Queen's Plate Development Ltd. v. Vancouver Assessor, Area 09, (1987), 16 B.C.L.R. (2d) 104 (C.A.)	