

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

APPLICANTS

AND:

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

RESPONDENTS

**MEMORANDUM OF ARGUMENT OF THE RESPONDENT,
DUKE POINT POWER LIMITED PARTNERSHIP IN REPLY TO THE ARGUMENT
OF JOINT INDUSTRY ELECTRICITY STEERING COMMITTEE**

**COUNSEL FOR DUKE POINT POWER
LIMITED PARTNERSHIP:**

GEORGE K. MACINTOSH, Q.C.
Farris, Vaughan, Wills & Murphy LLP
Barristers & Solicitors
2500-700 West Georgia Street
Vancouver, BC V7Y 1B3
Telephone: (604) 684-9151

LOYOLA KEOUGH
Bennett Jones
Barristers & Solicitors
4500, 855-2nd Street, S.W.
Calgary, AB T2P 4K7
Telephone: (403) 298-3429

recognizes that

First JIESC Issue: Whether Thackray J.A. Applied The Correct Tests In Determining Leave Should Not Be Granted

1. The Joint Industry Electricity Steering Committee (“JIESC”), at paras. 7 – 12 of its Argument, scrutinizes the various phrases this Court employs in articulating the test for leave to appeal. Thackray J.A. carefully applied the right tests, as seen in paras. 23 – 27 of his reasons. He set out the tests from *Queens Plate Development Ltd. v. Vancouver Assessor, Area 9* at para. 24 of his reasons (“some prospect of the appeal succeeding”; “substantial questions to be argued”) and noted the Applicants’ reliance upon *Queens Plate* at para. 27 of his reasons. As he also noted there, the Applicants took no issue with the Respondents’ submissions concerning the leave test.
2. Surprisingly, JIESC, at para. 12, references Thackray J.A.’s paras. 73 and 74. In para. 74, the Justice expressly kept the directions contained in *Queens Plate* in mind, and, as noted above, JIESC expressly relied upon *Queens Plate* as the basis for leave.
3. There is really no dispute about the tests for leave, and no basis for arguing that Thackray J.A. misapplied the tests.

Second JIESC Issue: BC Hydro Long Term Gas Contract

4. The Respondent, Duke Point, endorses the submissions of BC Hydro on this issue.

Third JIESC Issue: Thackray J.A. Refusing Leave Concerning The BCUC’s Treatment Of Confidential Commercial Information

5. The Application before the British Columbia Utilities Commission (“BCUC”) was brought pursuant to section 71 of the *Utilities Commission Act*, which addresses energy supply contracts. The Legislature recognized that energy supply contracts

often carry with them concerns of commercial confidentiality: section 71(5) provides as follows:

An energy supply contract or other information filed with the commission under this section must be made available to the public unless the commission considers that disclosure is not in the public interest. (emphasis added)

6. Additionally, as noted by Thackray J.A. at para. 43 of his reasons, section 42 of the *Administrative Tribunals Act* (Schedule A, hereto) provides additional legislative support for the BCUC's discretion to receive evidence in confidence.
7. The BCUC's decisions on confidentiality were made in the exercise of its discretion in the public interest, and as such, should be given a high degree of deference by this Court. As the Yukon Territory Court of Appeal noted in a leave application from the Yukon Utilities Board, "[The statutory regime for the Board] requires the courts to accord a high degree of deference to the Board's policy decisions, its administrative procedures, and its conclusions as to what is or is not in the public interest." (emphasis added)

Utilities Consumers' Group v. Yukon (Utilities Board), 2001
YKCA 5, para. 3

8. Here, it was apparent to Thackray J.A. that the BCUC acted reasonably in balancing competing interests in the application before it for the production of confidential information.
9. The relevant facts are as follows. In a letter dated December 16, 2004 (JIESC Motion Book, vol. 2, tab F), JIESC applied to have the BCUC "direct BC Hydro to provide a non-redacted copy of the Electricity Purchase Agreement in this matter to all parties" (which would include "Appendix 3" thereto), and to "disclose all other confidential communications and information exchanged between the Commission, its staff and BC Hydro and Duke Point Power Limited Partnership" (which would include the underlying information to "Appendix J").

10. On December 22, 2004, the BCUC heard submissions on JIESC's December 16, 2004 application.
11. On December 24, 2004, the BCUC ordered the disclosure of Appendix 3, which contained sensitive commercial information of the Respondent, Duke Point, but did not order disclosure of the underlying information to Appendix J or other documents containing bidding information of non-winning bids.
12. On January 6, 2005, the BCUC released extensive written reasons for its December 24, 2004 order (JIESC Motion Book, vol. 2, tab I). A review of those reasons demonstrates beyond argument how carefully the BCUC weighed the competing interests in deciding to make some information public and keep other information confidential. (The BCUC's treatment of the confidential information is further referenced in its reasons for decision of March 9, 2005 (JIESC Motion Book, vol. 1, tab 3), referenced in section 2.2, "Treatment of Confidential Information", at pp. 9 – 12.)
13. In the January 6, 2005 reasons, the BCUC considered and applied *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.R. 522, the leading case as to when a court is entitled to preserve confidentiality of documents introduced into its proceedings. The BCUC quoted the submissions of counsel for JIESC by which JIESC advised it was primarily interested in receiving disclosure of Appendix 3, and was not seeking disclosure of bidding information of the non-winning bids (January 6, 2005 reasons at p. 6, JIESC Motion Book, vol. 2, tab I). At pp. 8-9 of its January 6, 2005 reasons, the BCUC weighed the competing public interests as to the proposed disclosure of confidential information and made a considered decision in the exercise of its discretion.
14. As noted, the BCUC is specifically authorized by statute to receive evidence in confidence. The BCUC's decisions on confidentiality in the impugned proceeding were thoughtful, discretionary decisions that balanced the public interest in a

transparent and fair process with the need to protect sensitive commercial information and preserve confidence in the commercial bidding process for energy supply contracts. JIESC has raised no argument here that can possibly succeed against the BCUC's measured exercise of its discretion in the public interest.

15. Thackray J.A., in denying leave on this point, was neither wrong in law nor wrong in principle, nor did he misconceive the facts.

Fourth JIESC Issue: Whether Thackray J.A. Assessed The Bias Allegation By Making A Determination On The Merits

16. JIESC, at paras. 38 – 40, references 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, Thackray J.A. was simply stressing the need for placing an allegation of bias in its true context. When JIESC seizes upon a few words in Thackray J.A.'s para. 52, it commits the error courts warn against when bias is raised: taking a statement in isolation and divorcing it from its broader context. As noted by Duke Point in reply to the GSXCCC Argument, 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 shows there is no merit whatever to the bias allegation and correctly concludes, in his para. 56, by stating: "This issue does not support granting leave to appeal."

17. On the basis of the above submissions, Duke Point asks that this Application be dismissed with costs.

RESPECTFULLY SUBMITTED,

COUNSEL FOR THE RESPONDENT,
DUKE POINT POWER LIMITED PARTNERSHIP

"George K Macintosh QC"
George K. Macintosh, Q.C.

"Loyola Keough"
Loyola Keough

DATED: May 10, 2005