SUPREME COURT OF YUKON

Citation: *Wright v. Yukon Utilities Board and Yukon Energy Corporation*, 2014 YKSC 43

Date: 20140728
S.C. No. 14-AP002
Registry: Whitehorse

BETWEEN:

SKEETER WRIGHT

PETITIONER

AND

YUKON UTILITIES BOARD AND YUKON ENERGY CORPORATION

RESPONDENTS

Before: Mr. Justice R.S. Veale

Appearances:

Skeeter Wright	Appearing on his own behalf
Alison Sabo	Counsel for the Yukon Utilities Board
P. John Landry	Counsel for Yukon Energy Corporation

REASONS FOR JUDGMENT

INTRODUCTION

[1] Skeeter Wright petitions the court for a declaration that the Yukon Utilities Board hearing and Report dated May 14, 2014 (the "Report") be declared null and void. The Report recommended the approval of Yukon Energy Corporation's proposed Whitehorse diesel to natural gas conversion project (the "Project") to the Minister of Justice.

[2] Yukon Energy Corporation ("Yukon Energy") applies for an order striking out the petition and dismissing the proceedings with costs of the application to Yukon Energy.

[3] Counsel for the Yukon Utilities Board (the “Board”) appeared by telephone only to assist if requested by the Court.

[4] The precise claim by Mr. Wright is that the Board erred in its decision not to accept two graphs purporting to represent the historical price of natural gas in relation to diesel as an aid to cross-examination. Counsel for the Yukon Conservation Society and Leading Edge Projects Inc. (“YCS/LE”) presented the graphs as an aid to cross-examine the Yukon Energy panel. YCS/LE did not bring this application or participate in it. YCS/LE has not brought an appeal or variation application.

[5] This application is not about Mr. Wright’s commitment to what he sees as the compelling public interest relating to the Project. Rather, the question is whether he has standing to bring his application and whether it discloses a reasonable claim or is otherwise an abuse of process.

BACKGROUND

[6] Pursuant to ss. 37-43 of the *Public Utilities Act*, R.S.Y. 2002, Chapter 186, (the “*Act*”) Yukon Energy has brought an application for an energy project certificate.

[7] The Minister of Justice (the “Minister”) is obligated to refer the application for review to the Board, who may hold a public hearing. On conclusion of the review, the Board submits a report and recommendation to the Minister.

[8] The Minister may then refuse or grant the application subject to any terms or conditions that the Minister considers to be in the public interest.

[9] On receiving the reference from the Minister on December 30, 2013, the Board issued Board Order 2014-01 on January 14, 2014 with respect to the Project indicating, among other things, that the Report and recommendations would address electrical load

forecasts, the effect of the Project on the rates of customers, the alternatives to the Project and whether it is prudent to build the Project at this time.

[10] Board Order 2014-01 set out the date of March 31, 2014 for the public hearing. It also set out the information requirements for granting intervener status as well as the date of March 6, 2014 for intervener evidence.

[11] Board Order 2014-02 dated February 3, 2014 set out the requests for intervener status which included YCS/LE and others. All who requested were granted intervener status. Mr. Wright did not request intervener status.

[12] In the Board "Rules of Practice", "party" means either an applicant or an intervener. An intervener means, among other things, a person "who intends to participate in the production and testing of evidence".

[13] On March 31, 2014 the Board reminded parties about the appropriate use of aids to cross-examination as follows:

> The purpose of an aid to cross is to assist the parties questioning a witness about the evidence of that witness. An aid to cross-examination should only be used if it assists in the questioning of a witness.

[14] The Board added a number of conditions on the presentation of aids to cross-examination which are not pertinent to this application.

[15] On March 31, 2014 following the formal hearing during the day, the Board held the community session in the evening and Mr. Wright made his presentation along with 17 other citizens. He submitted, among other things, that the price of natural gas will rise making the conversion from diesel to natural gas a financial risk that consumers will have to carry. He said:

> Now, I must apologize for the limited citations that I can make use of, but my research was curtailed when I found out a much more researched and cited intervention was being made by one of the interveners at your hearings.

[16] On April 1, 2014 legal counsel for the YCS/LE presented two pages with graphs on the historical relationship between natural gas and diesel pricing as aids to cross-examination. The graphs purported to be prepared by the U.S. Energy Information Agency. Counsel for Yukon Energy had discussed the graphs with counsel for the YCS/LE in advance of the hearing and informed him that Yukon Energy would object to the use of the graphs as there was no proof that they were prepared by the U.S. Energy Information Agency. The Board rejected the graphs as aids to cross-examine but permitted questioning on the price of natural gas or diesel based on information on the record before the Board.

THE LAW

[17] Rule 20(26) of the Yukon *Rules of Court* gives the Court discretion to strike out a petition in whole or in part:

> (26) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be.
>
> …
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[18] In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17, the Court stated that a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, on the ground that the pleading discloses no reasonable cause of action. Another way of putting it is that the claim will be struck if it has no reasonable prospect of success. The Court goes on to say that the power to strike claims promotes two goods (*sic*) - efficiency in the conduct of litigation and correct results. But at para. 21, the Court cautions that, in determining whether the claim should proceed, “the approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial”.

Private Interest Standing

[19] Mr. Wright brings his petition under Rule 54 of the *Rules of Court.* Rule 54 is not the law of judicial review but rather the procedural basis on which applications for judicial review are governed.

[20] The correct approach to standing is set out in *Sandhu v. British Columbia (Provincial Court),* 2013 BCCA 88, at para. 35, which approved the view that one looks at the underlying statute to see whether it gives any express or implied right to persons in the position of the applicant to complain of the alleged unlawful act or omission.

[21] Applying this test to Mr. Wright, he is not a party under the Board Rules or the *Act*. He did not apply to be an intervener which would have made him a party.

[22] On the other hand, although he did not allege any direct reliance on the YCS/LE intervention, his submission at the community hearing indicated that he was relying upon another intervention at the formal hearing.

[23] Under the *Act*, the Board is clearly subject to the fundamental principles of justice as follows:

> 52 Subject to the other provisions of this Act and the regulations and to the need to abide by the fundamental principles of justice, the board in respect to any inquiry or hearing
>
> (a) has the exclusive jurisdiction and authority to determine any question of fact, law, or mixed fact and law required to be decided;
>
> (b) may receive any evidence or other information that it considers appropriate, whether or not the evidence is given under oath or affirmation, and whether or not it would be admissible in a court of law;
>
> (c) has the powers, privileges, and immunities of a board of inquiry under the Public Inquiries Act;
>
> (d) may determine the persons to whom notice of the proceedings shall be given; and
>
> (e) may determine its own procedures. S.Y. 2002, c.186, s.52

[24] Given that the Board has the power to determine its own procedures and that Mr. Wright did not apply to be an intervener and thereby become a party, I conclude that he does not have private standing. This is particularly so in these circumstances where YCS/LE, the party who does have the standing to raise the matter, has declined to do so.

[25] I also note that Mr. Wright crafts his written outline in this matter as denying YCS/LE the fundamental principles of justice.

Public Interest Standing

[26] The test for public interest standing is set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45:

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a

> real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

[27] It should be noted that the *Downtown Eastside Sex Worker*s case involved a *Charter* challenge to the prostitution provision of the *Criminal Code*.

[28] As to whether there is a serious justiciable issue raised, this case is a far cry from the serious issues raised in *Downtown Eastside Sex Workers*. The case at bar deals with the use of graphs as aids in cross-examination, not whether the issue of pricing of natural gas versus diesel fuel was relevant. The Board clearly allowed the general issue of pricing between natural gas and diesel fuel to be cross-examined on as that was one of the precise issues before it. There was no attempt by the Board to deny cross-examination on the pricing issue. There was no suggestion that the YCS/LE was in any way prevented from calling evidence on the issue in addition to its cross-examination.

[29] As to the second factor whether Mr. Wright has a real stake or genuine interest in the pricing issue, there is absolutely no doubt that he has a real stake and genuine interest in advocating that the future price of natural gas is a significant factor working against the approval of the Project. But, that is a very different matter from the narrow issue that he has raised in that the denial of using the graphs as an aid to cross-examination amounts to a denial of a fundamental principle of justice.

[30] Finally, the question is whether the proposed petition is a reasonable and effective way to bring the issue before the Court.

[31] This factor must be addressed from a “practical and pragmatic point of view”. The Court in *Downtown Eastside Sex Workers* addresses this at para. 50 by asking whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination and whether if the proposed action is permitted to go forward it will serve the purpose of upholding the principle of legality.

[32] One of the specific issues raised in this context is whether there are realistic alternative means to bring the issue to court and whether the fact that YCS/LE, who have a more direct and personal stake as well as resources, declined to pursue the issue suggesting that discretion should be exercised against standing for Mr. Wright.

[33] There are two alternative remedies provided in the *Act* that should have been considered.

[34] The first is to proceed before the Board as a Variation of an Order:

> 62 The board may review, change, or cancel any decision or order made by it, and may re-hear any application or complaint before deciding it. S.Y. 2002, c.186, s.62

[35] This is a summary procedure to request the Board to vary or cancel their decision but would not engage the remedy of having the Board hearing, Report and recommendation declared null and void. However, it would be an appropriate way to deal with a procedural issue raised by a non-party.

[36] The other statutory procedure is by way of appeal:

> Leave to appeal to the Court of Appeal
>
> 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.
>
> (3) The applicant shall give notice of the application stating the grounds of appeal to the board, to the Minister, and to any party adverse in interest, at least three clear days before the hearing of the application. S.Y. 2002, c.186, s.69

[37] In my view, the appeal provision has been designed by the legislature to ensure that only serious and meritorious issues would be granted leave and they would go directly to the Court of Appeal so that the timelines of an approved project would not be disrupted with the exception of meritorious matters that were granted leave by the Court of Appeal. This also works against the exercise of discretion in favour of Mr. Wright.

[38] In my view, the issue brought by Mr. Wright, a non-party, is a procedural matter that the party directly affected, YCS/LE, declined to pursue. They are also alternative remedies provided in the *Act* that were not pursued by Mr. Wright. For all these factors, I conclude that public interest standing should not be granted, despite the fact that Mr. Wright has a real stake in the issues before the Board.

CONCLUSION

[39] I conclude that the Petition has no reasonable prospect for success. It relates to a procedural matter that may have affected a third party who does not wish to pursue the matter. In my view, it meets the plain and obvious test and I would not exercise discretion to allow Mr. Wright to proceed on the basis of either private or public interest standing. This does not suggest that his viewpoint on the general issue of the pricing of natural gas and diesel fuel has no merit but rather it says that the denial of the use of the graphs as an aid in cross-examination does not amount to a denial of natural justice for

a non-party who chose not to participate as a party in the production and testing of evidence.

[40] I also conclude that the Petition amounts to an abuse of process in the sense that the *Act* provides a variation procedure to review, change or cancel any of its orders, particularly when it is raised by a non-party. It is also an abuse of process to avoid a statutory appeal directly to the Court of Appeal which would provide a more efficient and timely procedure to determine the merits of the judicial review.

[41] I therefore dismiss the petition pursuant to the lack of standing and Rule 20(26)(a) and (d).

[42] As to costs, Rule 20(26) permits the Court to assess costs as special costs. Special costs are actual fees and disbursements incurred by Yukon Energy. Mr. Wright submitted that a cost award to Yukon Energy would be punitive to him as a self-represented litigant. In my view, costs should be awarded to Yukon Energy as I consider the petition brought by a non-party to have no reasonable chance of success. However, an award of special costs would be punitive and serve as a significant deterrent to others who might have valid claims to pursue. In the circumstances, I order Mr. Wright to pay party-and-party costs to Yukon Energy on Scale B.

VEALE J.