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 IN REPLY TO THE ARGUMENT OF GSX CONCERNED CITIZENS COALITION ET AL

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The Test Under Section 9(6) Of The *Court Of Appeal Act* For An Applicant To Have Thackray J.A.'s Order Discharged

1. This Court, in reviewing the dismissal of an application for leave to appeal, in *Chaplin v. Sun Life Assurance Co. of Canada*, 2004 BCCA 655, at para. 15, adopted the established test which governs this application:

> It is common ground that the standard of review to be applied on an application brought under s. 9(6) of the *Court of Appeal Act* is summarized in *Haldorson v. Coquitlam (City)* (2000), 149 B.C.A.C. 197, 2000 BCCA 672 at paragraph 7:
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> > It comes to this: that the review hearing is not a hearing of the original application as if it were a new application brought to a division of the court rather than to a chambers judge, but is instead a review of what the chambers judge did against the test encompassed by asking: was the chambers judge wrong in law, or wrong in principle, or did the chambers judge misconceive the facts. If the chambers judge did not commit any of those errors, then the division of the court in review should not change the order of the chambers judge.

Thackray J.A. Employed The Well-Established Legal Tests For Whether Leave To Appeal Should Be Granted

2. Thackray J.A. obviously appreciated the tests for leave to appeal, as seen from paras. 23-27 of his reasons. The Applicants, GSX Concerned Citizens Coalition *et al* ("GSXCCC"), at paras. 5-12 of their Argument, reference two isolated passages from paras. 52 and 54 in Thackray J.A.'s reasons, to mistakenly assert that he misapplied the tests for leave. In his para. 54, quoted by GSXCCC at para. 6 of their Argument, Thackray J.A. was simply stressing the need for placing an allegation of bias in its true context, a step the Supreme Court of Canada has stressed repeatedly. Ironically, when GSXCCC seizes upon a few words in Thackray J.A.'s para. 52 (see GSXCCC Argument at para. 10) they commit the error all courts have warned against when bias is raised: taking a statement in isolation and divorcing it from its broader context. These few words from

Thackray J.A.'s para. 52 are a small part of section 3 in his reasons (at pp. 25-28, paras. 49-56) where he examined the facts and arguments presented and, after applying the proper test, reached the conclusion (at para. 55) that: "...it would not be open, in my opinion, for a panel of this Court to conclude that the decision of the Commission should be set aside." Finding no merit whatever to the bias allegation, Thackray J.A. stated, at para. 56: "This issue does not support granting leave to appeal." Contrary to the assertion of GSXCCC, Thackray J.A. clearly understood and applied the correct test.

Thackray J.A. Was Clearly Right In Not Granting Leave To Appeal The Allegation That The BCUC Was Biased: The Relevant Law Concerning Bias

3. As noted above, Thackray J.A. addressed the allegation of bias in section 3 of his reasons, at paras. 49-56. There is no dispute that he cited, at para. 53 of his reasons, the settled law for assessing an allegation of bias, as found in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394, as reviewed recently by this Court in *R. v. Parmar,* 2005 BCCA 187, at paras. 31-33.

4. Thackray J.A., at para. 54 of his reasons, referenced the need for placing allegations of bias in their proper context, reflecting the law as stated by the Supreme Court of Canada and this Court:

> *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at p. 295, para. 77
> *Kootenay, Okanagan Electric Consumers Assn. v. Utilicorp United Inc.*, [1987] B.C.J. No. 1657 (C.A.) at pp. 8-9

Why It Is Clear On The Facts That The BCUC Was Not Biased (And Therefore Thackray J.A. Was Right To Deny Leave On The Bias Allegation)

5. The central issue before the British Columbia Utilities Commission ("BCUC") was stated in the BCUC's March 9, 2005 reasons (JIESC Motion Book, vol. 1, tab 3) as follows at p. 6:

> 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?

6. These terms, "Tier 1", "Tier 2" and "No Award" are explained in the BCUC's reasons (JIESC Motion Book, vol. 1, tab 3) at pp. 25-26, pp. 68-75 and pp. 84-100. In essence, "Tier 1" projects were larger projects, offering more electrical capacity, and "Tier 2" projects were combinations of two or more smaller projects offering less electrical capacity. Pursuant to section 71 of the *Utilities Commission Act*, BC Hydro filed with the BCUC the energy supply contract from the winning bid in the BC Hydro selection process, which was a Tier 1 bid presented by the Respondent, Duke Point.

7. The term "cost-effective", as used in the BCUC's statement of the central issue, cited above in para. 5, has a broad meaning and dates back to the BCUC's September 8, 2004 Vancouver Island Generation Project decision (JIESC Motion Book, vol. 2, tab B), wherein the BCUC stated as follows at p. 77:

> 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.

8. GSXCCC's allegation of bias is entirely misconceived. It stems from a simple and practical concern expressed by the Chair of the BCUC panel on January 19, 2005,

in the course of the public hearing. The remarks of the BCUC that are complained of by GSXCCC arose in the hearing during a discussion of the results of a financial evaluation model, the Quantitative Evaluation Model ("QEM"), put before the BCUC by BC Hydro.

9. The results of the QEM showed that the second-place Tier 1 bid, also submitted by the Respondent, Duke Point, offered more electrical capacity for very little additional cost. (The winning Tier 1 bid had been selected because it offered the required amount of electrical capacity at the lowest net present value, and therefore best satisfied the stipulated bid criteria.) In reviewing these results, the Chair was concerned as to whether the winning Tier 1 bid was better value for customers than the second-place Tier 1 bid.

10. The Chair wished to further discuss with BC Hydro the results of the QEM in respect of the Tier 1 bids. However, in a prior ruling, the BCUC had determined that bidding information from the non-winning bids would remain confidential in order to protect unsuccessful bidders and the commercial bidding process. Accordingly, on January 19, 2005 the Chair took the hearing *in camera,* as he was allowed to do, and without objection from the parties. The transcript of this *in camera* portion of the hearing is at BC Hydro's Reply Book, tab 1-Q, containing transcript pages 1741-1758.

11. The entire *in camera* transcript (excepting a few lines not in issue) was released to all parties on January 24, 2005. The *in camera* discussion of the QEM did not purport to address the overall issue that was before the BCUC as to whether the winning Tier 1 bid was the most cost-effective option for Vancouver Island. When the comments of the Chair, complained of by GSXCCC, are placed in their context, it is plain and obvious he was simply attempting to understand the results of the QEM and whether a different Tier 1 bid offered better value to customers. Clearly the BCUC, acting in the public interest, was entitled to inquire into this

matter and it cannot be suggested that the Chair had pre-judged the hearing in any way as a result of this discussion. (The BCUC's conclusion that the filing of the winning Tier 1 bid was in the public interest is found at p. 75 of the BCUC's March 9, 2005 reasons, JIESC Motion Book, vol. 1, tab 3.)

12. The parties before the BCUC made lengthy submissions on the bias allegations on January 26, 2005. On January 27, 2005, the BCUC dismissed the bias application, with reasons to follow. Detailed reasons were released by the BCUC on February 9, 2005 and are found at JIESC's Motion Book, vol. 2, tab W. It is apparent from a review of those reasons that the BCUC properly addressed the question in dismissing the bias application. (This point is further addressed in the BCUC's final reasons, JIESC Motion Book, vol. 1, tab 3, at pp. 71-75).

13. Duke Point submits it is clear the BCUC was not biased. It is therefore equally clear that Thackray J.A. was correct in dismissing the application for leave to appeal on the grounds of bias. Thackary J.A. applied the correct test and correctly concluded that there was no possibility of success for the applicants. From this, it follows that GSXCCC has failed to meet the test on this review application, set out at para. 1 above.

RESPECTFULLY SUBMITTED,

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DATED: May 9, 2005