COURT OF APPEAL OF YUKON

Citation: Yukon Energy Corporation v. Yukon Utilities Board
2016 YKCA 2

Date: 20160309
Docket: YU764

Between:

Yukon Energy Corporation

Appellant

And

Yukon Utilities Board

Respondent

Before: The Honourable Madam Justice Stromberg-Stein
(In Chambers)

On appeal from: an order of the Yukon Utilities Commission Tribunal, dated August 18, 2015

Oral Reasons for Judgment

Counsel for the Appellant:	P.J. Landry and E. Snow
Counsel for the Respondent:	A. Sabo
Place and Date of Hearing:	Vancouver, British Columbia March 9, 2016
Place and Date of Judgment:	Vancouver, British Columbia March 9, 2016

Summary:

Yukon Energy applies for leave to appeal under s. 69 of the Public Utilities Act from an order of the Yukon Utilities Board. The proposed appeal concerns the proper interpretation of a rate policy directive. Held: leave to appeal granted. Yukon Energy has raised questions of law that, given the relatively low threshold for assessing the merits on a leave application, have some prospect of success.

[1] **STROMBERG-STEIN J.A.**: The appellant, Yukon Energy Corporation, applies for leave to appeal an order of the respondent, Yukon Utilities Board.

[2] The proposed appeal arises from the Board's interpretation of a rate policy directive issued pursuant to the *Public Utilities Act*, R.S.Y. 2002, c. 186. It is the position of Yukon Energy that the Board erred in law in its interpretation of what costs Yukon Energy can recover from a wholesale ratepayer under s. 7 of the directive.

BACKGROUND

[3] Briefly, by way of background, which may be an over simplification, the Board is the statutory authority that regulates the provision of electricity by public utilities in the Yukon pursuant to the *Public Utilities Act*. As part of this mandate, the Board regulates the rates of Yukon Energy.

[4] Yukon Energy is a government owned public utility that generates the majority of electrical power in the Yukon. Yukon Energy supplies power on a hydro-based grid, but also uses diesel generation when customer loads surpass the available hydro generation.

[5] Yukon Electrical Company Limited is the primary distributor of power for customers in the Yukon. It purchases a majority of its power requirements from Yukon Energy on a wholesale basis. It is also regulated by the Board, but is not a party to this proposed appeal.

[6] Rate Schedule 42 delineates the rate and terms and conditions of Yukon Energy's wholesales to Yukon Electrical. The Energy Reconciliation Adjustment ("ERA") was established by the Board. It allows for Yukon Energy to recover added

diesel generation costs when its actual diesel costs of supplying power to Yukon Electrical are above forecast. The ERA results in a direct charge to Yukon Electrical.

[7] As part of its rate setting function, the Board established the Diesel Contingency Fund ("DCF"). This fund is a deferral account. Its purpose is to smooth the impact to ratepayers from variations in diesel generation costs due to the impact of changing water conditions. Yukon Energy can produce greater electrical generation in high water conditions as opposed to in drought conditions. Yukon Energy makes payments into and out of this fund depending on the difference between forecast and actual diesel generation costs. In favourable water conditions, Yukon Energy generally makes payments into the fund; in unfavourable conditions it receives payments out of the fund.

[8] Order in Council 1995/90 is a governmental rate policy directive. Section 7 requires the Board to fix Yukon Energy's wholesale rates charged to Yukon Electrical at an amount "sufficient to enable Yukon Energy Corporation to recover its costs that are not recovered from its other customers." The interpretation of this provision is the substance of this proposed appeal.

[9] In 2014, as directed by Board Orders 2013-01 and 2014-07, Yukon Energy filed an application to revise the DCF and amend the ERA provisions of Rate Schedule 42. Two things happened in 2012 that led to this application. First, water conditions were favourable, resulting in much higher hydro generation than was forecast. This required Yukon Energy to make a payment into the DCF. Second, Yukon Electrical's actual load requirements increased over its forecast. This resulted in an increase in diesel generation requirements and costs. These two events led to diesel related costs (including the payment into the DCF) being $1,773,000 higher than the costs included in Yukon Energy's rates. After considering the added revenues received from Yukon Electrical (from the increase in sales over forecast), Yukon Energy was unable to recover $439,000 in costs. A purpose of Yukon Energy's application was to address this perceived shortfall.

[10] On February 6, 2015, the Board issued Order 2015-01 in response to the application. In appendix A to Order 2015-01, the Board interpreted costs under s. 7 of the Order-in-Council to mean actual diesel generation costs and not forecast costs derived from Yukon Energy's forecasting and modelling tool. It ordered Yukon Energy to provide a revised ERA based on actual diesel costs.

[11] In a compliance filing in response to Order 2015-01, Yukon Energy identified perverse outcomes arising from the Board's interpretation of s. 7. It argued that 'costs' should be interpreted to include diesel related costs, including payments into the DCF.

[12] On August 18, 2015, the Board issued Order 2015-06. The Board held that it "was not persuaded that the definition of 'actual costs' for ERA purposes … should be changed" and that because Yukon Energy can recover its actual diesel generation costs, the criteria in s. 7 of the Order-in-Council are met. Further, it noted that with its interpretation, the "perverse outcomes" identified by Yukon Energy would not occur in high-water years. To avoid any such outcomes in drought years, when diesel costs are recovered through the DCF, the Board stated that Yukon Energy cannot invoke the ERA.

[13] Yukon Energy requested a review and variance of Order 2015-06. On December 31, 2015, the Board dismissed the application.

LEGAL PRINCIPLES

[14] Section 69 of the *Public Utilities 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 reads as follows:

> 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.

[15] 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 s. 69 is the well-known test set out in *Queens Plate Development Ltd. v. Vancouver Assessor*, Area 09 (1987), 16 B.C.L.R. (2d) 104 (C.A. Chambers) at 109-110. The factors to consider in deciding whether to grant leave are as follows:

> (a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from;
>
> (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;
>
> (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.]

[16] 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.

PARTIES' POSITIONS

[17] Yukon Energy argues the Board made the following errors of law in section 2.2 of Appendix A to Order 2015-06:

> interpreting Section 7 of [Order-in-Council] 1995/90;
>
> interpreting Section 7 of [Order-in-Council] 1995/90 in a manner which fails to ensure that the rate charged to [Yukon Electrical] including the ERA is

> sufficient to enable Yukon Energy to recover its costs not recovered from other ratepayers; more particularly
>
> > in not permitting Yukon Energy to recover $439,000 of its 2012 diesel-related costs from [Yukon Electrical] including payments Yukon Energy made to the DCF resulting from favourable water conditions in that year (payments required by Board Orders 2015-01 and 2015-06), and
> >
> > by directing Rate Schedule 42 be amended to state that Yukon Energy cannot invoke the ERA when "drought conditions" or unfavourable water conditions exist, thereby preventing Yukon Energy from recovering its diesel-related costs if such conditions exist in any given year;
>
> interpreting [Order-in-Council] 1995/90 so as to limit the criteria under Section 7 to Yukon Energy's "actual diesel costs", and excluding diesel-related costs made by way of payments to the DCF as required by the Board Orders 2015-01 and 2015-06.

[18] Yukon Energy observes that the Board's interpretation of s. 7 of the Order-in-Council prevents it from recovering its diesel related costs when there is Yukon Electric wholesale growth beyond what was forecast, no matter whether favourable or unfavourable water conditions exist.

[19] Yukon Energy also notes that this Court is in effect the first and last court of review of the Board's decision, and thus a generous view should be taken of its leave application. It states that the outcome of this appeal will have a material financial impact on it, and potentially Yukon Electrical and other ratepayers.

[20] The Board submits that Yukon Energy has failed to raise a question of law. Thus, it has not met the requirements of s. 69 of the *Public Utilities Act*. The Board says that all of the grounds raised by Yukon Energy are questions of mixed law and fact because they involve the interpretation of the Order-in-Council as it applies to the facts related to Yukon Energy's recovery of diesel costs. Further, the Board argues that the standard of review of the proposed appeal will be one of reasonableness because the matters determined by the Board engage its expertise to set rates and payment amounts under its home statute and policy directive: *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45 at paras. 26-28. Viewed in light of the deferential standard of review, the Board says Yukon

Energy has not raised a substantial question to be argued involving the Board's interpretation of the Order-in-Council.

DISPOSITION

[21] In considering criteria (a), (c), (e) and (f) from the *Queens Plate* test, Yukon Energy does not argue that this appeal raises a question of the jurisdiction of the Board. There is no marked difference in opinions in the decisions below. These factors militate against granting leave.

[22] However, this appeal would have the benefit of determining what amounts Yukon Energy can charge its wholesale customers for its costs related to diesel generation. This will have a significant financial impact on Yukon Energy and potentially Yukon Electrical and other ratepayers. The issue of the interpretation of s. 7 of the Order-in-Council has not been considered by this Court, nor, as far as I am aware, have similar provisions been considered by other appellate bodies. These factors weigh in favour of granting leave.

[23] In my view, the key *Queens Plate* factors in this case are: (b) whether the appeal raises a question of law (as is also required by the *Public Utilities Act*) and (d) whether there is some prospect of success in the sense that there is a substantial question to be argued.

[24] In my view, Yukon Energy has raised questions of law in the sense required by *Queens Plate* in that the grounds of appeal raise questions of "statutory interpretation that [are] particularly important to the litigant": *Queens Plate* at 109. The dispute between the parties involves the interpretation of s. 7 of the Order-in-Council. The interpretation of this provision is important to the parties as it will have a significant financial impact on Yukon Energy and its ratepayers.

[25] The Board says the standard of review is reasonableness and Yukon Energy has not demonstrated that its grounds of appeal have some prospect of success. In my opinion, merely because the standard of review on appeal may be a deferential one does not mean Yukon Energy's grounds of appeal have no prospect of success.

Yukon Energy has identified arguable issues that raise potential difficulties with the Board's interpretation of s. 7 of the Order-in-Council as the Board's interpretation may prevent Yukon Energy from being able to recover the costs it incurs, regardless of water conditions, when there is growth in wholesales to Yukon Electrical beyond what was forecast.

[26] The parties contest what is included in 'costs' in s. 7 of the Order-in-Council. The language of s. 7 provides that Yukon Energy shall sell electricity to Yukon Electrical at rates "sufficient to enable Yukon Energy Corporation to recover its costs that are not recoverable from its other customers." It is arguable that the word 'costs' could be interpreted to mean diesel-related costs as opposed to actual diesel generation costs.

[27] Given the relatively low threshold for assessing the merits on a leave application, in my view Yukon Energy has demonstrated that the proposed appeal has some prospect of success. There is a substantial question to be argued on the merits. I would grant leave to appeal.

"The Honourable Madam Justice Stromberg-Stein"