Citation: Yukon Energy Corporation v. Yukon Utilities Board
2001 YKCA 2

Date: 20010427
Docket: YU403
Registry: Whitehorse

COURT OF APPEAL FOR THE YUKON TERRITORY

IN THE MATTER OF THE ***PUBLIC UTILITIES ACT***, R.S.Y 1986,c. 143 AND IN THE MATTER OF THE APPEAL BY THE YUKON ENERGY CORPORATION FROM A DECISION OF THE YUKON UTILITIES BOARD, BOARD ORDER 1998-5 DATED JULY 30, 1998

BETWEEN:

YUKON ENERGY CORPORATION

APPLICANT
(APPELLANT)

AND:

YUKON UTILITIES BOARD

RESPONDENT
(RESPONDENT)

Before: The Honourable Mr. Justice Cumming
The Honourable Mr. Justice Hollinrake
The Honourable Madam Justice Ryan

P.J. Landry and J.K. Herbert — Counsel for the Appellant

T. S. Preston, Q.C. — Counsel for the Respondent Yukon Utilities Board

D.O. Sabey, Q.C. — Counsel for the Respondent Yukon Electrical Company Ltd.

Place and Date of Hearing: Vancouver, British Columbia 28 March 2001

Place and Date of Judgment: Vancouver, British Columbia 27 April 2001

Written Reasons by:
The Honourable Mr. Justice Hollinrake

Concurred in by:
The Honourable Mr. Justice Cumming
The Honourable Madam Justice Ryan

Reasons for Judgment of the Honourable Mr. Justice Hollinrake:

[1] This is an appeal from an order of the respondent Yukon Utilities Board dated 30 July 1998. The order concerns an application by the Yukon Energy Corporation to the Board for approval of an interim and refundable rate increase for 1998.

[2] The Yukon Energy Corporation ("YEC") is a public utility that generates, transmits and distributes electricity in the Yukon. It is regulated by the Yukon Utilities Board (the "Board") under the ***Public Utilities Act***, R.S.Y. 1986, c. 143 (the "***Act***"). The Board's jurisdiction is subject to directives issued by the Commissioner in Executive Council.

[3] The Yukon Electrical Company Ltd. ("YECL") is an electricity generator and distributor in the Yukon. Approximately 89% of the electricity distributed by YECL in the Yukon is purchased by YECL from YEC. YECL participated in the hearing that resulted in the order currently on appeal.

[4] Anvil Range Mining Corporation was the owner of the Faro Mine from 1994 to 1998, and a very significant purchaser of electricity from YEC. While Faro Mine was operating, Anvil consumed approximately 40% of the total electricity generated by YEC.

[5] In early April of 1997, due to financial difficulties, Anvil closed down operations at the Faro Mine and disconnected electrical services with YEC.

[6] YEC projected that without special relief, the 1997 shutdown would eliminate all of its projected earnings for 1997. On 11 April 1997 YEC applied to the Board for a 20% interim refundable rate increase. The Board approved this increase on 26 May 1997 after a public hearing under Order 1997-6.

[7] At this time Anvil had an outstanding debt to YEC of approximately $2.53 million (plus GST and interest). YEC says it did not request any allowances for Anvil's debt in its April 1997 application because it anticipated that Anvil would resume operations within a reasonable period of time and pay its outstanding invoices.

[8] In March and May of 1997 YEC filed liens in respect of the outstanding debt against Anvil's interest in Faro Mine. In July and early August of 1997 Anvil entered into negotiations with the Yukon Government and YEC to facilitate a loan between Anvil and Cominco Inc. that would permit the mine's re-opening. Anvil, YEC and the Yukon Government reached an agreement on 7 August 1997 (the "Tri-Partite Agreement").

[9] Under this agreement, the Yukon Government agreed to pay $1.5 million in cash to YEC. YEC assigned $1.5 million of Anvil's bad debt and $1.5 million of its miners' lien claims to the Yukon Government. Anvil agreed to a payment schedule for the balance of its debt owing to YEC and that, upon the mine's re-opening, it would pay its ongoing power bills to YEC within 21 days of receipt of YEC's monthly invoice. YEC agreed to subordinate its remaining miners' claims to Cominco's security as required by Cominco, and to restore electrical service to Anvil, despite its outstanding debt of about $1 million.

[10] Before restoring service, YEC required the Board's approval to exempt Anvil from regulations requiring a customer to pay all outstanding accounts before being reconnected. The Commissioner in Executive Council directed the Board to grant this approval by Order-in-Council 1997/139. The Board did so in Order 1997-8. That order reads:

> **WHEREAS:**
> **a.** Pursuant to Section 17 of the *Public Utilities Act*, the Commissioner in Executive Council passed Order in Council 1997/139, as follows:
>
> > "1. The Yukon Utilities Board is directed to approve, as provided in subsection 3.1 of the Board's Electrical Service Regulations made on June 25, 1996, the Agreement among the Government of Yukon, Yukon Energy Corporation (YEC) and Anvil Range Mining Corporation

(Anvil) dated August 7, 1997 and filed with the Board so as to exempt YEC and Anvil from section 4.18 of the said Electrical Service Regulations when YEC reconnects electrical service to Anvil in accordance with the said agreement."

B. Section 3.1 of the Electrical Service Regulations (ESR") state that no agreement can provide for the waiver or alteration of any part of these regulations unless such agreement is first filed with and approved by the Board.

C. Section 4.18 of the ESR requires:

"Before reconnecting or restoring service, the customer shall pay:

a) any amount owing to the Company;
b) a collection charge of $45 if the reconnection is made during the Company's normal business hours, or, in any other case, an amount not exceeding the Company's actual cost of reconnection;

D. Section 17.(1) of the *Public Utilities Act* requires that, "notwithstanding any other provision of this *Act*, the Board shall comply with any general or specific direction of the Commissioner in Executive Council with respect to the exercise of the powers and functions of the board."

NOW THEREFORE

The Board orders that YEC and Anvil are exempted from section 4.18 of the Electrical Service Regulations when YEC reconnects electrical service to Anvil in accordance with the August 7, 1997 agreement.

Dated at the City of Whitehorse, in the Yukon Territory, this 4 day of September, 1997.

[11] In August of 1997 electrical service to Faro Mine was reconnected. According to YEC, the restoration of electrical services to Anvil permitted YEC to eliminate the 20% interim rate increase to other ratepayers that the Board had approved in Order 1997-6.

[12] In December of 1997 YEC filed an application requesting Board approval to finalize its 1997 rates and requesting further rate riders and orders to address ongoing uncertainties and ratepayer risks related to the Faro Mine's continuing operations.

[13] On 16 January 1998 Anvil closed the Faro Mine again, and filed for protection under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36 ("***CCAA***"). At that time its outstanding debt to YEC, including the approximately $1 million owing from before August 1997, was approximately $3.2 million.

[14] As a result of the 1998 closure, YEC revised its 23 December 1997 application and filed its revisions with the Board on 22 April 1998 (the "Revised Application"). The Revised Application included, among other things, a proposal for final rates for 1997 and a request for an interim rate increase for 1998 to deal with the mine closure.

[15] On 6 July 1998 YEC filed an update to the Revised Application, seeking an interim and refundable rate increase of 18.55% for 1998. This proposed increase included allowances for YEC to recover its cost of service or revenue shortfalls for 1997 and 1998 of approximately $4.6 million due to mine closures and Anvil's bad debt of approximately $2.3 million.

[16] YEC did not seek to recover the 1997 and 1998 cost of service or revenue shortfalls and the Anvil's bad debt in a single year. According to YEC, it did not seek this recovery because it would require a significant rate increase. Instead, as a stabilizing measure, YEC sought to amortize recovery of these expenses over a five-year period. This approach was similar to the Board's response when the previous owner of Faro Mines left behind a bad debt and filed for ***CCAA*** protection in 1993.

[17] On 30 July 1998 the Board issued Order 1998-5 after a two-day public hearing. That order is the order in issue in this appeal.

[18] In its decision the Board approved YEC's recovery of the 1997 and 1998 revenue shortfalls from other utility customers, except for the recovery of the approximately $3.2 million Anvil bad debt.

[19] In dealing with and denying recovery of the Anvil bad debt, the Board said this:

> As previously noted, YEC signed the Tri-Partite Agreement and reconnected Anvil on August 11, 1997. When the Mine shut down in January 1998 and left the system, it left behind bad debts of $3.2 million. YEC proposes to recover this bad debt from its other customers over 5 years, including a return on equity. YEC's President repeatedly stated that the Corporation was acting in the best interests of its customers during the negotiations. However, the facts at the time were:
>
> 1. Anvil had a history of payment problems, with $2.5 million in arrears when the Tri-Partite Agreement was signed.
> 2. Anvil had serious liquidity difficulties.
> 3. The Tri-Partite Agreement resulted in YEC releasing its Electric Service Regulations security and subordinating its Miners Liens to Cominco Ltd.
> 4. YEC fully understood that the $1.5 million it was receiving came from its shareholder, the Yukon Government.
> 5. The Government was determined to get the Mine running for reasons that appear to be unrelated to the business imperatives of the Corporation.
>
> While the Board must give the utilities under its jurisdiction an opportunity to earn a fair return on assets, it is not required to approve all expenses if they were not prudently incurred. The Anvil potential bad debt appears to fall within the category of an extraordinary bad debt occurring through an unusual transaction made not in the ordinary course of business, with the utility and its shareholder fully understanding the associated risks.
>
> Mr. McWilliams states that had YEC not entered into the agreement, then Anvil would not have commenced operations, with the result that the 20% surcharge rider would have continued. The evidence on this issue is simply not sufficient for the Board to

> conclude that that would have been the case. It appears from the circumstances, bearing in mind that the Mine could not operate without electrical service, that YEC had an overwhelming position to secure payment of all of the arrears without relinquishing the security it had under [Electric Service Regulation] 4.18 and without subordinating its Miners Liens. The decision to continue to provide service and give up its security to receive the $1.5 million payment from, in reality, its shareholder, the Yukon Government, leaves the Board very much in doubt that this decision was based on business reasons; it appears to have a large political component. However, the evidence on this issue is simply insufficient for the Board to come to any conclusion. The Board has not been satisfied that this potential bad debt should be paid by the other rate payers.
>
> Accordingly, based on the rather limited evidence before the Board with respect to the circumstances of YEC entering into the Tri-Partite Agreement, the incurring of the potential bad debt, the subordination of the Miners Lien and the relinquishment of the security under Section 4.18 of the Electric Service Regulations, the Board is of the opinion that the potential bad debt of $3.1 million should not be recovered from the other classes of rate payers. The debt should be absorbed by YEC.

[20] This case now comes before this Court, leave having been granted by a Court of Appeal Chambers Judge. The ***Act*** confers on the Board exclusive jurisdiction and authority in respect of any inquiry or hearing to determine any question of fact, law or mixed fact and law required to be decided. There is no privitive clause as such. The ***Act*** goes on to confer appellate jurisdiction on any question of law or excess of jurisdiction.

In granting leave on a question of law the Chambers judge said this:

> The applicant submits that the Board erred in law or exceeded its jurisdiction by applying an incorrect test of “prudency" in reviewing the Utility's business expenses; by concluding that the debt was inappropriate when there was no evidence to support that determination or when such determination was patently unreasonable; by ignoring evidence that entering into the tri-partite agreement was reasonable; and by taking into account the irrelevant consideration that the agreement may have been politically motivated. These are said to be issues of general importance because the debt is large($3.2 million), the proper test for reviewing business expenses is in question, Board decisions of this nature have been inconsistent in the past, and the legal nature of a government directive to the Utility is in question.
>
> ...
>
> In my judgment, the applicant raises one question of general importance, namely, whether the Board applied the wrong test in determining whether to allow the Anvil bad debt as an expense in setting electricity rates for 1997. I grant leave to appeal on that issue, but only on that issue.
>
> I am persuaded by the respondents' arguments that the other issues proposed by the applicant are essentially factual matters and have no reasonable prospect of success on appeal.

[21] The question of law is:

> Did the Board apply the wrong test in determining whether to allow the Anvil bad debt as an expense in setting the electricity rates for 1997?

[22] In its factum the appellant said this under the heading "Summary of Appeal":

> 1. The issue in this appeal is the proper test that should be applied by the Yukon Utilities Board (the "Board" or "YUB") when it decides whether to allow recovery of a utility's operating expenses as a component of its rates.
>
> 2. In an interim rate application by the Appellant, Yukon Energy Corporation ("YEC"), the Board refused to approve the recovery of a $3,177,200 bad debt expense, on the basis that the expense was not "prudently incurred".
>
> 3. It is YEC's position in this appeal that the Board erred by applying the wrong test. The test which it applied was much too onerous, and resulted in the Board impermissibly substituting its own business judgment for that of YEC's managers. By doing so, the Board violated YEC's common law right to fair and reasonable rates by denying recovery of a properly incurred operating expense.
>
> 4. The correct test for allowance of operating expenses is based on a reasonableness standard which requires as a starting point a presumption of managerial good faith. It is YEC's position that if the Board had applied the correct test, it would have allowed YEC to recover the bad debt expense as requested.

[23] The first issue this Court must decide is the standard of review to be applied by this Court in reviewing the test or standard applied by the Board to the bad debt.

[24] The appellant says the standard this Court should apply is one of correctness. The respondent says it is

reasonableness *simpliciter*. As can be seen the only issue before us relates to the standard, as a matter of law, applied by the Board to this bad debt. I conclude that the standard to be applied by this Court is one of correctness. I see nothing in the judgments of the Supreme Court of Canada in ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748 or ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982, that could lead to the adoption of a standard of reasonableness as the respondent Board would have it.

[25] This takes us to the correctness or otherwise of the standard the Board adopted, which appears to be one of prudence. The Board said:

> While the Board must give the utilities under its jurisdiction an opportunity to earn a fair return on assets, it is not required to approve all expenses if they were not prudently incurred.

The appellant says that if the Board did not apply a standard of prudence it was one that was more onerous than reasonableness. The appellant cites a 1996 Court of Appeal decision involving the same parties and reported at (1996), 74 B.C.A.C. 58. In that case there was an issue involving the phrases “reasonably incurred” and “prudent acquisition” in the ***Act***. The Court said this at paras. 59, 60 and 62 of this decision:

> [59] I think the question is to be decided by the wording of s-s. 5(2) of the Directive: "... expenditures reasonably incurred by them for the purposes set out in subsection 1." "Expenditures" covers both operating and maintenance expenses as well as capital expenditures. "Reasonably incurred" is not synonymous with "prudent acquisition" in s-s. 32(3) of the ***Act***. Unlike s. 4 of the Directive, there are no introductory words subordinating the direction in s. 5(1) to other provisions of the Directive or the ***Act***.
>
> [60] The dictionary meaning of reasonable is best captured in these words from the ***Shorter Oxford Dictionary***:
>
> > "5. Within the limits of reason; not greatly less or more than might be though likely or appropriate."
>
> This conveys the sense of appropriateness to the purpose....
>
> ...
>
> [62] Prudence on the other hand imports proceeding with care and circumspection. A prudent acquisition relies both upon past experience and conservative forecasts.

[26] This leads into what I see as the definitive issue in this case. That is, assuming without deciding that on these facts a standard of prudence is more onerous than one of reasonableness, is it open to the appellant to assert this as an error on the part of the Board? That is the question of law before this Court.

[27] I have read the submissions made to the Board at the hearing by the parties. All those submissions refer to prudency or prudent without reference to reasonableness or reasonable. What has happened here is that the Board has responded to the case as it was put to it by those involved and, in particular, by the appellant. That being so, I do not think it is open to the appellant to now assert, in effect, that the Board fell into an error of law on the standard it applied to the Anvil bad debt, when it decided the case as it was presented by the parties and in particular by the appellant. It is appropriate here to review excerpts from the submissions made to the Board at the hearing.

[28] Counsel for the appellant said the following during the course of his submissions:

> I'd like to take a moment, Mr. Chairman, to talk a little bit about the so-called bad debt portion, which received a fair amount of attention yesterday, and focus somewhat on the prudency issue. Before concluding on that issue, Mr. Chairman, I would ask that all parties, including the Board, look very carefully at that issue. In my submission, when the facts are examined, they clearly point to the decision – sorry, clearly point to the fact that the decision to enter the tripartite agreement made by YEC was not only prudent, it was in the best interest of all ratepayers.
>
> ...

> With respect, Mr. Chairman, I would submit to you that there is no evidence that this deal was not prudent. All of the evidence points to this was a prudent thing done in the circumstances.
>
> ...
>
> A number of parties dealt with the issue of bad debt, and I'd like to sort of focus back in on that issue and reply to that. Two issues. First of all, there's the issue of prudency, and secondly, there's the issue of once the Board determines, assuming for the moment that they do, that it was a prudent expenditure, then how it should be collected.
>
> ...
>
> ... it's my submission, Mr. Chairman, that once you determine that the bad debt is an appropriate expenditure, it's a prudent expenditure, then it seems to me you have two choices.
>
> ...
>
> Mr. Duncan, in my submission. if it's a valid expense, a prudently incurred expense, the difficulty you have ...

[29] And also:

> MR. CLARKSON:
>
> The next point that I brought up in my cross-examination and so on, is was the tripartite agreement a prudent decision on Yukon Energy's point.
>
> ...
>
> The third point I'd like to bring up is should Yukon Energy recover the cost of its bad debt from ratepayers. We submit that they shouldn't be able to do that. The bad debts are a result of actions and business decisions undertaken by Yukon Energy;

> whether you agree they're prudent or not, they're a result of actions and decisions undertaken by the utility.
>
> MR. RONDEAU:
>
> The tripartite (sic) agreement was signed – tripartite, sorry, agreement was signed by the YEC and endorsed by its Board of Directors. Even though there may have been Government pressure or interference to accept this agreement, Mr. McWilliam admitted yesterday that YEC entered this agreement on their own volition. It is a question of whether becoming a signatory of this agreement was prudent, as it placed ratepayers at further risks by allowing a corporation, that already had a bad debt, to reconnect without paying their bill already owing.

[30] I should note here that it is on the basis of the references to "prudency" in the submission of counsel for the appellant that the respondent Board submits in its factum that:

> The Board did address the prudency issue. Applying the standard of reasonableness *simpliciter*, it is submitted that it was not unreasonable for the Board to adopt a prudency test when so urged by the Appellant. To the contrary, it was reasonable for the Board to apply the very test that the utility submitted was applicable.

In my view this submission cannot stand in the place of a standard of correctness which I think is imposed as a matter of appellate review on the issue before us. However, I do think it significant in coming to the conclusion I have that it is not open to the appellant to assert before this Court

that the Board fell into error in responding as it did to the submissions put to it.

[31] I also should note here that the appellant asserted before this Court that the order in council directing the Board to waive the regulation as to payment of past arrears and the subsequent order of the Board (set out above) must be taken as the approval of the Board of what led to that direction, that being the Tri-Partite Agreement. The appellant goes on to say that in effect the government had taken the issue of reasonableness or prudency out of the hands of the Board and it, the Board, cannot do otherwise than accept the agreement as being prudent or reasonable.

[32] I cannot agree with this submission. The fact is that this decision of the Board was the first time it turned its mind to the issue of the prudency or reasonableness of the tri-partite agreement. I think it was open to the Board to conclude as it did as to this agreement and the debt that followed on it.

[33] Lastly, I make the observation that I am satisfied that when the Board said, “The Board has not been satisfied that this potential bad debt should be paid by the other ratepayers”, followed by the conclusion that “The debt should be absorbed by YEC”, that would have been its conclusion

whether the standard it referred to was one of prudency or reasonableness.

[34] As can be seen from the above, I would dismiss the appeal.

"The Honourable Mr. Justice Hollinrake"

I AGREE:

"The Honourable Mr. Justice Cumming"

I AGREE:

"The Honourable Madam Justice Ryan"

June 14, 2001

Citation number changed to read **2001 YKCA 002**

not 2001 YTCA 002