

# COURT OF APPEAL OF YUKON

COURT OF APPEAL  
Cour d'appel  
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FEB 10 2025

For Yukon  
pour le Yukon

Citation: *Yee v. Yukon Energy Corporation*,  
2025 YKCA 3

Date: 20250206  
Docket: 24-YU922

Between:

**Nathaniel Yee**

Appellant

And

**Yukon Energy Corporation and Yukon Utilities Board**

Respondents

Corrected Judgment: The text of the judgment was corrected on the cover page  
on February 12, 2025.

Before: The Honourable Justice Griffin  
(In Chambers)

On appeal from: An order of the Yukon Utilities Board, dated July 12, 2024  
(Board Order 2024-05).

## Oral Reasons for Judgment

The Appellant, appearing in person  
(via videoconference):

N. Yee

Counsel for the Respondent, Yukon Energy  
Corporation  
(via videoconference):

J. Herbert

Counsel for the Respondent, Yukon Utilities  
Board  
(via videoconference):

G. Bentivegna

Place and Date of Hearing:

Whitehorse, Yukon  
January 28, 2025

Place and Date of Judgment:

Whitehorse, Yukon  
February 6, 2025

**Summary:**

*The applicant, Mr. Yee, seeks leave to appeal a decision of the Yukon Utilities Board, approving the Yukon Energy Corporation's revenue requirement for 2023 and 2024. He submits the Board made an error of law or jurisdiction, by approving costs that were premised on YEC exceeding its environmental permits for diesel emissions. Held: Application for leave granted. While YEC has an argument that the Board's decision was one of mixed fact and law, Mr. Yee has identified a substantial question to be argued that the Board erred in law or exceeded its jurisdiction. The public could benefit from clarity on the issue, which is of general importance to ratepayers.*

**GRIFFIN J.A.:****Overview**

[1] Nathaniel Yee, the applicant, an intervener before the Yukon Utilities Board (the "Board"), applies for leave to appeal a decision of the Board approving the Yukon Energy Corporation's ("YEC") revenue requirement for 2023 and 2024 as part of a General Rate Application ("GRA"). The Board rendered its decision on July 12, 2024, in Board Order 2024-05 with attached Reasons for Decision ("Board Decision").

**Positions of the parties**

[2] The essence of Mr. Yee's argument is that the Board made an error of law or exceeded its jurisdiction, because it allowed YEC to claim costs based on a forecast use of rental diesel generation units that would exceed YEC's environmental permit as granted to it by the Department of the Environment, Government of Yukon ("Environment Yukon").

[3] Mr. Yee also argues that the reasons in the Board Decision are inadequate on this issue.

[4] Mr. Yee submits that it is in the public interest for YEC to seek proper environmental permits, and for customers to not be required to pay for capacity that has not been assessed or permitted. He argues that this appeal is important to YEC customers because if they are not required to pay for unpermitted diesel capacity, YEC customers will save \$2.3 million for the years 2023–2024. He argues that if the

appeal is not allowed, the Board's decision will disincentivize compliance with and undermine the authority of Environment Yukon.

[5] YEC argues that leave should not be granted because Mr. Yee's application does not raise an extricable question of law or jurisdiction. YEC submits that at best the issues raised by Mr. Yee are of mixed fact and law. The issue of YEC occasionally exceeding its environmental permits was raised and considered by the Board in the exercise of its broad discretion in setting rates.

[6] Further, YEC submits that while the Board's reasons on this issue are brief, they are informed by the context of the Board considering this same issue and giving reasons in its previous rate-setting decision, YUB Board Order 2022-03, Reasons for Decision March 16, 2022 at paras. 107–108:

107. Mr. Yee alleged that YEC is in violation of the Yukon Environmental and Socioeconomic Assessment Act and the YESAB permit granted to YEC. The Board does not have jurisdiction over YEC's licences approved by YESAB. For clarity, the Board's statutory mandate is to set YEC's just and reasonable rates, and the Board's analysis and findings are necessarily limited to its mandate.

108. The Board does not agree with Mr. Yee's recommendation of excluding the diesel rental unit costs from rate base and excluding the diesel rental units from N-1 events, even if the rentals at issue did not have authorization from YESAB. The Board finds YEC's explanation that it connected the additional rental units to resolve an N-1 dependable capacity shortfall event, not to increase its normal operation capacity, to be credible. The Board accepts YEC's statement that rental of these diesel units was necessary to connect sufficient dependable capacity in the winter to keep customers connected to electricity during an extended cold weather event under N-1 emergency conditions. In the Board's view, this action by YEC is consistent with its statutory obligations to provide service to customers. The Board finds that excluding additional diesel units, other than the two spare backup units, from N-1 events would hinder YEC's provision of reliable service.

[Footnotes omitted.]

[7] Although this was not well-defined before me, the Board defines "single contingency N-1" as a standard "which determines system capacity assuming the loss of the system's single largest generating or transmission-related generation resource": Board Decision p. 14, footnote 36.

[8] Alternatively, YEC submits that this Court should exercise its discretion to deny leave under s. 69(2) of the *Public Utilities Act*, R.S.Y. 2002, c. 186 [*PUA*].

[9] The Board intervenes in this proceeding but does not take a position on the outcome of the application.

**Background**

[10] YEC is a government-owned public utility, which generates the majority of electricity in Yukon. The Yukon Utilities Board is a statutory authority, which regulates the rates YEC charges to consumers of electricity.

[11] The majority of power that YEC provides is from hydro energy. When energy consumption exceeds YEC's hydro capacity, it uses liquified natural gas and diesel thermal generation.

[12] On August 31, 2023, YEC filed a GRA with the Board, requesting an order approving a forecast revenue requirement for 2023 and 2024.

[13] The Board held a hearing on March 4–7, 2024, in Whitehorse, pursuant to the *PUA*.

[14] A portion of the costs that YEC was seeking to include in its rate base were related to renting diesel units. Mr. Yee opposed these costs being included, because YEC's forecasts were based on it at times using diesel capacity in excess of the limits permitted to it by Environment Yukon.

[15] Mr. Yee submitted that any costs related to diesel capacity that exceeds YEC's permitted limits should be disallowed: Board Decision, para. 130. He argued to the Board that "YEC's need for capacity does not exempt it from regulation, and should not be accepted by the Board as rationale for including unauthorized capacity in costs": Board Decision, para. 129. He further argued that a rates hearing is not the appropriate forum for arguments to increase YEC's diesel capacity above what has been authorized by Environment Yukon.

[16] YEC presented to the Board that with diesel units, it would have a surplus of dependable capacity; without diesel units, it would have a shortfall: Board Decision, para. 76. It argued that if there is any conflict between specific provisions of the *Environment Act*, R.S.Y. 2002, c. 76 and YEC's statutory duty under s. 106 of the *PUA* to provide energy to consumers, then its duty under s. 106 should prevail: *Board Decision* para. 123. It further argued that the Board did not need to decide this question about the relationship between the *PUA* and the *Environment Act* in the context of a GRA proceeding.

[17] YEC submitted that its forecast use of diesel generation units would only temporarily exceed its permitted capacity in an emergency situation to prevent immediate harm to public welfare, health or safety. It pointed to examples in the past where it had to do so.

[18] YEC gave the example that in December 22, 2024 it experienced a failure of some of its generation units during a period of extreme cold weather. Also, on January 31, 2024 the Aishihik Generating Station experienced a plant outage. These emergencies required YEC to temporarily exceed its permitted diesel generation capacity in Whitehorse to meet demand and ensure uninterrupted service to customers.

[19] YEC further submitted that it was working with Environment Yukon to expand its permits to encompass the need for excess capacity in an emergency.

[20] Ultimately, the Board Decision approved a rate increase which included the forecast costs related to the diesel units.

[21] On August 9, 2024, Mr. Yee filed a notice of appeal of Board Order 2024-05 and an application for leave to appeal.

### **Legal framework**

[22] This Court may grant leave to appeal from an order of the Board pursuant to s. 69 of the *PUA*, which states:

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.

[Emphasis added.]

[23] Applicants seeking leave to appeal under s. 69 must therefore meet two requirements: they must demonstrate that the alleged error of the Board involves a question of law or jurisdiction, and they must persuade this Court that it should exercise its discretion to allow leave.

[24] As noted in *Yukon Energy Board v. Yukon Utilities Board*, 2020 YKCA 12 (Chambers) at para. 8, the factors to consider in exercising discretion to grant leave were set out in *Queens Plate Development Ltd v. Vancouver Assessor*, Area 09 (1987), 1987 CanLII 2626 (B.C.C.A.), 16 B.C.L.R. (2d) 104 (in Chambers) at 109–110 as follows:

(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) 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 ....

[Case citations omitted.]

**Analysis****Is the alleged error a question of law or jurisdiction or mixed fact and law?**

[25] It is not always easy to untangle whether an issue is an extricable question of law or one of mixed fact and law.

[26] This question often arises in cases involving appeals of arbitrator's decisions dealing with contractual interpretation. The analysis in those cases is useful even though in the present context we are dealing with the exercise of a statutory authority, not contract law. I find helpful the analysis of Justice Butler in *Creative Energy Vancouver Platforms Inc. v. Concord Pacific Developments Ltd.*, 2024 BCCA 128 at paras. 33–37, citing the analysis of Justice Hunter in *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 at para. 72.

[27] A significant factor on this application, weighing in Mr. Yee's favour, is that the facts are not in issue. It is an undisputed fact that YEC was forecasting revenue requirements based in part on costs of renting diesel units that, if used, would exceed its environmental permits.

[28] I have little difficulty in accepting that Mr. Yee has framed the issue as one of law or jurisdiction, involving a general proposition with precedential value that turns on facts that are not in dispute.

[29] There is clearly precedent for this Court to interfere with decisions of the Board setting a rate where the Board acts outside its jurisdiction by failing to consider a factor it ought to have considered. In this regard, see this Court's decision granting YEC leave to appeal indexed at 2016 YKCA 2, which led to a successful appeal by YEC: *Yukon Energy Corp. v. Yukon (Utilities Board)*, 2017 YKCA 15 [YEC v. YUB 2017].

[30] But YEC's position is that Mr. Yee's framing of the issue is not the real question that will be before this Court if leave is granted. In essence it says the real question before this Court will be whether the Board made an error in its

determination of rates, justifying appellate interference, which is a question of mixed fact and law.

[31] The Board has wide discretion in setting rates under the *PUA* and Rate Policy Directive (1995) OIC 1995. Under the latter, ss. 2 and 3 provide:

2. (1) Subject to subsection (2), the Board must include in the rates of Yukon Energy Corporation and the Yukon Electrical Company Limited provision to recover a fair return on their equity used to finance their rate base.

(2) The Board must include in the rates of the Yukon Energy Corporation provision to recover a fair return on the Corporation's equity, less one-half of one per cent (.5%).

....

3. Except to the extent otherwise stated by this Directive or the Act, the Board must review and approve rates in accordance with principles established in Canada for utilities, including those principles established by regulatory authorities of the Government of Canada or of a province regulating hydro and non-hydro electric utilities. ...

[32] As noted in *YEC v. YUB* 2017:

[17] In 1995, the Commissioner issued the OIC, which is entitled "Rate Policy Directive, 1995". Pursuant to its terms, the Board must fix rates that allow Yukon Energy to recover a fair return on its equity and accord with established Canadian rate-setting principles for utilities: ss. 2, 3....

[18] Canadian rate-setting principles generally require that rates, and thus approved costs upon which they are based, be just and reasonable to both the utility and consumers: *Ontario (Energy Board)* at paras. 7, 14-20. Subject to its overarching duty to ensure that its orders are just and reasonable, nothing in the OIC or the *Act* constrains the Board's discretion to determine the methodology it uses to assess Yukon Energy's costs in its rate-setting decisions.

[Emphasis added.]

[33] There were several issues the Board considered when determining YEC's stated operating costs and revenue requirements, of which the issue raised by Mr. Yee on this leave application was one.

[34] The Board admitted evidence, made its own informational requests, and heard argument, all on the topic of YEC forecasting the potential use of diesel generation assets in excess of its environmental permits. YEC gave examples of situations where because of emergency it had to rely on these units in excess of its



permits. YEC also explained how it works with Environment Yukon and is seeking to expand its permitted capacity.

[35] The Board took into account the issue of YEC potentially exceeding its environmental permits in respect of the rental of diesel units. It provided reasons, summarizing the information and its analysis of this issue at paras. 113–137 of the Board Decision.

[36] Having considered the issue of YEC's operating costs forecasting use of diesel units in excess of its environmental permits, the Board concluded:

138. In this proceeding, YEC has proven that a capacity shortfall exists on the YIS unless additional capacity is added. The Board accepts that in the short term, the only solution is rental diesel units. Therefore, the Board approves the rental costs for diesel units that YEC has applied for in this application.

[37] The above review illustrates that this is not a case where the argument is that the Board failed to consider a relevant factor in the exercise of its discretion.

[38] Rather, the position advanced by Mr. Yee is more akin to a case where the Board took into account a factor that it ought not to have: namely, YEC's forecast of costs that were premised on YEC exceeding its environmental permits.

[39] In my view, Mr. Yee has a substantial question to be argued that the Board erred in law or exceeded its jurisdiction. As a question of law, the issue is whether it can ever be just and reasonable for the Board to approve of costs premised on conduct that is contrary to environmental permits; as an issue of jurisdiction, the issue is whether the Board has jurisdiction to approve such costs prior to YEC obtaining the necessary environmental permits.

[40] At the same time, I recognize that YEC has a viable argument that the Board simply exercised its discretion to set rates after fully considering this factor, leaving it to Environment Yukon to regulate environmental matters.

[41] In my view, there is a public interest in further clarity about the issue, regardless of which side's arguments prevail on appeal. There is an important question about the overlapping roles of the Board and Environment Yukon in regulating YEC as an energy provider in the territory.

[42] In my view, Mr. Yee has identified a substantial but narrow issue of law or the Board's jurisdiction that has not been previously considered and it will be of benefit to ratepayers generally to determine the issue. I am of the view that there is sufficient merit to his argument and that it is of general importance to ratepayers in Yukon, and so I would grant him leave to appeal.

**Disposition**

[43] I therefore grant the application for leave to appeal on the issue framed by Mr. Yee, namely, whether the Board has erred in law and exceeded its jurisdiction by allowing YEC to claim and receive payments from customers based on forecasts that factor in the cost of rental of diesel units for diesel capacity that exceeds the limits Environment Yukon has permitted it to generate.

  
The Honourable Justice Griffin