Court of Appeal File No. CA032708

COURT OF APPEAL

IN THE MATTER OF 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

REPLY BOOK OF THE RESPONDENT, BRITISH COLUMBIA HYDRO AND POWER AUTHORITY APPLICATION TO VARY AN ORDER OF A JUSTICE

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PART I: STATEMENT OF FACTS

Introduction

1. The Applicants, GSXCCC et al, seek an order pursuant to section 9(6) of the *Court of Appeal Act* varying the Order of Mr. Justice Thackray in Chambers rendered April 12, 2005 denying the Applicants leave to appeal. The proposed appeal is from Order No. E-1-05 of the British Columbia Utilities Commission ("**BCUC**" or "**Commission**") dated February 17, 2005 (the "**Decision**") in which the Commission accepted for filing an Energy Purchase Agreement entered into between British Columbia Hydro and Power Authority ("**BCH**") and Duke Point Power Limited Partnership ("**DPP**"). The Commission subsequently issued Reasons for Decision for Order E-1-05 on March 9, 2005. The Applicants also seek leave to appeal from Commission Order No. L-10-05 pronounced January 27, 2005 (Reasons issued February 9, 2005) wherein the Commission Panel refused to disqualify itself based upon a reasonable apprehension of bias (the "**Bias Decision**").

2. It is the position of BCH that in denying leave to appeal, Mr. Justice Thackray did not err in principle or in law nor did he misconceive the facts and, as such, this application must be dismissed.

The BCUC Proceeding

3. The hearing before the BCUC and the resulting Decision represent the culmination of a lengthy regulatory process that examined in detail the long term electricity needs of Vancouver Island. That process is summarized in the Reasons of Mr. Justice Thackray and is canvassed in detail in the Commission's Decision. It is apparent from a review of the relevant background that the hearing process below was reasonable and fair and was conducted in a manner consistent with the Commission's public interest mandate under section 71 of the *Utilities Commission Act*. Thus, as found by Mr. Justice Thackray, there are no grounds that would warrant further review by this Court.

BCUC Reasons for Decision, JIESC Motion Book, Vol. 1, Tab 3;

Reasons for Judgment of Thackray J.A., JIESC Motion Book, Vol. 1, Tab 1.

4. The Applicants seek to rely upon the Statement of Facts as set out in their Memorandum of Argument filed on the Application for Leave to Appeal. This illustrates the fact that this Application is simply an attempt by the Applicants to re-argue the leave application that was denied by Mr. Justice Thackray. It is submitted that this Court should disregard any references to the previous Memorandum. The facts that are relevant to this Application are those found by Mr. Justice Thackray, as well as the findings of fact made by the Commission in its extensive Reasons for Decision.

PART II: POINTS IN ISSUE

5. It is respectfully submitted that Mr. Justice Thackray did not err in law or in principle in denying leave to appeal nor did he misconceive the facts. Accordingly, this Application should be dismissed.

PART III: ARGUMENT

Test on Application to Vary an Order of a Justice

6. It is common ground that the test on this application is whether, in denying leave to appeal, Mr. Justice Thackray erred in law or principle or misconceived the facts. This Court has also made it clear that a review hearing is not a re-hearing of the original leave application.

***Haldorson v. Coquitlam (City)* 2000 BCCA 672;**
***Croll v. Brown* [2003] B.C.J. No. 378; 2003 BCCA 105;**
***Pierce v. Chaplin* 2004 BCCA 655.**

Test for Granting Leave to Appeal

. Mr. Justice Thackray properly cited *Queens Plate Development Ltd. v. Vancouver Assessor, Area 9* as the governing authority in respect of applications for leave to appeal. The Applicants have demonstrated no error in Mr. Justice Thackray's

interpretation and application of the *Queens Plate* factors to the circumstances of this case.

> ***Queens Plate Development Ltd. v. Vancouver Assessor, Area 9* (1987), 16 B.C.L.R. (2d) 104 (C.A.) at 109-110.**

8. The Applicants argue that Mr. Justice Thackray applied too stringent a test by effectively ruling on the merits of the bias allegation when he found 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 [sic] would not decide fairly."

9. In fact, this passage reflects Mr. Justice Thackray's proper application of the test established by the Supreme Court of Canada for determining whether a reasonable apprehension of bias exists. The Supreme Court has consistently held that the conduct giving rise to the apprehension must be considered in its full context, that the inquiry is fact specific and that the apprehension of bias must be substantial, as distinct from a mere suspicion or sensitivity.

> ***Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394;**
>
> ***Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 849-850;**
>
> ***Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at 294-295.**

10. Mr. Justice Thackray considered the comments of the Chair in their full context and determined that there was no prospect of success on appeal and that this ground did not give rise to a substantial question to be argued. His Lordship engaged in the very inquiry required of him by *Queens Plate* and the Applicants have established no error that would warrant further review by a panel of this Court.

11. The Applicants (at paras. 8 and 9 of their Memorandum) rely upon the observation of the Commission that the Chair's comments, if taken in isolation, might

give rise to some concern that the Panel Members had closed their minds. The Applicants argue that this observation on its own indicates some prospect of success of the bias allegation. However, the Applicants' submission in this regard does precisely what the Supreme Court of Canada has admonished against, namely it seizes upon a single comment taken in isolation. Both the Commission and Mr. Justice Thackray recognized the flaw in this approach and properly rejected it.

12. Lastly, on the issue of whether Mr. Justice Thackray applied the correct test in denying leave, this Court has on numerous occasions dismissed applications to vary a denial of leave to appeal in circumstances where the Chambers Judge had determined that the proposed grounds of appeal have no merit. In none of these cases is there any suggestion that in considering the merits of the proposed appeal and the likelihood of success, the Chambers Judge committed a reviewable error.

> ***Croll v. Brown, supra*;**
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> ***K.M. v. British Columbia (Director of Child, Family and Community Services)* 2004 BCCA 603;**
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> ***Pierce v. Chaplin, supra;***
>
> ***Plateau Pipe Line Ltd. v. British Columbia (Utilities Commission)*, [2002] B.C.J. No. 423; aff'd [2003] B.C.J. No. 402.**

Alleged Misconception of the Facts

13. The Applicants further allege that Mr. Justice Thackray misconceived certain key facts. However, each of the issues raised by the Applicants under this heading was argued fully before both the Commission and Mr. Justice Thackray and both the Commission and Mr. Justice Thackray came to different conclusions from those advanced by the Applicants. The Applicants now seek to re-argue those points before this panel.

14. The "facts" underlying the reasonable apprehension of bias allegation are not in dispute. The transcript of the *in camera* session, including the impugned comments of the Chair, were in the record before Mr. Justice Thackray and there is no issue about

what was said or what transpired before or after that session. Rather, the Applicants take issue with the conclusions drawn from those facts by the Commission and by Mr. Justice Thackray. This is very different from arguing that Mr. Justice Thackray misconceived the facts in a way that would support further review by this Court.

15. BCH endorses the submissions of the Respondent, DPP, as to why the conclusions drawn by Mr. Justice Thackray were correct and why his finding on the allegation of reasonable apprehension of bias issue was proper on the evidence before him.

PART IV: NATURE OF THE ORDER REQUESTED

16. It is respectfully submitted that the Application to Vary the Order of Mr. Justice Thackray be denied with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: May 9, 2005

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