

CANADA / JUDGMENT

Coquitlam (City) v. British Columbia Utilities Commission

2020 BCCA 289

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 289 Coquitlam (City) v. British Columbia Utilities Commission COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Coquitlam (City) v. British Columbia Utilities Commission, 2020 BCCA 289 Date: 20201023 Docket: CA46903 Between: City of Coquitlam Appellant (Intervenor) And British Columbia Utilities Commission Respondent (Administrative Tribunal) And FortisBC Energy Inc. Respondent (Applicant) Before: The Honourable Mr. Justice Abrioux (In Chambers) On appeal from: An order issued by the British Columbia Utilities Commission, dated April 2, 2020 (Order Number G-75-20). Counsel for the Appellant (via teleconference): M. Vesely I.D. Webb S.B. Hannigan Counsel for the Respondent, British Columbia Utilities Commission (via teleconference): J.M. Coady, Q.C. T.M. Shoranick Counsel for the Respondent, FortisBC Energy Inc. (via teleconference): M.T. Ghikas T. Ahmed Place and Date of Hearing: Vancouver, British Columbia October 7, 2020 Place and Date of Judgment: Vancouver, British Columbia October 23, 2020 Summary: The City of Coquitlam seeks leave to appeal an order of the British Columbia Utilities Commission, which authorized FortisBC Energy Inc. to abandon a decommissioned pipeline in place on City lands and directed the parties to share removal costs equally in the event that the City requests the pipeline's removal to accommodate municipal infrastructure. Held: Application granted. The proposed appeal raises questions of law concerning the respective jurisdictions of the British Columbia Utilities Commission and municipalities over decommissioned utility infrastructure. It raises issues of general importance and substantial questions to be argued that warrant consideration by the Court. Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

- [1] The City of Coquitlam ("the City") seeks leave to appeal a Reconsideration Decision of the British Columbia Utilities Commission ("BCUC") issued April 2, 2020 and indexed as Order No. G-75-20. The decision affirmed an order (No. G-80-19, dated April 15, 2019) authorizing the respondent FortisBC Energy Inc. ("FEI") to abandon a decommissioned pipeline in place on City lands, and directing the parties to share removal costs equally in the event that the City requests the pipeline's removal to accommodate municipal infrastructure.

- [2] FEI opposes the application, with BCUC taking no position on the merits of the application.

Background

- [3] In 1955 the Public Utilities Commission of British Columbia approved by way of a "certificate of public convenience and necessity" ("CPCN") the construction of a Nominal Pipe Size 20 ("NPS 20") Intermediate Pressure gas line by the British Columbia Electric Company Ltd. ("BCEC"), 5.5 kilometres of which was to be located along Como Lake Avenue in the municipality of Coquitlam. In 1957 the company and the City concluded an operating agreement that required the company to obtain City approval before proceeding with new pipeline construction within its jurisdiction. The pipeline was built in 1958.
- [4] Many years later, on October 16, 2015, the British Columbia Utilities Commission ("BCUC") approved the construction of a new pipeline, the Lower Mainland Intermediate Pressure System Upgrade Projects ("LMIPSU Project"). The LMIPSU will pass through Coquitlam, Burnaby and Vancouver and will replace the NPS 20 pipeline with a larger line with Nominal Pipe Size 30 ("NPS 30"). A term of the approval provided that the NPS 20 pipeline would be permanently decommissioned.
- [5] As successor operator to the BCEC, FEI entered into discussions with the City with respect to the new construction. Differences arose, however, over FEI's proposal to abandon the NPS 20 pipeline in place. The City withheld its consent to the new construction unless FEI agreed to two conditions:
- a) that FEI, at its own cost, remove approximately 380 metres of the abandoned NPS 20 Pipeline if the pipe ultimately conflicts with a planned City project that may proceed within 3 to 5 years, and patch the pavement to temporarily restore the road; and
 - b) that FEI agree to repave the entire width of Como Lake Avenue for 5.5 kilometres after completion of the LMIPSU Project, and to provide security in the form of a letter of credit in the amount of \$6 million for all the paving work.
- [6] If realized, these two conditions would cost FEI an estimated \$5 million and \$5.5 million respectively. Statutory Scheme
- [7] On June 28, 2018, FEI applied to the BCUC for orders settling the terms of the new construction, pursuant to ss. 32 and 33 of the Utilities Commission Act, R.S.B.C. 1996, c. 473 [UCA]. Those sections provide: Use of municipal thoroughfares 32 (1) This section applies if a public utility
- (a) has the right to enter a municipality to place its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse, and
 - (b) cannot come to an agreement with the municipality on the use of the street or other place or on the terms of the use.

- (2) On application and after any inquiry it considers advisable, the commission may, by order, allow the use of the street or other place by the public utility for that purpose and specify the manner and terms of use. Dispensing with municipal consent 33 (1) This section applies if a public utility
 - (a) cannot agree with a municipality respecting placing its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse in a municipality, and
 - (b) the public utility is otherwise unable, without expenditures that the commission considers unreasonable, to extend its system, line or apparatus from a place where it lawfully does business to another place where it is authorized to do business.
- (2) On application and after a hearing, for the purpose of that extension only and without unduly preventing the use of the street or other place by other persons, the commission may, by order,
 - (a) allow the use of the street or other place by the public utility, despite any law or contract granting to another person exclusive rights, and
 - (b) specify the manner and terms of the use.
- [8] "Distribution equipment" is defined in s. 1 of the UCA to mean "posts, pipes, wires, transmission mains, distribution mains and other apparatus of a public utility used to supply service to the utility customers" (emphasis added).
- [9] Sections 41, 45-46 and 121 of the UCA are also relevant to this matter. Section 41 prohibits public utilities from ceasing operations on an approved and operating project without BCUC permission. Section 45 prohibits the construction of a "public utility plant or system" without approval in the form of a CPCN. Section 46 provides the approval process. The effect of an approval is determined by s. 46(8): 46 (8) A public utility to which a certificate is, or has been, issued, or to which an exemption is, or has been, granted under section 45 (4), is authorized, subject to this Act, to construct, maintain and operate the plant, system or extension authorized in the certificate or exemption. [Emphasis added.]
- [10] Section 121 insulates approvals from local government powers. It provides: Relationship with Local Government Act 121 (1) Nothing in or done under the Community Charter or the Local Government Act
 - (a) supersedes or impairs a power conferred on the commission or an authorization granted to a public utility, or
 - (b) relieves a person of an obligation imposed under this Act or the Gas Utility Act.
- (2) In this section, "authorization" means
 - (a) a certificate of public convenience and necessity issued under section 46 BCUC Decisions

- [11] By order issued April 15, 2019 and indexed as Order G-80-19, the BCUC made the following orders:
1. Pursuant to section 121 of the UCA, it is affirmed that FEI is authorized to abandon the decommissioned NPS 20 Pipeline in place.
 2. Pursuant to section 32 of the UCA, upon request by the City in circumstances where it interferes with municipal infrastructure, the costs of removal of any portion of the decommissioned NPS 20 Pipeline shall be shared equally between FEI and the City.
 3. The City's request that FEI should be required to repair and repave the whole 5.5 kilometre section on Como Lake Avenue curb to curb is denied.
- [12] The City applied for reconsideration pursuant to s. 99 of the UCA on two grounds: a) that the BCUC erred in finding it had jurisdiction to give "authorization" to FEI within s. 121 of the UCA to abandon NPS 20 in place; and b) that the BCUC erred in finding that s. 32 of the UCA permitted it to specify the manner and terms by which the City could request FEI to remove portions of NPS 20.
- [13] By order issued April 2, 2020 and indexed as Order G-75-20, the BCUC dismissed the City's reconsideration application and invited further submissions from the parties respecting the process and evidentiary record of the "cost allocation formula" component of the decision (the "Reconsideration Decision").
- [14] Noting that the UCA was silent on the BCUC's jurisdiction over decommissioned public utility assets, the tribunal cited *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para. 50 [ATCO] for the proposition that administrative tribunals may have powers that "exist by necessary implication from the wording of the act, its structure and its purpose." It found that the authority to authorize decommissioning arose by necessary implication from ss. 41, 45 and 46 of the UCA, since interpreting those provisions otherwise would lead to the absurd and unintended result that public utilities would be required under section 41 to apply for permission to cease all or part of an operation, but the BCUC would have no power to authorize the public utilities to decommission the assets on which the operation relied.
- [15] The tribunal further found that its jurisdiction over public utility assets survived decommissioning by necessary implication, on the basis that the BCUC would otherwise be unable to regulate matters that are an "integral part" of its core mandate of "rate setting and protecting the supply system in a manner which safeguards the public interest." On the basis of these powers, it interpreted s. 46(3), which permits conditions to be attached to an approval, as enabling the BCUC to authorize NPS 20's abandonment in place. Alternatively, it found the same power to authorize abandonment existed by necessary implication.

- [16] The tribunal relied on the finding that it retained jurisdiction over decommissioned public utility assets to find that it could impose a term for sharing costs on future municipal use of the pipeline lands, pursuant to s. 32 of the UCA.
- [17] The City then filed this application for leave to appeal the Reconsideration Decision on June 30, 2020. Positions of the Parties The City
- [18] The City proposes to raise two main issues on appeal, which largely mirror those it raised on reconsideration before the BCUC:
- a) whether the BCUC erred in law by finding that it has the power to require a municipality to allow FEI to abandon in place its permanently decommissioned pipeline on City lands; and
 - b) whether the BCUC erred in law by finding that it has the power to order the terms under which a municipality may request a portion of a decommissioned pipeline be removed from City lands, including by requiring the municipality to pay a portion of FEI's costs of removal if removal is required to accommodate municipal infrastructure.
- [19] Reduced to its essentials, I understand the City's position on appeal to be that a pipeline on municipal lands falls outside of BCUC jurisdiction once it becomes permanently decommissioned.
- [20] The City highlights the BCUC's finding that the relevant provisions of the UCA are silent as to whether BCUC jurisdiction extends to permanently decommissioned pipelines. It submits that the tribunal misapplied the law of necessary implication and gave an overbroad construction to BCUC's core mandate. It argues that the appeal would be the first opportunity for an appellate court to consider the BCUC's jurisdiction with respect to permanently decommissioned infrastructure, and an opportunity to consider the respective jurisdictions of the UCA, the Community Charter, S.B.C. 2003, c. 26 and the Gas Utility Act, R.S.B.C. 1996, c. 170. It adds that significant sums of public monies are at stake: removing the NPS 20 under the order's terms would cost the City approximately \$38 million.
- [21] The City relies on an affidavit of Gary MacIsaac, Executive Director of the Union of British Columbia Municipalities ("UBCM"), sworn on behalf of that body. He deposes that BC municipalities would benefit from clarification as to the jurisdiction between the Community Charter and the UCA over decommissioned infrastructure, particularly as many public utility projects approach the end of their service lives. He deposes that the impugned decision of the BCUC will have "far-reaching consequences" for municipal budgets and planning.
- [22] The affidavit appends a resolution endorsed by the UBCM at its annual convention in 2019, which called for a "holistic review of the regulatory framework surrounding provincial utility undertakings" by the Province, citing a lack of jurisdictional clarity in matters touching both the Community Charter and the UCA. The same exhibit includes the Province's response, which indicates that the BCUC began an inquiry in August 2019 to examine the regulation of energy utilities affiliated with municipalities. An update on the

inquiry was set to be given at the UBCM's 2020 Convention. FEI

- [23] FEI opposes the application on the grounds that the appeal is bound to fail.
- [24] It submits that BCUC jurisdiction over decommissioned assets falls squarely within the tribunal's mandate "to ensure that FEI provides appropriate service at just and reasonable rates." FEI also points to several provisions in the UCA, in particular ss. 32-34, 36, 41, 45(7-9), 46 and 121, which appear to delineate jurisdiction between the BCUC and local governments and argues that reliance on the Community Charter is misplaced, since the UCA expressly subordinates that legislation to "power[s] conferred on the commission or authorization[s] granted to a public utility": UCA, s. 121(1). It adds that long-standing case law has stressed "the BCUC's broader public interest mandate relative to municipalities when it comes to utility infrastructure."
- [25] Consequently, it submits that there is "no realistic prospect" that this Court would find that the BCUC lacks authority in these matters. BCUC
- [26] BCUC takes no position on the application's merits. Its submissions are limited to informing the Court on three points: the applicable standard of review, the BCUC's jurisdiction and regulatory environment, and the test for leave to appeal.
- [27] Regarding its jurisdiction, BCUC submits that the tribunal's central functions are to determine rates and protect the supply system consistent with the public interest, citing ATCO at paras. 7, 60, and 63. Its positions on the other two points are reflected in the discussion below. Legal Framework & Analysis
- [28] Section 6(1)(b) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 (the "Act") grants this Court jurisdiction to hear any matter in which jurisdiction has been given to it under an enactment of British Columbia. An enactment may provide a limited right of appeal: Act, s. 6(2).
- [29] Pursuant to s. 101(1)(b) of the UCA, an appeal lies from decisions or orders of the commission to the Court of Appeal with leave of a justice.
- [30] Where a statutory tribunal has issued original and reconsideration decisions on a matter, the reconsideration decision represents the final decision and is the proper subject of a leave application: *British Columbia Old Age Pensioners' Organization v. British Columbia Utilities Commission*, 2017 BCCA 400 at paras. 28-29 (Goepel J.A. in Chambers) [B.C.O.A.P.O].
- [31] Section 101(4) of the UCA permits the BCUC to be heard on an appeal brought under s. 101(1)(b). Absent legislative intent to the contrary, statutory tribunals are generally limited to an "explanatory role" in proceedings where their decisions are challenged before the court: *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 (S.C.C.) at 709; *Timberwolf Log Trading Ltd. v. Commissioner* (Pursuant to s. 142.11 of the Forest Act), 2011 BCCA 70 at para. 7.

- [32] The factors applicable to leave applications from a decision of a statutory tribunal were summarized by Justice Taggart in *Queen's Plate Development Ltd. v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104 (C.A.) at 109-110, cited in *Joint Industry Electricity Steering Committee v. British Columbia Utilities Commission*, 2005 BCCA 330 at para. 9:
- 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; iii. interpretation of standard wording which appears in many statutes, for example the in force provisions of retroactive legislation;
 - 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. [Citations omitted.]
- [33] The determination of whether the issue raised by an application for leave to appeal has sufficient merit and there are substantial questions to be argued must be done in light of the standard of review that would apply on appeal: *B.C.O.A.P.O.* at para. 22. A question of general importance cannot arise from an application devoid of merit: *Plateau Pipe Line Ltd. v. British Columbia Utilities Commission*, 2002 BCCA 149 at para. 36 (Thackray J.A. in Chambers), *aff'd* 2002 BCCA 246.
- [34] Where leave to appeal is allowed, the justice granting leave may limit the issues on appeal: *Khorchidian v. British Columbia (Securities Commission)*, 2019 BCCA 411 at para. 24 (Tysoe J.A. in Chambers). Standard of Review
- [35] The parties agree that an appellate standard of review would apply to this appeal, pursuant to UCA, s. 2.1, and *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. Questions of law would therefore be reviewed on a correctness standard, while questions of fact would be reviewed on a standard of palpable and overriding error: *Vavilov* at para. 37.

Analysis

- [36] I am of the view that the proposed appeal would raise novel issues of law concerning the jurisdiction of the BCUC vis-à-vis local governments. Mr. MacIsaac's affidavit illustrates that those jurisdictional boundaries have been a matter of general concern for BC

municipalities. The fate of decommissioned public utility assets like pipelines is undoubtedly a matter of public importance. Furthermore, both Coquitlam and FEI stress the significant cost implications which arise from a decision on this issue. I am therefore satisfied that the appeal would raise a question of general importance and would offer a "clear benefit."

- [37] Without in any way pronouncing on the ultimate merits of the case, I am not persuaded by FEI's submission that the appeal would be without arguable merit. Notwithstanding the existence of provisions in the UCA that appear to subordinate municipal authority in many areas to that of the BCUC, the issues on appeal concern powers that the tribunal found arose in the BCUC by necessary implication rather than through express statutory language. Resort to statutory language delineating established powers between the BCUC and local governments is therefore of limited assistance at this stage.
- [38] Whether the implied powers claimed by the BCUC exist, namely to authorize decommissioning, to retain jurisdiction over decommissioned assets and to authorize those assets' abandonment in place on municipal lands, are not questions, in my view, that have an obvious answer. They cannot be resolved by simple reference to the Supreme Court of Canada's decision in ATCO, whose application to statutory interpretation in this context is unclear, in my view, and a matter of disagreement between the parties. Since these and other issues of law would be determined on a correctness standard on appeal, the BCUC's own conclusions would not be given deference by this Court.
- [39] I am also not persuaded that the BCUC's mandate, express or implied, is so evidently broad as to render an appeal inarguable. I recognize FEI's submission that binding authority dating from the 1950s, when much of today's utility infrastructure was built, reflects a broader conception of the BCUC's public interest mandate relative to municipalities when it comes to utility infrastructure: see *District of Surrey v. British Columbia Electric Company Limited*, [1957] S.C.R. 121 at 126 and 127; *Prince George Gas Co. v. Inland Natural Gas Co.* (1958), 14 D.L.R. (2d) 247 at 379 (B.C.C.A.). However, the real issue as advanced by the applicant is whether those same principles apply at the end of the infrastructure's life in comparison to when it/they went into service. As this issue has not been considered on appeal, and given the number of other pipelines which are approaching the end of their usefulness, leave ought to be granted, in my view, such that this and related issues may be properly considered by the Court.
- [40] In light of the above, I am satisfied that the issues on appeal would raise "substantial questions to be argued."

Disposition

- [41] Accordingly, I would grant leave to appeal. "The Honourable Mr. Justice Abrioux"

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