

COURT OF APPEAL OF YUKON

Citation: *Yee v. Yukon Energy Corporation*,
2024 YKCA 13

Date: 20241108
Docket: 24-YU922

Between:

Nathaniel Yee

Appellant

And

Yukon Energy Corporation

Respondent

Before: The Honourable Madam Justice Bennett
(In Chambers)

On appeal from: An order of the Yukon Utilities Board, dated July 12, 2024
(Board Order 2024-05).

The Appellant, appearing in person
(via videoconference):

N. Yee

Counsel for the Respondent, Yukon Energy
Corporation
(via videoconference):

J. Herbert
J. Pileggi, Articled Student

Counsel for the Proposed Respondent,
Yukon Utilities Board
(via videoconference):

G. Bentivegna

Place and Date of Hearing:

Whitehorse, Yukon
October 25, 2024

Place and Date of Judgment:

Whitehorse, Yukon
November 8, 2024

Summary:

Application by the Yukon Utilities Board to be added as a respondent at the leave to appeal stage. Held: Application granted.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] The Yukon Utilities Board (“the Board”) seeks to be added as a respondent to the application for leave to appeal its decision, brought by Nathaniel Yee. Mr. Yee named the Yukon Energy Corporation (“YEC”) as the only respondent. YEC supports the Board’s application. Mr. Yee contends that the application is premature as the litigation is only at the leave stage. He says that if leave is granted, the Board may apply to be added as a party.

Background

[2] Yukon Energy Corporation (“YEC”) is a government-owned public utility that generates the majority of power in Yukon. The Yukon Utilities Board is a statutory authority that regulates the rates YEC charges to consumers of electricity.

[3] On August 31, 2023, YEC filed a General Rate Application with the Board, requesting an order approving a forecast revenue requirement for 2023 and 2024.

[4] The Board held an oral hearing on March 4–7, 2024, in Whitehorse, and rendered its decision on July 12, 2024, in Board Order 2024-05. Mr. Yee participated as an intervener in the hearing.

[5] On August 9, 2024, Mr. Yee filed a notice of appeal of Board Order 2024-05, and on September 9 he filed an application for leave to appeal.

Position of the Parties

Yukon Energy Board (Applicant)

[6] The Board argues that this Court has the discretionary power to add it as a respondent in the leave application and appeal. It argues that the considerations set out in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 [*Ontario Power*] are applicable here. These factors include whether the appeal is

unopposed; whether there are other parties available to oppose the appeal; and whether the tribunal serves a policy-making, regulatory or investigative role, rather than adjudicating individual conflicts between two adversarial parties: *Ontario Power*, para. 59.

[7] The Board argues that because the decision against which leave to appeal is sought is a regulatory one, concerns about the Board's participation impacting its impartiality are lessened. Although YEC is a respondent, the Board submits that it is uniquely positioned to speak to the scope of its jurisdiction, which is challenged by Mr. Yee's proposed appeal. The Board intends to limit the scope of its participation to jurisdictional issues, the legal framework within which it operates, and the record.

Yukon Energy Corporation (Respondent)

[8] YEC makes similar submissions to the Board. It argues that this Court has discretion to add the Board as a respondent, and that the operative considerations in exercising this discretion are laid out in *Ontario Power*. It points out that the Board has invariably been named as a respondent in applications to appeal its decisions. However, it could not point the Court to an application at the leave to appeal stage.

Nathaniel Yee (Appellant)

[9] Mr. Yee opposes the Board's application to be added as a respondent. He argues that adding the Board as a respondent would interfere with the Board's impartiality and undermine the principle of finality in administrative decisions. He argues that the application to be added as a respondent is premature given that leave to appeal has not yet been granted.

[10] Mr. Yee argues that there is no need for the Board's participation, because there is already a party who can defend the merits of the decision (the named respondent, YEC). He submits that the Board's participation raises the risk of bootstrapping. Bootstrapping is where a tribunal "seeks to supplement what would otherwise be a deficient decision with new arguments on appeal": *Ontario Power*, at para. 64.

Legal Framework

[11] Under s. 69 of the *Public Utilities Act*, R.S.Y. 2002, c. 186 [*Act*], leave may be sought from this Court to appeal an order of the Board, on application within 30 days of the order. The granting of leave to appeal is in the discretion of the Court: s. 69(2). The statute dictates that the applicant for leave “shall give notice of the application stating the grounds of appeal” to the Board, Minister, and any party adverse in interest, at least three clear days before the hearing of the application: s. 69(3).

[12] The *Act* further provides that this Court has “the same jurisdiction and powers on appeals as it has for appeals from orders of the Supreme Court”: s. 72(1).

[13] Rule 2(2)(a) of the *Yukon Court of Appeal Rules*, 2005, gives a justice sitting in Chambers the authority to add a person who has not been named as a respondent on an application for leave to appeal, if that person “could be affected by the order requested”. This is identical to the former Rule 2(2)(a) of British Columbia’s *Court of Appeal Rules*, B.C. Reg. 297/2001.

Discussion

What is the legal test for adding the Board as a respondent?

[14] As the Board concedes, the *Act* does not provide the Board with a right to be heard on an application for leave to appeal its decision. On the other hand, the legislation does provide that notice of an application for leave to appeal be given to the Board in a timely way in advance of the hearing.

[15] The question is whether the Board should be added as a respondent under R. 2(2)(a). The Yukon provision is similar to R. 2(2)(a) of British Columbia’s former *Court of Appeal Rules*, B.C. Reg. 297/2001. There does not seem to be a decision on point in relation to the Yukon rules. However, in *Sunshine Coast (Regional District) v. Vanderhaeghe*, 2023 BCCA 192 (Chambers), Justice Hunter summarized

the test to meet under the former British Columbia Rule and its successor at para. 19:

Applicants must show that they have interests that could be affected by the relief sought in the appeal, and the application judge must then engage in an exercise of judicial discretion, governed by an overarching concern with the interests of justice.

[16] A board or tribunal is often granted standing if it has not been named as a party, even when there is no statutory right of participation. A tribunal, given its specialized expertise, generally assists with respect to its jurisdiction and takes an explanatory role with reference to the record and the legal framework in which it operates in order to present the “big picture” to the Court. A tribunal is also sometimes permitted to make submissions on the standard of review and whether the decision is reasonable. It is not permitted to raise new arguments in order to supplement its decision, as that is a form of “bootstrapping”: see *Ontario Power* paras. 42–44, 59, 64.

[17] There appears to be no decision in either Yukon or British Columbia on the issue of whether an unnamed party should be added as respondent at the leave stage. There are at least two decisions from the Alberta Court of Appeal addressing the issue. In *Saskatchewan Power Corporation v. Morgan Stanley Capital Group Inc.*, 2013 ABCA 341, Justice Hunt considered this issue and found at paras. 8–10:

[8] Only in exceptional circumstances should a party be granted respondent status prior to the decision in a leave application: *Provident Energy Ltd. v. Alberta (Utilities Commission)*, 2008 ABCA 316 at para 8 (available on CanLii) [*Provident*]. The reason for this is obvious. Before a leave application is decided, it is impossible to predict if leave will be granted or in relation to what questions.

[9] In these matters, leave can only be granted for questions of law or jurisdiction: *Alberta Utilities Commission Act*, SA 2007, c A-37.2, s 29(1). The test for leave to appeal requires the applicant to demonstrate that the question of law or jurisdiction raises a “serious, arguable point”: *Provident* at para 11. Subsumed in the general test are four elements: is the point on appeal of significance to the practice; is the point raised of significance to the action itself; is the appeal *prima facie* meritorious; and will the appeal unduly hinder the progress of the action.

[10] If leave to appeal is granted, a party can then apply to participate in the appeal as a respondent or an intervener. At that stage the Court can

better determine if and how the party's interests may be affected, and what if anything it may usefully contribute to the proceedings.

[18] A similar conclusion was reached by Justice Paperny in *Balancing Pool v. ENMAX Energy Corporation*, 2018 ABCA 143 at 21–22. Justice Paperny did add parties at the leave stage in *Balancing Pool*. I note, however, that neither case dealt with adding a board or tribunal at the leave stage.

[19] There are cases where it is appropriate to permit the addition of a party at the leave stage. While I do not necessarily conclude that it is only in exceptional cases, (as the issue was not fully argued in this application), that a party may be added at the leave to appeal stage, such an application may require greater scrutiny as the issues may not necessarily have sufficiently crystalized to determine the appropriateness of adding a party.

[20] In this case, the Board submits that it will limit the scope of its submissions as noted above. It will, however, provide valuable information in relation to the areas it proposes to address, and in particular, the issue of jurisdiction as that is one of the issues on which Mr. Yee seeks leave to appeal. Thus, because the Board's jurisdiction is being impugned by Mr. Yee's application for leave, it will be affected by the relief sought, and will address an issue that YEC may not be best equipped to address. There are no concerns about bootstrapping as the Board will not be permitted to add supplemental arguments in an effort to sustain its decision.

[21] Therefore, the Board has met the test for being added as a respondent at this early stage. I would limit its participation, at least at this stage, to the three areas on which it sought to make submissions: jurisdiction, the legal framework, and the record. I allow the application on that basis.

“The Honourable Madam Justice Bennett”