

VANCOUVER
MAY 10 2005
COURT OF APPEAL
REGISTRY

Court of Appeal File No. CA032700

IN THE MATTER OF 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

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

VOLUME 2

**Joint Industry Electricity Steering
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PART I: STATEMENT OF FACTS

Introduction

1. This Memorandum should be read in conjunction with the Memorandum of Argument filed by British Columbia Hydro and Power Authority ("BCH") in the companion application in Court of Appeal File No. CA032708 and BCH adopts the Statement of Facts and submissions as set out in that Memorandum.

PART II: POINTS IN ISSUE

2. 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 for Granting Leave to Appeal

3. It is apparent from a review of Mr. Justice Thackray's extensive Reasons for Judgment that he understood and properly applied the factors set out by this Court in *Queens Plate Development Ltd. v. Vancouver Assessor, Area 9* for granting leave to appeal. His Lordship found that none of the proposed grounds of appeal advanced by JIESC supported the granting of leave to appeal nor had JIESC raised any substantial questions to be argued. JIESC has failed to demonstrate any error in Mr. Justice Thackray's application of the *Queens Plate* factors.

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

Queens Plate Development Ltd. v. Vancouver Assessor, Area 9 (1987), 16 B.C.L.R. (2d) 104 (CA) at 109-110, JIESC Authorities, Tab 6.

4. JIESC argues that Mr. Justice Thackray applied too stringent a test in denying leave to appeal however His Lordship's approach and analysis is consistent with numerous recent authorities of this Court, including decisions where applications to vary a denial of leave to appeal have been rejected in circumstances in which the Chambers Judge determined that the proposed grounds of appeal have no merit. In none of those decisions 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 [2003] B.C.L.R. 105, 2003 BCCA 105, BCH Authorities, Tab 2;

K.M. v. British Columbia (Director of Child, Family and Community Services) 2004 BCCA 603, BCH Authorities, Tab 4;

Pierce v. Chaplin 2004 BCCA 655, BCH Authorities, Tab 5;

Plateau Pipe Line Ltd. v. British Columbia (Utilities Commission), [2002] B.C.J. No. 423; aff'd [2002] B.C.J. No. 802, BCH Authorities, Tab 6.

5. JIESC cites *Dalhuisen v. Maxim's Bakery Ltd.* and *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)* in support of its position. However, in each of those cases, the panel sitting on the review application found that the proposed appeal raised an important issue of pure law that had significance beyond the specific appeal. No such issues of law are raised by this proposed appeal. Rather, the grounds advanced by JIESC involve the exercise of discretion by the British Columbia Utilities Commission (the "Commission") and the review and interpretation of the facts and evidence by the Commission and by Mr. Justice Thackray. In the circumstances, there is no basis for alleging that Mr. Justice Thackray misapprehended or misapplied the proper test for determining leave to appeal.

The TGVI Issue

6. Mr. Justice Thackray denied leave on this ground because he accepted that JIESC's argument was entirely speculative. Paragraph 20 of JIESC's Memorandum seeks to respond to this conclusion by suggesting that His Lordship erred in failing to recognize that the Commission will somehow be limited in the issues that it can consider when TGVI files a firm gas transportation agreement ("TSA") in connection with supply to the Island Co-Generation Plant ("ICP") as required by the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 ("UCA"). This suggestion ignores the clear terms of the Commission Order No. E-1-05 and the provisions of the UCA.

7. In Order No. E-1-05, the Commission accepted the EPA subject to, *inter alia*, BC Hydro entering into and facilitating the filing of a TSA with TGVI for service to DPP and to the ICP near Campbell River. This agreement was subject to a direction that should BC Hydro not reach an agreement respecting the TSA within 45 days in a form acceptable to the Commission, BC Hydro must apply to the Commission for further directions. These conditions clearly support Thackray J.A.'s conclusion that the Commission's decision regarding the Commission's future conduct when it alleged, as it does in paragraphs 18, 19 and 20, that harm to ratepayers will result from the TSA.

Commission Order No. E-1-05, dated January 1, 2004, Tab 3.

8. When the Commission comes to consider whether the TSA with TGVI is acceptable pursuant to Order No. E-1-05, it will bring to bear all of its powers under sections 59-61 of the UCA to ensure that the tolls provided for in the TSA are just and reasonable in light of submissions from all interested parties, including JIESC. If, in its opinion, the toll that results for firm service to ICP is not acceptable, the Commission has clearly indicated it has reserved the power under Order No. E-1-05 to make such further directions as it then believes appropriate. Those directions could include removing the requirements in Order No. E-1-05 to enter into the TSA in the first place.

9. It is respectfully submitted that Thackray, J.A. was correct in concluding that JIESC's assertion of ratepayer prejudice from this condition is purely speculative and that JIESC has failed to establish any error of law or principle or mischaracterization of fact on his part. In the absence of demonstrating this, the JIESC's request for reconsideration on these grounds should be denied.

Confidential Information

10. As found by Mr. Justice Thackray and as conceded by JIESC, the Commission has a broad discretion to determine the extent to which documents and evidence will be received in confidence. In keeping with this discretion, the Commission, following submissions from all parties, issued Order No. G-119-04 dealing with confidentiality and it further issued extensive reasons in support of that order (the "**Confidentiality Decision**"). In those reasons, the Commission considered and applied the Supreme Court of Canada decision in *Sierra Club of Canada v. Canada (Minister of Finance)* and, as required by that decision and the governing legislation, it balanced the competing interests of confidentiality, on the one hand, and commercial and ratepayer interests, on the other.

Utilities Commission Act, R.S.B.C. 1996, c. 473, section 71(5);

Administrative Tribunals Act, S.B.C. 2003, c. 45, sections 41, 42;

Confidentiality Decision, Affidavit #2 of John Hiesfeld, Exhibit "I", BCH Reply Book, Tab 1.

11. Mr. Justice Thackray correctly concluded that there was no prospect for an appeal succeeding on this point because no legal error, let alone a clear error, had been demonstrated. JIESC has failed to provide any basis to suggest that Mr. Justice Thackray erred in his conclusion or by mischaracterizing the facts in reaching this conclusion.

12. To the contrary, it is apparent from a review of the January 12, 2005 letter from JIESC's counsel to the Commission and upon which JIESC now relies that it never asked for relief of the type that it now says it should have received. The January 12, 2005 letter complains of many things, including the need to maintain some information in confidence. However, the procedural suggestions that JIESC makes to the Commission at pages 6 and 7 of that letter did not ask the Commission to establish any process by which confidential information could be released while still protecting commercial confidentiality. It is respectfully submitted that Mr. Justice Thackray was entirely correct to conclude that where no specific relief had been sought from the Commission itself, there was no prospect of obtaining that relief from this Court.

13. Moreover, JIESC's argument advanced in this Application that the Commission erred in failing to consider more appropriate confidentiality processes like those adopted by the International Trade Tribunal ("ITT") flies directly in the face of the position it took before the Commission. Prior to submitting the January 12, 2005 letter, counsel for JIESC expressly submitted to the Commission that the development of such processes would have to occur over many years and accordingly were not appropriate or available in the context of the ongoing hearing. Furthermore, when the Commission asked for submissions with respect to how the "in-camera" session should be held, none were forthcoming from JIESC. In these circumstances, it should not now be open to JIESC to advance this argument in support of its request for leave to appeal.

Transcript of Pre-Hearing Conference, December 22, 2004, p. 697, Affidavit of A. Leoni, Exhibit "H", JIESC Motion Book, Vol. 2;

Transcript, pp. 1717 – 1722, GSXCCC Motion Book, Tab 4

14. In paragraph 36, JIESC says that the Commission only looked at the *Sierra Club* test in conjunction with the disclosure of Appendix 3 and that, in consequence, Thackray, J.A. mischaracterized the facts in front of him. To the contrary, in its Reasons for Decision for Order No. G-119-04, the Commission describes the documents, the confidentiality of which it was considering as follows:

The documents were created during the CFT process, as a result of subsequent analysis by BC Hydro management, in response to Information Requests made of BC Hydro and/or DFP during the proceeding.

Confidentiality Decision, Affidavit #2 of John Kleefeld, Exhibit "I", BCH Reply Book, Tab 1.

15. Appendix 3 was a document created during the CFT process. The data behind Appendix J was created as a result of subsequent analysis by BC Hydro management. Confidentiality in connection with both was directly before the Commission at the December 22, 2004 pre-hearing conference and directly dealt with as part of the Commission's consideration of the general issue of confidentiality in its Confidentiality Decision.

16. Appendix 3 contained information relating exclusively to DPP's winning bid. Appendix J contained additional information relating to the bids of third parties. Applying the test in the *Sierra Club* decision, the Commission concluded that Appendix 3 should be released, but that the backup data for Appendix J should not. At the time, JIESC indicated it would be satisfied with that result. Apparently, it is no longer. Mr. Justice Thackray committed no error when he concluded that JIESC's current dissatisfaction did not provide the basis for granting leave to appeal.

Reasonable Apprehension of Bias

17. BCH adopts its submissions as set out in its Memorandum of Argument filed in Court of Appeal File No. CA032708 on this issue as well as the submissions of DPP.

PART IV: NATURE OF THE ORDER REQUESTED

18. 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 10, 2005


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