IN THE COURT OF APPEAL OF BELIZE, A.D. 2009

CIVIL APPEAL NO. 3 of 2009

BETWEEN:

BELIZE ELECTRICITY LIMITED	**Appellant**
AND	
MINISTER OF PUBLIC UTILITIES	
ATTORNEY GENERAL	
PUBLIC UTILITIES COMMISSION	**Respondents**

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BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Michael Young SC for the appellant.
Ms. Priscilla Banner for the Attorney General.
Mr. E. Andrew Marshalleck and Mrs. Liesje Barrow-Chung for the Public Utilities Commission.

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17 June, 30 October 2009.

MOTTLEY P

[1] On 17 October 2008 the appellant filed an application for judicial review by way of certiorari to quash the Electricity (Tariffs, Charges and Quality of Service Standards) (Amendment) By-Laws, 2008 (the by-laws) comprised in Statutory Instrument No. 58 of 2008. The grounds upon which the application was made

were stated to be that the amended by-laws, which related to and fixed the methodology and process for the determination of tariffs charged and fees to be charged for the provision of electrical services by the service providers for the transmission and supply of electricity were formulated, made and promulgated without consultation with the appellant. It was also stated that, by the scope and scheme of the Electricity Act, Cap 24 (the Act), it was implied that the Minister of Public Utilities (the Minister), had an obligation to consult with the appellant prior to the finalization and making such by-laws. In the circumstances, therefore, It was said that the failure of the Minister to consult the appellant was unlawful in that it was unreasonable within the principle laid down in **Associated Provincial Picture House Limited v Wednesbury Corporation [1948] 1KB 223**. In any event, it was alleged that in making these by-laws the Minister acted ultra vires.

[2] The appellant based its application on the failure of the Minister to consult the appellant before making the by-laws. The by-laws were made by the Minister pursuant to the provisions of section 7(1) of the Act which states:

> "7(1) The Minister may, after consultation with the Commission, make by-laws relating to:- …"

This provision came into force in 2007 pursuant to the Electricity Amendment Act of that year. Previously, the Commission was empowered to make the by-laws with the approval of the Minister. That section specifically stated::

> "The Commission may, with the approval of the Minister make by-laws relating to:- …"

[3] The appellant contended that the Court should read into section 7(1) a provision making it a requirement that the Minister, before he made the by-laws, should consult with the appellant as the service provider.

[4] In support of this argument, the appellant relied on the history of the development of the provision of electricity services in Belize. Counsel for the

appellant pointed out that the appellant had been granted a license on 1 July 2000 for the sale and supply of electricity. This license had been issued under the Electricity Act. Previous to this license being issued, the Belize Electricity Board, a statutory corporation, was the sole supplier of electricity. The undertaking and assets of the Belize Electricity Board were subsequently vested in the appellant.

[5] The Public Utilities Commission Act Cap. 223 was enacted in 1999 and the functions of the Commission (PUC) which that Act established include, inter alia, ensuring that the services rendered by a public undertaking, such as BEL, are satisfactory and that the charges imposed are reasonable. At the same time the Public Utilities Commission Act was enacted, certain amendments were made to the Act which recognized the establishment of the Public Utilities Commission and its functioning under that Act.

[6] As previously stated, prior to the amendment of 2007, section 7 of the Act gave the PUC the power to make by-laws subject to the approval of the Minister. These by-laws related inter alia:

> "7(g) the methodology and process for the determination of tariffs, charges and fees to be charged for the provision of electrical services by licenses for transmission or supply;
>
> (h) the quality of service standards, including penalties for violations of such standards, methodology and process for establishing and enforcing quality of service standards, and the calculation and assessment of penalties for their violations."

[7] Under the Act, if the approval of the Minister was required as a condition precedent to the making of any regulation or any other subsidiary legislation, the procedure set out in section 13(1) had to be followed. Section 13(1) provides:

> "13(1) Where powers are conferred upon the Commission under this Act to make regulations or any other form of subsidiary legislation subject to the approval of the Minister, the Commission shall not submit such regulations to the Minister for approval without first circulating for comments the final draft copies of such regulations or other subsidiary legislation to any interested persons, and without generally consulting with such persons and taking such person's views and comments into account."

[8] This regime required the Commission to circulate the final draft regulations or subsidiary legislation for the comments of interested persons. The Commission had to consult with the interested persons and was required to take views and comments into account. It was only after this process was completed that the Commission could submit the draft regulations or subsidiary legislation to the Minister for his approval.

[9] Section 13(2) of the Act deals with the situation where the Commission is empowered to make regulations or subsidiary legislation without first obtaining the approval of the Minister. Section 13(2) provides as follows:

> "13(2) Where powers are conferred upon the Commission under this Act to make regulations or any form of subsidiary legislation, and where provision is made that such regulations or subsidiary legislation shall after signature by the Commission, come into force upon publication published in the Gazette, the Commission shall not cause such regulations or subsidiary legislation to be published in the Gazette without first circulating for comments, the final draft copies thereof to any interested person, and without generally consulting with such person and taking such person's view and comments into account."

Under this subsection the power of the Commission to bring into force regulations and subsidiary legislation is circumscribed by the obligations to

consult generally with interested persons and to take their views into consideration.

[10] Under section 13 of the Act a clear distinction is made between the situations where the approval of the Minister is required as a condition precedent to the regulations or subsidiary legislation being brought into force and where the approval of the Minister is not required. As earlier observed under section 7(1), prior to the amendment of 2007 the power to make by-laws resided in the Commission and not the Minister. The Minister's role was limited to giving his approval.

[11] However, in 2007 the National Assembly enacted the Electricity Amendment Act 2007 which gave the power to the Minister to make by-laws instead of the PUC. The Minister exercised this power after consulting with the Commission.

[12] Counsel for the appellant argued that regard should be had to the fact that prior to the amendment to section 7(1) of the Act in 2007 consultation was required under section 13(1) before the by-laws were made. Consequently, he submitted that the Court in interpreting this section should give a purposive construction to it. In so doing, counsel suggested that the Court should read into the amended section a term which would have the effect of requiring that the draft by-laws made by the Minister should be circulated to the appellant.

[13] To accede to this request, in my view, this Court would be usurping the functions of the Legislature. The Act is very clear and is not in anyway ambiguous. Prior to the amendment of 2007, the role of the Minister was limited to approving the by-laws. The Minister did not have power to make the by-laws. If he did not agree with the contents of any proposed by-law the Minister would clearly not approve them. However, he did not have the power to change them. Nonetheless, he could refuse to approve them. It would appear that a change of

policy was adopted by the Legislature which led to an alteration in the law. No longer was the Minister only required to approve the by-laws made by the Commission after the by-laws were circulated to the appellant. The amendment gave the power to the Minister to make the by-laws after consultation with the Commission. The amended section does not require the Minister to consult with any other person. This appears to the Court to be a fundamental change in this regard. The effect of the amendments to section 7(1) was to remove that section from the ambit of section 13(1) as the Commission was no longer empowered to make by-laws under the amendment.

[14] No amendment was made to section 13(1) of the Act. This may very well be due to the fact that, under the Act, the PUC has power to make other regulations. An example of this is to be found in sections 53(1) and 58(1) of the Act under which the Minister or the Commission with the approval of the Minister, may make regulations with respect to the matter set out in those sections.

[15] It was the appellant's case that on a proper interpretation of the Act as a whole and, having regard to the history of the legislation, there was an implied obligation on the part of the Minister to consult with the appellant when making the by-laws.

[16] The Act provides what powers are to be exercised by the Minister and what powers are to be exercised by the Commission. It also provided for certain power to be exercised either by the Minister or the Commission. By amending the provisions of section 7 and not amending the provisions of section 13(1) of the Act, the Legislature must be taken to have removed that section from the ambit of 13(1). In so doing, the Legislature, in my view, may be taken to have made a fundamental change of policy. No longer was the regime for consultations set out in section 13(1) to apply when by-laws are being enacted by the Minister (no longer by the Commission) governing those matters set out in section 7 of the Act. As their alternative submission, the appellant argued that,

even if it cannot be said that the Minister was under a duty to consult under the provision of section 7(1), his failure to consult with the appellant was unreasonable in the "Wednesbury sense".

[17] In my view, the Minister acted under the powers given to him by section 7(1). He was therefore empowered to make the regulations. The section only required him to consult with the Commission. The Minister acted within the provision of section 7(1) in making the by-laws. It cannot therefore be said that his conduct was unreasonable in the "Wednesbury sense". The Minister was acting in accordance with the change of policy. Such policy was for the Government to determine and not the Court.

[18] In my view, the judge was correct in dismissing the appellant's application for an order of certiorari to quash the Electricity (Tariffs, Charges and Quality of Service Standards) (Amendment) By-Laws 2008 comprised in Statutory Instrument No. 58 of 2008.

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MOTTLEY P

SOSA JA

[19] On 17 June 2009 I was in agreement with the other members of the Court that the appeal should be dismissed and the order of the court below affirmed and that the respondent, the Minister of Public Utilities, should have his costs, to be taxed, if not agreed. I concur in the reasons for judgment given by Carey JA in his judgment, which I have now had the privilege of reading in draft.

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SOSA JA

CAREY, JA:

[20] Belize Electricity Limited, (BEL) a public limited liability company incorporated under The Companies Act and duly licensed under the Electricity Act, Cap. 22, (the Act) to generate, transmit and supply electricity in Belize, is the sole supplier of electricity in the country. The Minister of Public Utilities (the Minister), by Statutory Instrument No. 58 of 2008 enacted the Electricity (Tariffs Charges and Quality of Service Standards) (Amendment) Bylaws 2008. BEL was greatly disturbed by this exercise of ministerial power, complaining that no draft of the proposed amendment was furnished to it nor was there any prior consultation with it. It launched proceedings for judicial review by way of certiorari to quash the amending byelaws. The matter came on for hearing before Hafiz J who, in a reserved judgment, dismissed the application with costs. BEL now appeals to this court. We heard submissions on 17 June when we

dismissed the appeal with costs to the respondent. We affirmed the order of the court below and intimated that we would provide reasons at a later date. My reasons are set out hereunder.

[21] The grounds of the application for judicial review were as follows:

> "(i) That the 2008 Amendment Bylaws related to and determined the methodology and process for the determination of tariffs, charges and fees to be charged for the provision of electrical services by licensees for the transmission and supply of electricity and was formulated without any consultation with the Claimant Belize Electricity Limited.
>
> (ii) That by the scope and scheme of the Electricity Act, it is necessarily implied that the Minister of Public Utilities has an obligation to consult with a licensee under the Act prior to the finalization and making of any Bylaws determining or changing the methodology and process for the determination of tariffs, charges and fees for the transmission and supply of electricity.
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> (iii) That the failure to consult with the Claimant as licensee was unlawful in that it was unreasonable in the Wednesbury sense.
>
> (iv) That the Minister acted *ultra vires* the Electricity Act in making the 2008 Amendment Bylaws."

[22] The grounds upon which administrative decisions are subject to judicial review were articulated by Lord Diplock in *Council of Civil Service Union v. Minister of the Civil Service [1985] A.C. 374 at 410*, as illegality, irrationality and procedural impropriety. It is not readily apparent under which of these heads of review, the appellant's grounds, save for its ground (iii), fell. The first ground alleges that the Byelaws were formulated without consultation with the appellant. It does not however invoke any statutory provision which requires the Minister to

consult the appellant. The second ground suggests that the obligation on the part of the Minister to consult is to be implied from the "scope and the scheme" of the Act. The third ground recognizes a classification articulated by Lord Diplock, namely "Wednesbury unreasonableness", which says that it is applicable to a "decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it…" The appellant as an alternative or fallback position, relies on this ground. Its principal position rests, it would seem, on Lord Diplock's third head of classification, namely, "procedural impropriety", which includes a failure to act with procedural fairness towards the appellant. In order to arrive at this position, the appellant argues that on a proper interpretation of the Act and having regard to the history of the legislation, there was by implication an obligation on the Minister to consult with the appellant prior to making any new byelaws, or changing the existing byelaws having to do with (a) the methodology and process for the determination of tariffs, charges and fees to be charged for the provision of electrical services by licensees for transmission or supply and (b) the quality of service standards. This circuitous journey involves the construction of the Act, and an examination of the legislative history of the Act in order to discover whether there was an obligation to consult the appellant. Ground (iv) of the appellant's grounds for judicial review, was not argued below and has not been raised in this court.

[23] The law-making powers of the Minister are provided for in section 7(1) of the Act. It states:-

> "7-(1) The Minister may after consultation make byelaws relating to-
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> (a) the inspection of electrical installations;
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> (b) the fixing and testing of meters;
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> (c) the prevention of the misuse or waste of energy supplied;
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> (d) the protection of electrical installations;

(e) the conditions under which fixtures and fittings may be installed;

(f) matters generally connected with the electric light and power service which are not otherwise provided for, the generality of this provision not being limited by the preceding paragraphs;

(g) the methodology and process for the determination of tariffs, charges and fees to be charged for the provision of electrical services by licensees for transmission or supply;

(h) the quality of services standards, including penalties for violations of such standards, and the methodology and process for establishing and enforcing quality of service standards, and the calculation and assessment of penalties for their violations;

(i) the entities that may be afforded open access to the transmission system and the terms of such access;

(j) the use by licensees of a uniform system of accounts."

The other law-making authority under the Act is the Public Utilities Commission. Section 13 of the Act provides as follows:

> "13(1) Where powers are conferred upon the Commission under this Act to make regulations or any other form of subsidiary legislation subject to the approval of the Minister, the Commission shall not submit such regulations to the Minister for approval without circulating for comments the final draft copies of such regulations or other subsidiary legislation to any interested person, and without genuinely consulting with such person and taking such person's views and comments into account".

"Interested person" is defined by the Act as a person who may be materially affected by any decision, order, regulations or byelaws made or issued by the Commission or the Minister.

[24] Section 7(1) of the Act was amended in 2007 by the Electricity (Amendment) Act to confer power on the Minister to make regulations called byelaws with respect to a range of disparate activities and processes identified in the section. Prior to 2007, the Minister had no such power. His responsibility was to give approval to the byelaws submitted to him by the Public Utilities Commission. Prior to the Amending Act of 2007, the Commission was obliged to obtain the views and comments of "interested persons" and to genuinely consult with them. The provision in section 13 was not changed by the amending Act. The Commission's duty to consult remains undisturbed and it remains the duty of the Commission to consult. As the law stands, therefore it is not the Minister who is obliged to consult with interested persons but the Commission. Mr. Young, S.C. argued that having regard to the legislative history of the Act, there was by implication an obligation on the Minister to consult with the appellant. I cannot agree. Consultation continued as an integral requirement of the law-making process. On any logical basis, it can only be said that there was no room for any implication: the intention of Parliament was manifest.

[25] The consultation which Parliament deliberately enacted into law was between the Minister and the Commission. Section 8(1) of the Act sets out the duty of the Commission in these terms:-

> "8-(1) It shall also be the duty of the Commission, so far as it appears to it practicable from time to time to do so to collect information which respect to commercial activities connected with electricity carried on in Belize and the persons by whom they are carried on with a view to its becoming aware of, and ascertaining

> the circumstances relating to, the matters with respect to which its functions are exerciseable"

The Commission is thus eminently qualified to be consulted as they would have relevant information to provide the Minister. It is inconceivable that the Commission in the discharge of its duty to advice the Minister would fail to consult with interested persons. In the result, in my opinion, counsel is not assisted by legislative history.

[26] The next question to be answered is this – is he assisted by a proper interpretation of the Act? Does such an interpretation yield the implication of consultation with interested persons by the Minister when he/she exercises his/her powers to enact byelaws pursuant to section 7(1) of the Act. Mr. Young invited us to be guided by the following extract from Cross on Statutory Interpretation (3rd ed), p. 49, which represents one of the rules of statutory interpretation:-

> "The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute".

It was clear from counsel's skeleton arguments that he placed great store on this rule which he noted with emphasis. With respect, it is not clear how the words "consult with interested persons" may be read into the provisions of section 7(1) of the Act when that section already includes the requirement of consultation, albeit with the Public Utilities Commission. No one doubts that the purpose of the rules of interpretation is to give effect to the legislature's intention where the meaning is doubtful. Parliament by the Electricity (Amendment) Act 2007,

changed the existing law. That is the sole purpose of new law. Parliament intended to do so. The power to enact byelaws to govern certain activities and processes was transferred from the Commission to the Minister with the Minister being required to consult with the Commission. The plain grammatical meaning of the words in the provision, which are by no means ambiguous, admits of no other conclusion. There are no interpretative criteria that raise any real doubt as to whether that grammatical meaning is the one intended by Parliament. The rule on which Mr. Young, S.C. sought to place reliance, may only be invoked where the words to be added, or altered or ignored, are necessary to prevent a provision from being unintelligible, absurd or unreasonable or unworkable or irreconcilable with the rest of the statute. See Cross on Statutory Interpretation, p.49.

[27] The argument deployed by Mr. Young, S.C. in his skeleton submissions in support, was along these lines. If the meaning of the Electricity (Amendment) Act 2007 is to exclude the obligation of the rule making body to consult the licensee, it would stultify the purpose of the statute and produce injustice, absurdity, anomaly and contradiction. It would stultify the objective of seeking to ensure that the licensee can finance its obligations; it would undermine the objective that the licensee has the capacity to satisfy all reasonable demands for electricity; it would produce an injustice in removing from the licensee the right to have some input or register some objection or reaction to proposals which determine the regulatory regime and affect its bottom line.

[28] This rationalization relates exclusively to the appellant and serves to illustrate that it is an "interested person." Section 7 of the Act, the provision under challenge, relates, however, to a variety of classes. In my opinion the provision has to be interpreted with this factor in mind. Consultation which in previous legislation was directly with the law-making body became indirect. The Minister must consult with the Public Utilities Commission. As was indicated, this body is charged with the duty (*inter alia*) of collecting information with respect to

commercial activities, the purpose of which, it would seem plain, can only be to advise the Minister when he/she consults that body. The significance of this is that the absence of any requirement for consultation with the appellant, does not result in any absurdity or anomaly, nor does it make the provision unintelligible or unworkable. In the event, it is only necessary to state that the appellant, in my opinion, is not assisted by the rules of interpretation. There is no duty implied as a matter of interpretation.

[29] In my judgment it has not been shown that there was any unlawful failure to consult imposed either by statute or at common law. That being so, it is not a matter for the exercise of discretion of the court by way of judicial review.

[30] It was for these reasons that I agreed with the other members of the court, that the appeal be dismissed.

CAREY JA