

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 UTILITIES CONSUMERS' GROUP
FROM A DECISION OF THE YUKON UTILITIES BOARD,
BOARD ORDER 1999-3 DATED NOVEMBER 3, 1999;
AND IN THE MATTER OF
THE APPEAL BY THE UTILITIES CONSUMERS' GROUP
FROM A DECISION OF THE YUKON UTILITIES BOARD,
BOARD ORDER 1999-5 DATED NOVEMBER 10, 1999

BETWEEN:

UTILITIES CONSUMERS' GROUP

Applicant
(Appellant)

AND:

YUKON UTILITIES BOARD

Respondent

ROGER RONDEAU and
P.G. O'CONNOR

Appearing for the Applicant

TIMOTHY PRESTON, Q.C.

Appearing for the Yukon Utilities Board

JOHN LANDRY

Appearing for Yukon Energy Corporation

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

[1] Veale J. (Oral): This is an application by the Yukon Utilities Board to adjourn applications for leave to appeal by the Utilities Consumers' Group,

presently set for April 6, 2001 at 2:00 p.m. Mr. Rondeau represents the Utilities Consumers' Group, Mr. Preston represents the Yukon Utilities Board, and Mr. Landry appeared by telephone representing the Yukon Energy Corporation.

BACKGROUND

[2] The Utilities Consumers' Group filed a notice of application for leave to appeal Yukon Utilities Board Order 1999-3, dated November 3, 1999, on December 3, 1999. It also filed a notice of application for leave to appeal Yukon Utilities Board Order 1999-5, dated November 10, 1999, on December 10, 1999.

[3] My ruling applies to both applications. The notices are filed pursuant to s. 69 of the *Public Utilities Act*, R.S.Y. 1986, c. 143, which states 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.
- (3) The applicant shall give notice of the application stating the grounds of appeal to the board, to the Executive Council Member, and to any party adverse in interest, at least three clear days before the hearing of the application.

[4] Under s. 62 of the *Public Utilities Act*, the board has the power to review, change, or cancel any order made by it. This was pursued by the Utilities Consumers' Group and a decision was given by the board on February 15, 2000.

[5] The Utilities Consumers' Group now wishes to proceed with its application for leave to appeal, and to that end, consent orders dated February 8, 2001 were filed, approved and consented to by Mr. Rondeau and Mr. Preston. Mr. Landry did not file an appearance in these matters until April 3, 2001. The consent orders state that the time set for the appellant to file and serve the appeal book, transcript, and factum was extended until February 12, 2001. A factum, record and book of authorities was filed by the Utilities Consumers' Group in each appeal on February 8, 2001.

[6] The Utilities Consumers' Group then filed a notice of motion on March 16, 2001, to be heard on April 6, 2001, asking that the appeal be heard *ex parte* based on Rules 25(2) and 32(2) of the Court of Appeal Rules. These rules permit the Court of Appeal to allow the Utilities Consumers' Group to proceed *ex parte* where the respondent's factums have not been filed within three weeks of the appellant depositing his factum. Rule 32(2) also permits the Court to allow the respondent to be heard in any event if leave is granted.

[7] It is the application to proceed *ex parte* that the Yukon Utilities Board and the Yukon Energy Corporation seek to have adjourned. At the outset of the adjournment application it was clear that there was a great deal of confusion on the proper procedure in the matter. In fact, Mr. Rondeau indicated that he was always intending to proceed with his application for leave to appeal, not the appeal per se. Thus, consent orders filed February 8, 2001 and the notice of motion to be heard April 6, 2001 are incorrect and should be read as referring to the application for leave to appeal.

[8] All parties now understand that we are dealing with the appropriate date for hearing the application for leave to appeal. The parties have also requested that I

give some directions for hearing the leave application. I therefore make the following order:

1. Pursuant to rule 5.1(3) of the B.C. Court of Appeal Rules and s. 69 of the *Public Utilities Act*, I am granting the Utilities Consumers' Group the right to make the leave application on June 1, 2001 at 1:00 p.m.
2. I am not going to require the Utilities Consumers' Group to file any further notice of their application for leave to appeal because the grounds, I understand, are contained in some detail in the factum already filed on February 8, 2001. There will be no order that the Utilities Consumers' Group provide a copy of the factum, record and book of authorities to the Yukon Energy Corporation as that has already been done.
3. Pursuant to Rule 5(1) of the Yukon Court of Appeal Rules, I am ordering the Yukon Utilities Board and the Yukon Energy Corporation to file their reply factums on or before April 27, 2001, in the form required under practice directive number 1 of the Court of Appeal for British Columbia. I should note that it does not appear that the Utilities Consumers' Group followed practice directive number 1 in exact detail, and if any further directions are required by the Yukon Utilities Board or the Yukon Energy Corporation a further application under Rule 5(1) of the Yukon Court of Appeal Rules can be made.
4. To be perfectly clear, I am ordering that the application for leave to appeal proceed with the Utilities Consumers' Group, the Yukon Utilities Board and the Yukon Energy Corporation all fully participating. It will not be an *ex parte* application. Each party will be limited to one hour for its submission.

REASONS

[9] The Utilities Consumers' Group is a citizens' group that monitors decisions of the Yukon Utilities Board. It would be unfair to insist on their strict compliance with

the Yukon Court of Appeal Rules, and particularly, the British Columbia Court of Appeal Rules and practice directives in this case. The rules that apply to a leave application are a peculiar mix of British Columbia and Yukon Court of Appeal Rules, by virtue of s. 12 of the *Court of Appeal Act*, R.S.Y. 1986, C. 37, which reads as follows:

12. Proceedings in appeals under this Act, when not otherwise provided for by this Act or the rules made under section 11, shall be as nearly as possible in conformity with the rules of the Court of Appeal for British Columbia.

[10] There are no provisions in the Yukon Court of Appeal Rules setting out directions for applications for leave to appeal. Hence, we refer to Rule 5.1 of the British Columbia Court of Appeal Rules and its practice directive number 1. I also note that exact conformity is not required, but rather, "as nearly as possible in conformity," to use the words of s.12.

[11] The Utilities Consumers' Group has filed matters in good faith, assuming that it was protecting its position to proceed with the application for leave to appeal when its remedies under s. 62 of the *Public Utilities Act* were exhausted. It also appears that the Yukon Utilities Board, by its consent to the orders of February 8, 2001, is not in any way prejudiced to proceeding as I have ordered.

[12] I note that counsel for Yukon Energy Corporation did not consent to my ruling under Rule 5.1(3) of the British Columbia Court of Appeal Rules. Any prejudice that may have resulted from the application for leave to appeal not proceeding in a timely fashion may be raised in the application on June 1, 2001, as it affects the substantive matters under the proposed appeal.

[13] I am mindful of s. 74 of the *Public Utilities Act*, which requires that an application for leave to appeal "be heard and determined without delay in a summary way." This section was not relied upon by the Yukon Utilities Board in its adjournment application. Consequently, I am of the view that there is no prejudice to the Yukon Utilities Board in proceeding with the delay that has occurred.

[14] Those are my reasons, counsel. Is there anything arising out of them, Mr. Landry, or Mr. Preston, or Mr. O'Connor?

[15] MR. LANDRY: I have one question, My Lord.

[16] THE COURT: Yes?

[17] MR. LANDRY: Just on the last point. Just as I had heard you collect -- I'm sure I'll get a copy of what the court reporter says, but as I understand it, the issue of delay, you're saying that that can be raised on the leave application?

[18] THE COURT: Well, in other words, as you suggested in your argument or your submission, as I understood it, that the order was originally made in 1999 and there may be some prejudice as a result of the passage of time, I am simply saying that you can raise that at the leave application hearing.

[19] MR. LANDRY: Thank you, My Lord.

[20] THE COURT: Mr. Preston?

[21] MR. PRESTON: Nothing, My Lord.

[22] THE COURT: Mr. O'Connor, I am sure there is a lot of things that you might not understand that have been said. Can I help you in any way?

[23] MR. O'CONNOR: Probably not. I'm sufficiently confused that no help with it right now would be -- except that I didn't quite catch the date that Yukon Utilities Board is required to file.

[24] THE COURT: April 27th.

[25] MR. O'CONNOR: April 27th?

[26] THE COURT: Right. In other words, just to say it by way of summary to you, Mr. O'Connor, the hearing - what's called the application for leave to appeal - will be heard on June 1, at 1:00 p.m. and the Consumers' Group has filed everything they need to file at this point in time, and the Yukon Energy Corporation and the Yukon Utilities Board have to file their matters or anything that they wish filed on or before April 27th.

[27] MR. O'CONNOR: Notwithstanding the earlier requirement that they file within three weeks of receiving filed --

[28] THE COURT: That is correct.

[29] MR. O'CONNOR: That's a matter of some distress to us.

[30] THE COURT: Let me explain that to you if I can.

[31] MR. O'CONNOR: Please.

[32] THE COURT: The sections that you were relying upon were sections that apply to the appeal itself.

[33] MR. O'CONNOR: And we're not dealing with that.

[34] THE COURT: And we are not dealing with that yet --

[35] MR. O'CONNOR: I understand.

[36] THE COURT: -- because you have not succeeded on your leave application.

[37] MR. O'CONNOR: Right. I understand. Thank you.

[38] THE COURT: Okay.

[39] MR. PRESTON: My Lord, if I may? I did have an opportunity to speak with Mr. Shier over the lunch break; he tells me that there is a very high probability that June 4th, the week of June 4th, will be available in the sense that his matter will be settled, so I don't know whether that assists the --

[40] MR. LANDRY: What? Sorry, Mr. Preston, did you say
would be available or would not?

[41] THE COURT: Yes, he is saying it would be available, Mr.
Landry.

[42] MR. LANDRY: Okay. Good.

[43] THE COURT: Mr. Landry, there is a tendency on people to
mumble here because we are not usually accustomed to people being on the phone.

[44] MR. LANDRY: No, it's my fault. I should have been up
there, but at short notice I couldn't get there.

[45] THE COURT: No, I understand. Mr. Preston is just saying
that it looks like June 4 is going to be available, but what I suggest we do is we keep
the date of June 1 at 1:00 p.m., and as soon as that matter is formally settled, then
we can consider changing the date to the week of June 4.

[46] MR. LANDRY: Great. That's fine, My Lord.

[47] THE COURT: Thank you very much. We are adjourned
then, Madam Clerk.

VEALE J.