Too Close For Comfort? BC Utilities Commission Granted "Full Party" Status In Appeal Of Its Own Decision

In *Powell River Energy Inc. v. British Columbia (Utilities Commission)*, 2024 BCCA 327, the BC Court of Appeal ("BCCA") granted Powell River Energy Inc. ("PREI") leave to appeal a reconsideration decision of the British Columbia Utilities Commission ("BCUC") which affirmed that PREI fell within the definition of a "public utility" under section 1 of the *Utilities Commission Act* (the "*UCA*"), and was therefore subject to regulation by the BCUC. Noteworthy in the BCCA's decision is that the Court also directed that the BCUC may participate as a "full party" in the hearing of the appeal, thus avoiding the substantive issues on appeal being unopposed.

Background

PREI is engaged in selling power generated at two hydroelectric facilities in British Columbia to the United States through a chain of affiliated companies. PREI argued that it was excluded from section 1 of the UCA because it fell within the exclusion in (d) of the definition of "public utility", which states: "a person not otherwise a public utility who provides the service or commodity only to the person or the person's employees or tenants, if the service or

commodity is not resold to or used by others" (the "Exclusion").

As summarized in our previous bulletin reviewing the BCUC's original decision (Decision and Order G-332-23), PREI unsuccessfully argued that the chain of affiliated companies it used to sell power to the United States constituted the same "person" under the UCA and that it was engaging in electricity sales within the same corporate organization, and therefore, it was not reselling electricity (which would have attracted BCUC regulation).

As discussed in our previous bulletin, in March 2024, the BCUC dismissed a reconsideration application brought by PREI under section 99 of the UCA which focused on the BCUC's interpretation of the Exclusion (Decision and Order G-91-24). In particular, the BCUC disagreed that the Exclusion should be divided into the two sub-parts, which would have enabled PREI's interpretation of the provision.

In April 2024, filed a notice of appeal from the BCUC's reconsideration decision. The BCUC stayed its earlier orders pending the outcome of the proceedings before the BCCA.

The BC Court of Appeal Leave Decision

Section 101(1)(b) of the UCA generally allows appeals of BCUC orders and decisions to the BCCA with leave from the Court.

Participation of the BCUC on Appeal

The Chambers Judge who heard the leave application agreed with PREI that the BCCA had jurisdiction to hear the proposed appeal and, without undertaking a detailed analysis of the principles governing leave to appeal,[1] accepted that the appeal raised a question of law engaging the statutory interpretation of the UCA, not previously considered by the BCCA. In particular, the appeal will turn on the correctness of the

reconsideration panel’s interpretation of the words “or” and “and” in the context of the Exclusion and other sections of the UCA. The BCCA also recognized that the appeal was important to PREI, other entities and sites that have energy generation capability that may supply their operations, all public utilities subject to the UCA, and all customers of those public utilities.

While affirming that the issue of standing is a discretionary one where the statute does not clearly resolve the issue of tribunal standing, as recognized by the Supreme Court of Canada in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, the BCCA acknowledged that there are nonetheless circumstances where it is “unnecessary, and indeed problematic” for the BCUC to take on an expanded role by defending its decision (e.g., where it is adjudicating a dispute between a public utility and a municipality).

The BCUC sought a direction from the BCCA enabling it to participate in the appeal as a “full party”[2] as, there being no other respondents and no other parties that had applied to intervene, the appeal would have otherwise been unopposed.

The question before the BCCA was therefore whether the BCUC could be permitted to participate as a full party “without upsetting the balance that must be struck between the interests of informed adjudication and tribunal impartiality”. The need to maintain this balance reflects the unique role an administrative tribunal can have as the decision-maker of the decision being appealed. As such, courts are alive to the concern that allowing an administrative tribunal to address the substantive issues on appeal – as opposed to a more limited role – could allow a decision-maker to augment or restate its reasons on appeal (i.e., improper bootstrapping) or could otherwise be contrary to the accepted principles of finality and/or impartiality.

The Chambers Judge held that it would be beneficial to the

BCCA division hearing the appeal to receive responsive submissions from the BCUC concerning the issues of statutory interpretation PREI raised on the appeal as:

- there were no other parties who stood opposed to PREI on the appeal;
- the BCUC performed a *regulatory* rather than *adjudicative* role in determining whether PREI was subject to BCUC regulation as a "public utility";
- the BCUC was "well placed to provide submissions concerning the proper interpretation of 'public utility', given that it can be expected to have a 'particular' and 'habitual' familiarity with its home statute"; and
- a "pragmatic adversarial context" would "result in a deeper appreciation of the issues and a more interrogated final determination".

Given that the issue on appeal concerned a question of law, reviewable on a standard of correctness, the Chambers Judge found that typical concerns about improper bootstrapping and tribunal impartiality were unlikely to arise.

Conclusion

The BCCA's decision demonstrates its willingness to engage on issues of statutory interpretation with respect to the UCA, reflecting the importance of utility services for companies operating in the province and British Columbians generally.

The decision also affirms the value of the adversarial context in enabling a court to more deeply appreciate the issues at hand and, ultimately, as noted by the BCCA, "a more interrogated final determination". Where improper bootstrapping and tribunal impartiality are unlikely to arise, an adversarial process favours allowing an administrative tribunal to participate on appeal where it has no alternative but to step in and defend the merits of its decision.

Footnotes

1 These factors are set out in BCCA decision of *Queens Plate Dev. Ltd. v. Vancouver Assessor, Area 09*, (1987), 16 B.C.L.R. (2d) 104 at pp. 109–110, as affirmed in the recent decision of *North Vancouver (City) v. British Columbia (Utilities Commission)*, 2023 BCCA 203.

2 We note that while the BCCA used the term “full party status” to differentiate between a full scope of participation (addressing substantive issues) versus more limited participatory role, the standing of the BCUC as a respondent in the appeal was not at issue.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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