Court of Appeal File No. CA032700

COURT OF APPEAL

IN THE MATTER OF THE *UTILITIES COMMISSION ACT*
R.S.B.C. 1996, c. 473, as amended; and

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

BETWEEN:

JOINT INDUSTRY ELECTRICITY STEERING COMMITTEE

Appellant

AND:

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

Respondents

Court of Appeal File No. CA032708

COURT OF APPEAL

IN THE MATTER OF THE *UTILITIES COMMISSION ACT,* R.S.B.C. 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 THE RESPONDENT, DUKE POINT POWER LIMITED PARTNERSHIP

INDEX

PART I – STATEMENT OF FACTS

A. Background

1. Both Applications for Leave to Appeal arise from a proceeding held by the British Columbia Utilities Commission ("BCUC" or the "Commission") pursuant to s. 71 of the *Utilities Commission Act*, RSBC 1996, c. 473 ("UCA") to consider an energy supply contract between the British Columbia Hydro and Power Authority ("BC Hydro") and Duke Point Power Limited Partnership ("DPP") dated November 16, 2004 (the "Electricity Purchase Agreement" or "EPA").

2. The EPA was filed with the Commission pursuant to s. 71(1)(a) of the UCA on November 19, 2004. This filing, and the associated filing by BC Hydro of its "Report on the Call for Tenders Process", also on November 19, 2004, are described in the Commission's Reasons for Decision to Order E-1-05, dated March 9, 2005, pp. 1-2.

3. The Commission issued various procedural orders addressing steps prior to and during the hearing in the proceeding below, and these orders are referenced in the Commission's Reasons for Decision to Order E-1-05, dated March 9, 2005, pp. 3-5.

4. The EPA resulted from a Call for Tenders ("CFT") process conducted by BC Hydro following the Commission's earlier denial, on September 8, 2003, of a Certificate of Public Convenience and Necessity for a project known as the Vancouver Island Generation Project ("VIGP").

5. Although the Commission denied the Certificate for the VIGP on September 8, 2003, the Commission at that time made a number of determinations which are highly relevant to the issues raised in the Leave Applications which are now before this Court:

   (i) the Commission found that the evidence in the VIGP hearing indicated that the next appropriate resource for supplying electricity on Vancouver Island should be on-Island generation (VIGP Decision, p. 78); and

(ii) the Commission accepted the evidence that there will be a capacity shortfall (i.e. and electricity shortage) on Vancouver Island by the winter of 2007/08 (VIGP Decision, p. 27).

6. The Commission in conducting the present proceeding reaffirmed these determinations as part of its ruling on the scope of the matters to be addressed in the proceeding, as seen at Transcript Volume 2, pages 307-308 (Kleefeld Affidavit, Ex. F). No party challenged these findings or the CFT process initiated by BC Hydro.

7. As part of its VIGP Decision, September 8, 2003, the Commission also encouraged BC Hydro to proceed with a Call for Tenders to address the identified capacity shortfall on Vancouver Island, and, as noted, this led to the CFT referenced above in paragraph 4. The Commission also expressed the hope in the VIGP Decision that the information in BC Hydro's future filings, coupled with the extensive review undertaken in the VIGP proceeding, would allow the Commission to approve the preferred resource addition without a second oral hearing (VIGP Decision, p. 79). The Commission further stated that it was prepared to consider any future applications for this project on an expedited basis (VIGP Decision, p. 77).

8. In letters dated November 10, 2004 and November 24, 2004, the Commission set out the issues to be addressed at the first pre-hearing conference in this matter, to be held on November 29-30, 2004.

9. Following submissions from all parties at the pre-hearing conference, the Commission rendered its decision on the scope of the proceeding, and other issues, on November 30, 2004 (see Transcript Volume 2, p. 307-315, Kleefeld Affidavit, Ex. F). (This decision is also referenced in the March 9, 2005 Reasons for Decision to Order E-1-05, pp. 5-6.)

10. Further procedural rulings made in the course of the proceedings, are summarized in the March 9, 2005 Reasons for Decision at pp. 7-12. Certain of these procedural rulings have been made subject of the Applications for Leave to Appeal, and the facts relevant to these rulings will be addressed further below.

B. Reasonable Apprehension of Bias

11. With respect to the allegation of bias, both Applications for Leave to Appeal address only the last of what were three bias applications brought in the proceeding below. The Applicants first argued below that one of the three Commission Panel members raised a reasonable apprehension of bias by his presence on the panel, stemming from the fact that he had been appointed to an executive position in a publicly-regulated utility, albeit entirely unrelated to BC Hydro or this proceeding. That allegation did not lead to a decision because the Panel member in question resigned in order to ensure the integrity of the proceeding. Secondly, the Applicants argued that the Chair of the Commission Panel displayed bias for not readily acceding to the Applicants' bias argument regarding the panel member who resigned. Finally, the Applicants argued that the remaining two-member Commission Panel displayed bias from statements made in the *in camera* hearing on January 19, 2005, which are fully addressed below.

12. The Applicant, GSXCCC, raised the bias complaint from the January 19, 2005 proceeding in its letter dated January 23, 2005. The issue was addressed at length in oral submissions from all parties on January 26, 2005 (Transcript Volume 13). ("GSXCCC" is used here in reference to the Application brought by three entities, GSX Concerned Citizens Coalition, the British Columbia Sustainable Energy Association and the Society Promoting Environmental Conservation.)

13. On January 27, 2005, the Commission dismissed the GSXCCC application, with reasons to follow (Transcript Volume 14, p. 2882-2883, Kleefeld Affidavit, Ex. U). The Commission gave its reasons in Letter No. L-10-05, Appendix B, dated February 9, 2005 (Kleefeld Affidavit, Ex. W).

14. Consistent with the case law surrounding allegations of a reasonable apprehension of bias, it is critical to understand the context in which the impugned remarks were made.

15. The *in camera* session, which occurred in the course of the January 19, 2005 sitting, is recorded in a separate part of Volume 8 of the hearing transcript. For clarity, there are three partial transcripts that record the proceedings from January 19, 2005:

(i) the original transcript in Volume 8, which records the full text of the proceedings for that day excluding the *in camera* session (the "original transcript");

(ii) the initial redacted version of the *in camera* session (this will not be referred to further below); and,

(iii) the unredacted version of the transcript for the *in camera* session, which was released on January 24, 2005 in response to a request made by DPP (Transcript Volume 11, p. 2491-2504). As noted by the Commission, this unredacted transcript provides a complete text of the *in camera* session, except for lines 8-14 of page 1744 which are not relevant to the Leave Application (the "unredacted transcript"). As a result, all parties had available to them essentially a complete transcript of the proceeding, as if the *in camera* session had not been held.

16. In order to further understand the context of the *in camera* exchange between the Commission and BC Hydro, it is also necessary to understand the Commission's prior determination, from the November 30, 2004 pre-hearing conference, regarding the principal issue for this proceeding. In its decision as to the scope of the hearing the Commission identified the principal issue as follows:

> "Is Tier 2, Tier 1 or the No Award option the most cost-effective option to meet the capacity deficiency on Vancouver Island commencing in the winter of 2007/08?"

17. To understand the objective of the Commission in pursuing this principal issue, it is critical to understand what is meant by the term, "the most cost effective option". In this regard, DPP specifically disagrees with the alleged statements of fact contained in the Memorandum of Argument of the GSXCCC, at paragraphs 4, 12, 14, 16 and 22.

18. The GSXCCC purports to define "cost effective" as "cost on a per unit basis, ie. cost per MW". This is simply incorrect. Dating back to the Commission's September 8, 2003 VIGP Decision (page 77), it is clear that the term "cost-effective" means more than suggested by the GSXCCC. In the section titled "Commission Decision" the following is stated:

> "The principal distinction between most cost effective and least cost is the scope of considerations that are relevant. In the context of this Decision, most cost effective includes consideration of project characteristics such as reliability, dispatchability, timing and location as well as the cost or price, in the case of an EPA. Least cost is taken to only include cost or price considerations".
>
> ...
>
> "VIEC must demonstrate that VIGP is the most cost effective project to meet the needs of the ratepayers of BC Hydro. Safety, reliability and other impacts are relevant factors, along with the costs to ratepayers and the impact on the financial capability of the utility".

19. The above description of "most cost effective" is consistent with the testimony given by BC Hydro during the hearing (see for example, Volume 7, p. 1376-1377) wherein the cost-effectiveness analysis conducted by BC Hydro was being discussed and the following statements were made:

> "Ms. Hemmingsen A: We looked at a number of uncertainties that we were – thought important in managing the supply/demand balance, among them the timing of the cables, the load requirements that we might face, and gas/electricity price relationships. So we looked at both quantitative and qualitative factors in that high-level analysis".
>
> ...
>
> "Ms. Hemmingsen A: That's right. And in assessing cost-effectiveness, we took into account the Commission's direction on that, to consider reliability, timing, location, and other non-cost factors".

20. As will be seen below, the subject matter of the *in camera* session was narrow and dealt solely with the results of the Quantitative Evaluation Model ("QEM"), and the portfolio tab. Contrary to the assertion made by the GSXCCC (Memorandum of Argument, paragraph 22) the issue of the most cost effective option for Vancouver Island was not discussed in the *in camera* session.

21. As stated by BC Hydro in its submission, BC Hydro presented five (5) separate witness Panels to speak to its filing. The *in camera* session occurred when Panel 2 was being

questioned by the Commission Chair. As correctly noted by the Commission in its February 9, 2005 Reasons for Decision, the subject matter of Panel 2 dealt with the CFT process, QEM and outcome (p. 3). BC Hydro's Panel 2 did not, and was not intended to, deal with the principal issue identified by the Commission for determination in the subject proceedings. In fact, the issue of cost effectiveness was not dealt with until Panel 4 was seated.

22. The question posed by the Commission Chair at Volume 8, p. 1717 (Kleefeld Affidavit, Ex. O) of the original transcript for January 19 sets the stage for the *in camera* session and specifically addresses the QEM and the portfolio tab. This initial question is followed at Transcript p. 1718 by a discussion of the summary results, the ranking of the portfolios and the conclusion that could be drawn from the numbers. There is no discussion of cost effectiveness which again was the subject matter of Panel 4.

23. The unredacted transcript of the *in camera* session, Transcript Volume 8, p. 1741 (Kleefeld Affidavit, Ex. Q), carries on with the discussion the Commission Chair was having with the witnesses prior to going *in camera*. The text confirms that the issue has not changed and the context has not changed. The discussion still involves the narrow issue of the QEM and the portfolio tab and the information contained therein.

24. DPP accepts and adopts the additional facts as outlined in the Commission's February 9, 2005 Reasons for Decision, pp. 3-4.

C. Unduly Restricting the Scope of the Hearing

25. As noted earlier, the Commission provided notice to all parties that the matter of the scope of the issues to be addressed at the hearing would be discussed at the November 29-30, 2005 pre-hearing conference. During the November 29, 2004 pre-hearing session (Transcript Volume 1) all parties were provided a full opportunity to speak to the issues they believed should be considered in the hearing.

26. By its ruling of November 30, 2004 (Transcript Volume 2, p. 307-316, Kleefeld Affidavit, Ex. F), the Commission delivered its decision on the issues it considered relevant to the inquiry it was undertaking pursuant to section 71 of the UCA. In doing so,

the Commission exercised its discretion to determine the issues regarding which it needed further information.

27. By letter dated December 16, 2004, the JIESC applied for a reconsideration of the Commission's determination with respect to the scope of the hearing. After receipt of submissions from all parties, the Commission concluded that a *prima facie* case had not been established that an error of fact or law had been made with respect to this determination (See Ex. A-36, Commission letter dated January 13, 2005, Appendix A, Kleefeld Affidavit, Ex. M).

D. Proceeding With Undue Haste

28. By its Order G-99-04, dated November 9, 2004, the Commission established a procedural conference for November 29-30, 2004 to discuss, inter alia, the "steps and timetable associated with the regulatory review process". At the subsequent pre-hearing conference, all parties were provided the opportunity to address this issue (see Transcript Volumes 1 and 2). Following a consideration of this matter, the Commission, by letter dated December 3, 2004, established the timetable for the conduct of the subject proceedings. The Commission subsequently provided relief to several parties with respect to the deadlines specified in the above referenced procedural schedule.

29. All parties were provided notice, dating back to the VIGP Decision (page 77), that the Commission intended to deal with any future application for CPCN approval or Electricity Purchase Agreement approval on an expedited basis. This commitment by the Commission was reiterated in its January 23, 2004 letter to BC Hydro, wherein the Commission addressed various issues regarding BC Hydro's conduct of the CFT process. In its procedural ruling regarding the scope of the proceedings and other matters, the Commission stated as follows (Volume 2, page 315):

> And I will close by acknowledging that the scope of the review is beyond the scope anticipated by BC Hydro and Duke Point. However, the Commission Panel also intends to issue a decision with respect to the EPA filing within 90 days of its filing, and intends to balance the need to avoid a violation of planning criteria, arising from the zero rating of the HVDC line, with the need for a full and complete record on the issues identified for this

proceeding. And I will expedite the process as necessary so a decision is issued by February the 17th, 2005.

E. Unreasonably Limiting the Applicants' Access to Confidential Documents and Other Information

30. The issue of confidentiality and the handling of confidential information was first addressed in the Commission's ruling concerning the scope of the hearing (Volume 2, p. 314), wherein the Commission accepted BC Hydro's proposal regarding confidentiality. (See also the Commission's Reasons for Decision to Order No. E-1-05, p. 9.) These Reasons for Decision, pp. 10-12, further address confidentiality issues as they arose in the course of the hearing.

31. The EPA, as originally filed, had various provisions redacted in order to protect the commercial interests of DPP. The Commission's Reasons for Decision dated January 6, 2005 (Order G-119-04) set out the facts regarding the confidentiality of the EPA. The Commission directed DPP to file the complete EPA in an unredacted form, except for three specific subsections of Appendix 3 related to the dispatch of the plant, the disclosure of which the Commission determined would not be in the public interest. Furthermore, the Commission determined that the disclosure of information relating to the CFT non-winning bids would reasonably be expected to cause deleterious effects to future bid processes, with minimal public interest benefits arising from disclosure. The Commission did not require the disclosure of such non-winning bid information.

32. As mentioned above, the Transcript of the *"in camera"* session was initially released in a redacted form with certain exchanges kept confidential. This concern was fully remedied with the release of an essentially fully unredacted version on January 24, 2005.

F. Factual Grounds of Appeal

33. In the VIGP Decision (page 78), the Commission found that: "The evidence from this hearing suggests that the appropriate next resource addition should be on-Island generation, provided the cost of the proponents' projects can be confirmed near their expected values." This finding was reiterated in the context of the current proceeding, with the Commission stating that this determination was relevant to a determination of

the scope of the CFT review (Volume 2, page 307, Kleefeld Affidavit, Ex. F). This determination by the Commission has not been challenged, reviewed or appealed by any party.

34. In the hearing, the witness for British Columbia Transmission Corporation, Mr. Mansour, stated that the Norske Demand Management proposal was acceptable for operational purposes, but that it could not be relied upon for long-term planning purposes. Such proposals were identified as being suitable for second contingency events (Volume 10, page 2394-2395, Kleefeld Affidavit, Ex. V).

35. Mr. Mansour also testified that a combination of generation and transmission to supply the Island is the right long-term vision. Mr. Mansour noted that the Commission agreed with this in the VIGP Decision (Volume 10, p. 2405-2406, Kleefeld Affidavit, Ex. U).

PART II - POINTS IN ISSUE

36. Leave to Appeal should be denied on all of the proposed grounds raised by the Applicants.

PART III - ARGUMENT

A. Test for Leave to Appeal

37. The Applicants cite *Queens Plate Development Ltd. v. British Columbia (Assessor of Area in No. 9 - Vancouver)* (1987), 16 B.C.L.R. (2d) 104 (C.A.) for the applicable test in an application for leave to appeal.

38. Leave to appeal should be granted only when there is some prospect of the appeal succeeding on its merits. See the articulation of the test by Finch J.A., as he then was, in *Re: Consumers Association of Canada (BC Branch)*, [1994] B.C.J. No. 3152 (C.A.), at paragraph 4:

> The test requires the applicant to show that the appeal is meritorious, that there is an important question raised by the appeal, and that there are important practical consequences of significance to the parties of the appeal and to persons other than the proposed parties to the appeal.

This expression of the test for leave was recently cited and applied in *Utilities Consumers Group v. Yukon (Utilities Board)*, [2001] Y.J. No. 86 (Yukon C.A.).

39. As Patrick Foy, Q.C. stated in his article "Leave to Appeal: Civil Cases in the British Columbia Court of Appeal", The Advocate, v. 45, Part 3, page 339 (May 1987) (cited by Taggart J.A. in *Queens Plate*):

> A good arguable case is a necessary, but not a sufficient, condition precedent to the grant of leave. The justice may refuse an application notwithstanding that he thinks there may have been some error. [page 341]

With these principles in mind, the proposed grounds of appeal are addressed below.

B. Interpretation of Section 71 of the UCA

Overview of Section 71

40. At pages 12 –13 of the EPA Decision (Reasons for Decision to Order No. E-1-05, March 9, 2005), the Commission stated the following in respect of section 71:

> The EPA was filed pursuant to section 71 of the UCA. A filing pursuant to section 71 neither requires a hearing nor approval. Nevertheless, the Commission does have the authority to determine, following a hearing, that the EPA is not in the public interest and to declare the contract or portions of it unenforceable or make any other order it considers advisable in the circumstances.

41. These comments flow from a plain reading of section 71. The Commission can request any information from the applicant that the Commission believes is relevant to the filing. There is no requirement that a hearing be held unless the Commission, in its discretion, chooses to hold a hearing. Following a hearing the Commission can make such orders as it considers appropriate in the public interest.

42. Section 71 is a different regime from that which applies to a public utility seeking to obtain a certificate of public convenience and necessity (such as was the case in respect of the VIGP hearing). Section 45(1) of the UCA provides that:

> Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the Commission a certificate that public convenience and necessity require or will require the construction or operation.

43. Accordingly, projects to which section 45(1) applies require the approval of the Commission whereas energy supply contracts filed pursuant to section 71 do not.

44. It is clear from both Order E-1-05 (Section 1) and the March 9, 2005 Reasons for Decision that the Commission properly understood its role under section 71. The Commission determined that a hearing was to be held to consider information it found necessary to examine as part of determining whether the contract is in the public interest. Following the hearing the Commission determined that it "accepted the EPA as filed" (p. 101 of the Reasons for Decision). The Commission had obtained and examined the information it required to find the subject EPA in the public interest.

The Scope of the Hearing

45. The Commission determined that the principle issue was whether "Tier 2, Tier 1 or the No Award option was the most cost-effective option to meet the capacity deficiency on Vancouver Island commencing in the winter of 2007/08." This statement contained several important principles:

- it identified that the Commission would rely on the categories of projects identified in the call for tender process;
- it identified that the yard-stick for consideration of the projects would be "cost-effectiveness", a term which includes considerations of project characteristics such as reliability, dispatchability, timing and location as well as the cost or price; and
- it stated as fact that there will be a capacity shortfall on Vancouver Island commencing in the winter of 2007/08.

46. The Applicants complain that the scope of the hearing as determined by the Commission was too narrow and say that section 71 of the UCA mandates a general test of "what is in the public interest". What is or is not in the public interest is a determination to be made

by the Commission in the exercise of its legislative authority. Others can disagree with the Commission in this regard, but such disagreement does not give rise to an error of law or jurisdiction.

47. Section 71 does not specify the scope of the hearing referred to in subsection 71(2). Just as the determination that a hearing will be held at all is in the discretion of the Commission, so is the scope of that hearing. The plain language of the Act cannot bear an interpretation that, even if the Commission has only very specific concerns over certain aspects of an energy supply contract, the Commission must nonetheless hold a larger public hearing to consider matters the Commission has determined to be unnecessary or irrelevant.

48. The JIESC submission (at paragraph 48) suggests that the Commission was not entitled to rely on its findings in the VIGT Decision that the most cost-effective way to meet Vancouver Island's 2007/08 capacity needs was additional on-Island generation. The notion that the Commission cannot rely on its own earlier decisions would render the Commission's responsibilities under the UCA practically impossible to carry out. The Commission exercises a supervisory role over energy supply in this province, including the implementation of Government policy. Its role requires long-term planning for energy needs and this simply could not happen if the Commission was unable to plan for the future energy needs of the province by building upon past determinations. The instant case dealt precisely with the same energy requirements and capacity deficiency as were addressed previously in the VIGP Decision. That decision provided the foundation to move forward with the process that resulted in the decision that is currently being appealed. The two decisions are inextricably linked.

Alleged Reversal of Onus

49. The Applicants say that the comments of the Commission at page 101 of its decision reveal a reversal of onus that constitutes a jurisdictional error.

50. This argument has no merit. First, the argument relies upon an interpretation that section 71 of the UCA requires a formal hearing approval process as to whether an energy supply

contract is in the public interest. As discussed above, this is simply not what section 71 provides.

51. Second, when the impugned comment is considered in its proper context, there was no "reversal of onus". Two paragraphs earlier, the Commission stated simply that "the Commission Panel accepts the EPA with Duke Point Power...", and two sentences following the alleged reversal of onus comment, the Commission stated: "In coming to its determination that electricity supply from the Duke Point Power Project is in the public interest...". The Commission properly understood its mandate and the parties to the energy supply contract, BC Hydro and DPP, appropriately satisfied the requirements placed on them. The Commission accepted the EPA as being in the public interest based on its consideration of the totality of the information it had received on this matter.

The Precautionary Principle of International Law

52. This argument, raised by GSXCCC, is clearly without merit, and DPP will add only that the precautionary principle of international law does not assist in the interpretation of the plain language of section 71 of the UCA.

C. Allegations Concerning Procedural Fairness

Discretion Granted to the Commission Over Procedural Matters

53. Before addressing the specific complaints of the Applicants, it is important to appreciate the wide discretion that the UCA and the *Administrative Tribunals Act* grant the Commission in the course of its work.

54. Sections 79, 80, 86, 86.2, 99 and 105 of the UCA are relevant to an appreciation of the Commission's broad discretion.

55. Section 11 of the *Administrative Tribunals Act* provides:

> Subject to this Act and the tribunal's enabling Act, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

Sections 41 and 42 of the *Administrative Tribunals Act* provide further procedural discretion to the Commission.

56. In the face of these legislated discretionary powers, the Applicants have a very high threshold to surmount before this Court makes a finding that the Commission has been so procedurally unfair that it has committed jurisdictional error. This is particularly true when the Commission has, as occurred here, solicited the views of all parties on the procedural matters, weighed and considered these views and then rendered considered procedural decisions in the exercise of its discretion.

Alleged Limitation of Confidential Documents

57. The Applicants say they were not granted access to confidential documents and therefore the proceeding was unfair. These complaints are without merit.

58. First, as noted above, the Commission has, by legislation, been granted broad discretion to determine which documents are confidential and how they are to be handled in the proceeding. At all times the Commission clearly understood its discretion, applied it to the relevant factual situation and acted wholly in a manner consistent with the governing legislation.

59. Second, confidentiality issues were the subject of several applications and reconsideration applications. Extensive submissions were presented by all interested parties, deliberations were made by the Commission and considered decisions rendered. The Commission determined that the particulars of non-winning bids were to be kept confidential. This was essentially a decision of policy by the Commission because it was concerned that if non-winning bid documents were made public, it would discourage commercial parties from bidding on future calls for tenders. The Commission determined that the public interest was best served by preserving confidentiality in certain limited circumstances. Such determinations should not be "second guessed" absent the clearest demonstration of improper purpose. There is nothing whatever to suggest improper purpose here. Moreover, it is obvious that the policy determination of confidentiality in this context was entirely sound.

60. Third, in arriving at its decision, the Commission considered the leading case as to when and how courts may issue confidentiality orders (*Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 DLR (4th) 193 (SCC)). In applying the test applicable to courts, the Commission was applying the strictest possible test for making confidentiality orders. The Applicants can point to nothing in the Commission's decisions with respect to confidentiality that could form the basis of a meritorious argument on appeal.

61. The Commission was even-handed in its treatment of confidentiality. Some of its rulings favoured BC Hydro, others favoured intervenors. When confidentiality was an issue, the Commission took steps to minimize the confidentiality, as evidenced by the comments of the Chair during the *in camera* hearing, addressed earlier.

62. There is no merit to the arguments that procedural fairness was breached by the Commission's confidentiality orders. To the contrary, the orders balanced competing interests and achieved results the Commission considered to be in the public interest.

Directing BC Hydro to Enter Into a Contract for Gas Transmission

63. This issue is addressed in BC Hydro's submission, which is adopted by DPP.

D. Alleged Reasonable Apprehension of Bias

64. On January 19, 2005, the Commission Panel held the *in camera* hearing to discuss matters related to the confidential non-winning bids. The Applicants argue that the comments of the Chair in the *in camera* hearing demonstrate that he was biased such that his mind was closed to the outcome of the hearing.

65. The Supreme Court of Canada has addressed allegations of reasonable apprehension of bias in a series of cases, and the applicable legal principles are not in doubt. The passage from that Court's judgments cited most frequently as addressing the governing test is found in the dissenting judgement of de Grandpre J. at page 394 of *Committee for Justice v. National Energy Board*, [1978] 1 S.C.R. 369:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly".
>
> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".
>
> This is the proper approach which, of course, must be adjusted to the facts of the case. The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted by statute with an administrative discretion exercised in the light of its experience and of that of its technical advisors. [emphasis added]

66. In *Newfoundland Telephone Company Limited v. The Board of Commissioners of Public Utilities*, [1992] 1 S.C.R. 623, at issue was the conduct of an outspoken member of the Utilities Commission. Cory J. wrote for the Court and discussed the principle that, while all administrative bodies owe a duty of fairness to regulated parties whose interests they must determine, the extent of that duty of fairness depends upon the nature and the function of the particular tribunal (page 636). Cory J. stated at page 644 that:

> Once matters proceeded to a hearing, a higher standard had to be applied [than at the investigation stage]. Procedural fairness then required the board members to conduct themselves so that there could be no reasonable apprehension of bias. The application of that test must be flexible. It need not be as strict for this Board dealing with policy matters as it would be for a board acting solely in an adjudicated capacity. This standard of conduct will not of course inhibit the most vigorous questioning of witnesses and counsel by board members... [emphasis added]

67. In 1997 the Supreme Court of Canada again considered the question of reasonable apprehension of bias in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484. After citing de Grandpre J. in *Committee for Justice and Liberty, supra*, Cory J. stated as follows:

> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case.... Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold"...

68. Cory J. went on to emphasize, as de Grandpre J. had, that the test requires a real likelihood or probability of bias be demonstrated, and that a mere suspicion is not enough.

69. Cory J. concluded his explanation of the test as follows at page 532:

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.... Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.
>
> The onus of demonstrating bias lies with the person who is alleging its existence .... Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

70. Most recently, in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, McLachlan C.J.C., writing for the Court against a finding of bias, rejected the notion that the "appearance of justice" could supersede the accepted standard of reasonable apprehension of bias (pp. 291-292), reaffirmed the test as expressed by de Grandpre J. and expressed a strong presumption of judicial impartiality (pp. 294-295). The Chief Justice quoted with approval the remark of an English judge that "this is a corner of the

law in which the context, and the particular circumstances, are of supreme importance". The Chief Justice stated as follows at page 295:

> Whether the facts, as established, point to financial or personal interest of the decision maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

71. In the context of the *in camera* hearing on January 19, 2005, the Commission Chair was reviewing the QEM model, and the portfolio tab relating specifically to the non-winning bid by Duke Point Power. The QEM results indicated that Duke Point Power's non-winning bid had a slightly higher net present value, but contained a "duct-firing option that would provide a large amount of extra capacity at a very cheap cost". This narrow and limited discussion was started prior to the *in-camera* session and continued once the proceedings moved *in camera*. At no time was the principal issue for determination in the overall case ever discussed.

72. The Commission Chair sought to examine the narrow issue of the results of the QEM model, because there was the possibility that another result would have provided better value for customers. In furtherance of the Commission's public-interest mandate under s. 71 of the UCA, the Chair was attempting to explore whether additional value to the customers could be attained if a different portfolio were selected.

73. By the end of the *in camera* hearing, it was recognized by the Commission Panel that a substantial portion of the contents of the hearing were in fact not of a confidential nature. The Chair also recognized that the discussion of what to do with the DPP plant with duct-firing was an issue regarding which the intervenors should have an opportunity to make submissions. Consistent with the views expressed by the Commission prior to the conduct of the *in camera* session, every effort was made to disclose as much information as possible. In fact, after DPP's waiver of confidentiality, essentially all of the *in camera* transcript was disclosed.

74. Considered in its proper context, there was nothing in the discussion between the Commission Panel Chair and BC Hydro that demonstrated any bias whatsoever.

E. Carbon Tax Liability Issue

75. No decision was rendered by the Commission regarding the manner in which it would deal with a potential future occurrence. As such, there is simply nothing here to review or appeal.

F. Evidence as to Long Term Energy Supply Capacity

76. The evidence in these proceedings clearly confirms the Commission's findings from the VIGP Decision that a combination of generation and transmission to supply the Island was the right long-term vision. The Commission had previously determined that on-Island generation was the next appropriate resource addition. These were findings of fact that were not challenged. Findings of fact by the Commission on matters directly within its jurisdiction should not form the basis of an appeal to this Court, and cannot do so in light of Section 79 of the UCA, which provides that the determination by the Commission on a question of fact within its jurisdiction is binding and conclusive on all persons and all courts.

G. The Norske Canada Demand Management Project

77. The clear evidence is that proposals, such as that brought forth by Norske, are acceptable for operational purposes, but not for long-term planning purposes. Arguing this factual finding provides no basis for the granting of leave to appeal.

PART IV – NATURE OF THE ORDER REQUESTED

78. DPP submits the Applicants have demonstrated no meritorious case for appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

"George K. Macintosh"
GEORGE K. MACINTOSH, Q.C.

"Loyola Keough"
LOYOLA KEOUGH

PART V – TABLE OF AUTHORITIES

Legislation:

1. *Administrative Tribunals Act*, S.B.C. 2004, c. 45
2. *Utilities Commission Act*, R.S.B.C. 1996, c. 473

Cases:

3. *Committee for Justice v. National Energy Board*, [1978] 1 S.C.R. 369
4. *Newfoundland Telephone Company Limited v. The Board of Commissioners of Public Utilities*, [1992] 1 S.C.R. 623
5. *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484
6. *Re: Consumers Association of Canada (BC Branch)*, [1994] B.C.J. No. 3152 (C.A.)
7. *Utilities Consumers Group v. Yukon (Utilities Board)*, [2001] Y.J. No. 86 (Yukon C.A.)
8. *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259

Articles:

9. Foy, Patrick; *Leave to Appeal: Civil Cases in the British Columbia Court of Appeal*, The Advocate, v. 45, Part 3, page 339 (May 1987)