COURT OF APPEAL OF YUKON

Citation: *Yukon Energy Board v. Yukon Utilities Board*,
2020 YKCA 12

Date: 20200610
Docket: 19-YU853

Between:

Yukon Energy Corporation

Appellant

And

Yukon Utilities Board

Respondent

Before: The Honourable Mr. Justice Grauer
(In Chambers)

On appeal from: An order of the Yukon Utilities Board, dated September 20, 2019 (Order 2019-05).

Oral Reasons for Judgment

Counsel for the Appellant:	P. J. G. Landry E. J. Snow
Counsel for the Respondent:	A. Sabo
Place and Date of Hearing:	Vancouver, British Columbia June 10, 2020
Place and Date of Judgment:	Vancouver, British Columbia June 10, 2020

Summary:

Yukon Energy Corporation ("YEC") applies, pursuant to section 69 of the Public Utilities Act, RSY 2002, c 186, for leave to appeal an order of the Yukon Utilities Board in which it confirmed its earlier decision disallowing certain demand-side management expenses to be included in YEC's rate base. Under section 69 of the Act, an appeal lies to this Court on questions of law or excess of jurisdiction, and leave is within the discretion of the Court. Held: Leave to appeal granted. YEC's proposed grounds of appeal raise questions of law concerning the proper interpretation of the Act of particularly importance to the litigant and to Yukon ratepayers in general. The proposed appeal has at least some prospect of success, satisfying the test on this leave application.

1.0 Introduction

[1] Yukon Energy Corporation ("YEC") applies for leave to appeal Order 2019-05 of the Yukon Utilities Board (the "Board"). The application is brought pursuant to section 69 of the *Public Utilities Act*, RSY 2002, c 186 [the *Act*].

[2] YEC is a government-owned public utility. It generates the majority of power in Yukon on a hydro-based grid that uses fossil-fuel generation when customer loads exceed available hydro generation.

[3] The Board is a statutory authority that regulates the provision of electricity by public utilities in Yukon under the *Act*. Accordingly, the Board regulates the rates YEC charges to consumers of electricity.

[4] Under section 32 of the *Act*, the Board must determine a rate base for the property of YEC used or required to be used to provide service to the public, and the Board must set a fair return for YEC on that rate base. In determining a rate base, the Board must give due consideration to YEC's capital costs. Order in Council 1995/90 (the "OIC") also provides that the Board is to set rates in accordance with established Canadian rate-setting principles.

[5] By Order 2019-05 (the "2019 Order"), the Board denied an application by YEC to review and vary aspects of an earlier order, Decision 2018-10 (the "2018 Order"), by which the Board disallowed certain demand-side management ("DSM") expenses that YEC sought to have included in its rate base. The Board

concluded that YEC had failed to establish a *prima facie* case that it had committed an error of law in denying YEC's DSM programs and associated costs in the 2018 Order, and therefore declined to advance the review to the second phase of the review process established by section 31 of the Board's Rules of Practice.

[6] DSM costs are fixed costs arising from programs designed to reduce demand for energy through various methods including incentives, education, or retrofits. DSM costs are capital costs. YEC's 2017–2018 general rate application to the Board, the subject of the 2018 Order, included $3.319 million in rate base related to its DSM programs. By its order, the Board disallowed for inclusion in YEC's rate base much of YEC's DSM costs.

2.0 Legal Principles

[7] Section 69 of the *Act* provides this Court with the discretion to grant leave to appeal from an order of the Board on a question of law or jurisdiction. It provides:

> 69 (1) On application to the Court of Appeal within 30 days of a decision or order of the board or within a further time allowed by the Court of Appeal in special circumstances, the Court of Appeal may grant leave to appeal to that court from the order or decision on a question of law or excess of jurisdiction.
>
> (2) The granting of leave to appeal and the costs of the application are in the discretion of the Court of Appeal.

[8] In *Utilities Consumers' Group v Yukon Utilities Board*, 2006 YKCA 2 (in Chambers) at para 17, Mr. Justice Veale stated that the test to apply on a leave application under section 69 is the well-known test set out in *Queens Plate Development Ltd v Vancouver Assessor*, Area 09 (1987), 16 BCLR (2d) 104 (in Chambers) at 109–110. The factors to consider in deciding whether to grant leave include:

> (a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from;
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> (b) whether the appeal is limited to questions of law involving:
>
> (i) the application of statutory provisions ...;
>
> (ii) statutory interpretation that was particularly important to the litigant ...; or

> (iii) interpretation of standard wording which appears in many statutes …;
>
> (c) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward ...;
>
> (d) whether there is some prospect of the appeal succeeding on its merits ... although there is no need for a justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued;
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> (e) whether there is any clear benefit to be derived from the appeal ... ; and
>
> (f) whether the issue on appeal has been considered by a number of appellate bodies ....
>
> [Case citations omitted.]

[9] The Court may take a more generous view of the leave application when the appeal is the "first and likely the last review of the original decision": *British Columbia (Minister of Transportation & Highways) v Reon Management Services Inc*, 2000 BCCA 522 (in Chambers) at para 14. See also *Yukon Energy Corporation v Yukon Utilities Board*, 2016 YKCA 2 at para 16.

3.0 Discussion

[10] I conclude that the application should be allowed, and leave granted, for the following reasons.

[11] YEC identifies four proposed grounds of appeal, contending that, in confirming the 2018 Order, the Board erred in law by:

1. improperly interpreting section 32 of the *Act* as not requiring a principled prudency analysis;
2. failing to determine YEC's rate base in accordance with Canadian rate-setting principles, which require that the rates, and the costs they are based on, be just and reasonable to the utility as well as consumers;
3. failing to consider YEC's uncontroverted evidence in relation to YEC's DSM costs; and
4. taking into account irrelevant considerations in concluding that the DSM costs were imprudently incurred.

[12] In the Board's submission, these proposed grounds may be distilled into one true issue: does section 32 of the *Act*, together with the OIC, require the Board to undertake a further prudency analysis of DSM costs, when those costs were disallowed by the Board as imprudent, and the continuation of DSM programs were determined to be unnecessary?

[13] In the submission of the Board, the application for leave should be dismissed because the real issue is one of mixed fact and law, and does not yield an extricable question of law. Even if there is an extricable question of law, the Board asserts, the proposed appeal does not meet the test in *Queen's Plate Development* because it lacks merit in view of previous decisions, particularly *Yukon Energy Corporation v Yukon (Utilities Board)*, 2017 YKCA 15 (in which, I note, YEC's appeal was successful).

[14] As I understand them, however characterized, YEC's proposed grounds of appeal are centred on two main bases upon which the Board disallowed the relevant DSM costs.

[15] The first was that YEC had not sought prior approval for certain DSM costs before it implemented the relevant programs. The second was that, in the Board's view, the Yukon government had incentive programs in place and was in a better position to operate the projects.

[16] As to the first, the Board referred to its Order 2014-06 (the "2014 Order") where it stated at page 101 of Appendix A: Reasons for Decision:

> Further, the Board affirms it does not approve the program for the five-year term requested and that the Utilities are to make a formal application to the Board before expanding the DSM program elements beyond that approved above or beyond 2015.

[17] At para 478 of its Reasons for Decision, Appendix A to the 2018 Order, the Board said this:

> 478. Despite the Board determination that DSM projects were only approved up to 2015, YEC has continued with program expenditures beyond that point and has forecast continued DSM expenses during the test period.

> YEC did not make an application to the Board before expanding DSM programs beyond 2015. Accordingly, the Board finds that any DSM program expenditures that occurred after 2015 were not prudently incurred and are disallowed for inclusion in YEC's rate base.

[18] As to the second, the Board said this at para 482 of its Reasons for Decision (Appendix A to the 2018 Order):

> 482. The Board is not persuaded that YEC should continue to operate DSM projects. YEC has indicated the benefits of expanding the program and submitted that its programs have met or exceeded key performance indicators. However, the Board notes that the Yukon government has DSM incentive programs in place, and the Board is of the view that it is better to leave DSM projects to government, rather than having ratepayers fund these projects. For these reasons, the Board is of the view that continuation of DSM programs by YEC is not necessary. Accordingly, the Board denies YEC's request to continue with any DSM programs other than end-of-life streetlight conversions as discussed above.

[19] I agree with YEC that the Board's conclusions in these two areas raise questions of law concerning the proper interpretation of the *Act*, particularly section 32, and the OIC, and the appropriate basis, including relevant considerations, for determining whether expenditures were prudently incurred. Policy questions also arise that do not involve factual issues.

[20] Moreover, I conclude that the issues include questions of statutory interpretation that are particularly important to the litigant and to Yukon ratepayers in general.

[21] I further agree that there would appear to be sufficient merit to YEC's position to clear the hurdle of the *Queen's Plate Development* test. There are, I find, issues of substance to be argued on the merits, and the proposed appeal has at least some prospect of success. While past decisions may prove to be of importance, it is by no means clear that past pronouncements will be decisive in this case. As leave is to be granted, I will say no more about the merits.

4.0 Disposition

[22] Exercising the discretion conferred on me by section 69(2) of the *Act*, I allow the application and grant leave to appeal as requested. If costs are a factor, they will be in the cause.

"The Honourable Mr. Justice Grauer"