

COURT OF APPEAL

Citation: *Utilities Consumers' Group v. Yukon Utilities Board*
2006 YKCA 02

Date: 20060323
Docket No.: 05-YU551
Registry: Whitehorse

**IN THE MATTER OF THE *PUBLIC UTILITIES ACT*, R.S.Y. 2002, c. 186, AND
IN THE MATTER OF THE APPEAL BY THE UTILITIES CONSUMERS'
GROUP FROM A DECISION OF THE YUKON UTILITIES BOARD, ORDERS
2005-16 AND 2005-17, DATED DECEMBER 21, 2005;**

Between:

UTILITIES CONSUMERS' GROUP

Applicant

And

**YUKON UTILITIES BOARD
YUKON ENERGY CORPORATION**

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Roger L. Rondeau
Gordon A. Fulton
P. John Landry

Counsel for the Utilities Consumers' Group
Counsel for the Yukon Utilities Board
Counsel for the Yukon Energy Corporation

**REASONS FOR JUDGMENT
(Application for Leave to Appeal)**

INTRODUCTION

[1] The Utilities Consumers' Group (UCG) applies for leave to appeal two decisions of the Yukon Utilities Board dated December 21, 2005. The first decision, Board Order 2005-16, awards intervenor costs to six intervenors, one of whom is the Utilities Consumers' Group (UCB Costs Award). The UCB Costs Award also includes the Yukon

Utilities Board's own costs provided by the Government of Yukon pursuant to section 50 of the *Public Utilities Act*, R.S.Y. 2002, c. 186 (the *Act*).

[2] The second decision, Board Order 2005-17, awards hearing costs to Yukon Energy Corporation (the YEC Costs Award).

[3] The sole question is whether leave to appeal should be granted.

THE FACTS

[4] The Yukon Utilities Board (the Board) is a statutory body created pursuant to the *Act*. Its primary function is to regulate the operations of the Yukon Energy Corporation (YEC) by fixing the rates YEC can charge to consumers of electricity.

[5] On December 31, 2004, YEC filed a rate application for approval of 2005 Revenue requirements (the 2005 rate application). The Board established a regulatory timetable and final issues list with a public hearing commencing on April 18, 2005, which lasted 4 days. The Board issued reasons for its decision on October 18, 2005, under Board Order 2005-12. By Board Order 2005-14, the Board ruled that YEC, "the party being asked to pay", was the only party from which it was seeking input on the costs applications. In other words, the Board did not permit intervenors to address the final hearing costs application of YEC, although there was opportunity to raise the matter at the hearing in April 2005 when YEC filed an estimate of \$650,000.

[6] All costs awards are added to the rate base and charged to the consumer.

[7] UCG now applies for leave to appeal to the Court of Appeal pursuant to section 69(1) of the *Act*. There are three matters to be addressed:

1. The UCG Costs Award.

[8] Mr. Rondeau, the President of UCG, presented a claim for costs in the amount of \$74,405.13. This amount represented \$69,187.50 for fees for 307.5 hours at \$225 per hour, plus \$350 for disbursements and GST of \$4,867.63. The fees calculated at \$225 per hour were consulting fees that Mr. Rondeau invoiced to UCG.

[9] The Board adjusted this claim by applying a non-professional fee of \$35 per hour, thus reducing the claim to \$11,515.87. It then awarded 20% of the reduced claim in the amount of \$2,303.17 but further reduced it by 50% to a final award of costs in the amount of \$1,526.09 (including disbursements of \$374.50).

[10] The Board made the following findings with respect to the conduct of the UCG representative, Roger Rondeau:

1. He circulated written material which the Board described as “a bad attempt at humour” and “offensive and disrespectful to the Board and the parties”.
2. He tampered with summonses issued by the Board at his request. He removed pages which advised the persons served of their rights resulting in the Board setting aside the summonses. The Board described Mr. Rondeau’s conduct as “a flagrant abuse of the Board’s process”.
3. The Board stated that while the two previous examples of Mr. Rondeau’s conduct served to increase the overall costs of the hearing, they were not an exhaustive list. The Board found that his disruptive influence on the

proceedings resulted in inconvenience and further costs to the Board and other parties.

4. The Board concluded that based upon Mr. Rondeau's conduct in the proceedings, "the UCG did not provide a responsible intervention in terms of effectiveness, relevancy to the issues, reasonableness and prudence, and diligence". Mr. Rondeau did not participate in the oral hearing in April 2005.

2. The Government of Yukon Costs Award

[11] The Board noted its approval from the Executive Council Member for necessary expenses to conduct the hearing of the 2005 rate application. The Board awarded costs of \$245,269.97 to the Government of Yukon on the basis that those costs should be borne by the utility ratepayers rather than the Yukon taxpayer. These costs were awarded at 100% of fees and disbursements claimed. The intervenors were not permitted to review those costs.

3. The YEC Costs Award

[12] On April 8, 2005, the YEC filed an updated hearing cost estimate of \$600,000 to \$650,000 approximately 10 days before the oral hearing. On November 30, 2005, YEC filed an updated hearing cost of \$851,000. The Board did not view this increase of \$200,000 as "reasonably and prudently incurred" and awarded YEC costs in the amount of \$650,000.

The UCG Review and Variance Application

[13] On January 9, 2006, UCG requested review and variance of the UCG Costs Award, the Government of Yukon Costs Award and the YEC Costs Award. Mr. Rondeau, on behalf of UCG submitted:

1. That the Board should award intervenor costs based upon the \$225 per hour consultant fee invoiced to UCG by its President, Mr. Rondeau.
2. UCG agreed with the award of 20% of fees but requested that the further 50% reduction be limited to the maximum fine of \$1,000 set out in the offence and penalty section 68(1) of the *Act*.
3. UCG requested documentation on the breakdown of costs applied for by YEC on the basis that YEC should be required to follow the same procedure required for intervenor cost applications. Until such documentation is provided to all interested parties, UCG requested a suspension of the YEC Costs Award.
4. UCG requested the same remedy for the Government of Yukon Costs Award.

[14] In Board Order 2006-3, the Board denied the UCG requests for review and variance as they did not raise an error in law or meet the other grounds the Board requires for a variance under section 62 of the *Act*. The Board provided extensive written reasons for its decision not to vary the three Costs Awards

THE LAW

[15] UCG now applies for leave to appeal the three Costs Awards to the Court of Appeal pursuant to section 69(1) of the *Act*.

[16] Section 69(1) of the *Act* gives the Court of Appeal the discretion to grant leave to appeal from an order of the Board “on a question of law or excess of jurisdiction.” There is no claim that the Board exceeded its jurisdiction. The only issue is whether the proposed appeal is based upon a question of law.

[17] The test to be applied on applications for leave to appeal from special tribunals is found in *Queens Plate Development Ltd. v. British Columbia (Assessor of Area No. 9 – Vancouver)* (1987), 16 B.C.L.R. (2d) 104 (C.A.) at pp. 109 – 110:

“... a justice may have regard for one or more of the matters listed below:

- (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) a 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. ...”

[18] Although there has been a review by the Board of its own decision, this appeal is in effect the first and last court review of the Board’s decision. To this extent, a generous view should be given to the leave application (see *British Columbia (Minister of Transportation and Highways) v. Reon Management Services Inc.*, 2000 BCCA 522 at para 14).

[19] This appeal relates primarily to the statutory discretion of the Board to award costs. Section 56 of the *Act* states:

“The board may order to whom or by whom any costs incidental to any proceeding before the board are to be paid, and may set the costs to be paid.”

[20] The Rules of Practice adopted by the Board provide a Scale of Costs in Schedule 1 which sets out a consultant fee at a maximum of \$225 per hour. The Rules of Practice apply to an applicant and an intervenor.

[21] The Board also established an Intervenor Costs Award Policy on June 3, 2005. The policy states that applications for a costs award by an intervenor “should be supported by a statement of costs with the appropriate receipts, vouchers and copies of fee billings together with an affidavit in support of the claim for the award of costs.”

[22] The applicant bears an onerous burden in appeals of a costs award because the court is reluctant to interfere with discretionary orders. The discretion must be exercised judicially and not arbitrarily or capriciously (see *Currie v. Thomas* (1985), 2 C.P.C. (2d) 42 (B.C.C.A.); [1985] B.C.J. No. 1922).

ANALYSIS

[23] I will consider the three costs awards separately.

The UCG Costs Award

[24] The essence of Mr. Rondeau’s appeal is that he should be awarded costs based upon the rate of a consultant with expertise rather than the non-professional fee of \$35 per hour that the Board awarded. This is fundamentally a finding of fact by the Board which has had the benefit of observing the contribution and conduct of Mr. Rondeau before it. The Board is well aware of Mr. Rondeau’s qualifications. UCG and Mr. Rondeau were given the same consideration as the other intervenors.

[25] Although the Board did not state its reasons for having applied a 20% recovery followed by a 50% reduction, I do not find any question of law that should be considered by the Court of Appeal.

[26] Leave to appeal is denied.

The Government of Yukon Costs Award

[27] The UCG appeal in this matter is based upon Mr. Rondeau's submission that the procedure to determine costs should be the same for all parties. In other words, Mr. Rondeau would like to have the opportunity to challenge the costs that the Board incurred.

[28] The Board is not a party or an intervenor. It is the tribunal that hears the application. Its costs are provided by the Government of Yukon and are legitimately recoverable without the scrutiny of the intervenors. The fact that the Board has included them in the same order as intervenor costs, as a matter of convenience, does not make them subject to the rules for awarding costs to intervenors.

[29] Leave to appeal is denied on this ground.

The YEC Costs Award

[30] This ground of appeal is somewhat similar to the Board costs. Mr. Rondeau would like to have the opportunity to review the costs claimed by YEC. It is significant that Mr. Rondeau did not attend and raise this issue at the hearing in April 2005, when he had an opportunity to do so.

[31] YEC is the utility that is being regulated. The Board has exercised its discretion not to treat the utility in the same fashion as intervenors and wishes to confine the intervenors to the merits of the application. The Board in effect provides the oversight as

to whether the costs submitted by YEC are reasonable. It concluded they were not and reduced the YEC costs by \$200,000.

[32] This is not a question of law. The application for leave to appeal on this ground is denied.

COSTS

[33] The question of costs on the leave application was addressed by the parties. I award costs of this application to the Board and YEC against the UCG.

VEALE J.A.