COX TAYLOR
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Reply: **L. John Alexander***
**Law Corporation*
alexander@coxtaylor.ca

File: L-770-13*LJA

October 13, 2017

BY ELECTRONIC FILING

British Columbia Utilities Commission
Sixth Floor, 900 Howe Street
Vancouver, BC V6Z 2N3

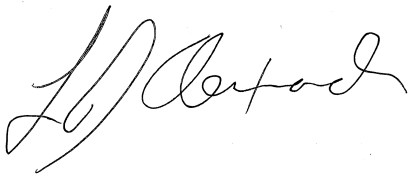
Attention: Mr. Patrick Wruck, Commission Secretary
and Manager, Regulatory Support

RE: Project No. 3698884
British Columbia Utilities Commission ("BCUC" or "Commission")
The City of Langford (the "City")
Sustainable Services Ltd. Geothermal System Status as a Public Utility under the *Utilities Commission Act*

The City of Langford writes in compliance with Commission Order No. G-138-17 to provide its final submission in the above-mentioned proceeding.

Yours very truly,

COX TAYLOR



Per:
L. JOHN ALEXANDER*
*Law Corporation

Enclosure
Copy to: SSL-Sustainable Services Ltd.
957 Langford Parkway
Victoria, BC V9B 0A5

Fortis Energy Inc.
gas.regulatory.affairs@fortisbc.com

FortisBC Alternative Energy Services Inc.
faes.regulatory.affairs@fortisbc.com

OVERVIEW

1. In 2006 the City of Langford (the "City") adopted a comprehensive land use plan for a portion of the City called the "Westhills Green Community Master Plan" (the "Westhills Plan"). An aspect of the Westhills Plan was the establishment of a district energy system by the City in part of the plan area.

2. In 2010 the City entered in to a partnership agreement with SSL Sustainable Services Ltd. ("SSL") to install and operate a district water system and a thermal hot water energy distribution system (the "Westhills Energy System") in part of the Westhills Plan area.

3. Commencing in 2010 the Westhills Energy System began supplying thermal energy to homes in Westhills.

4. On June 17, 2016 the Commission included the following in an Order:

> (whereas)
>
> G
>
> Under section 82(1)(a) of the *UCA* "the Commission may, on its own motion, inquire into, hear and determine a matter that under this Act it may inquire into, hear or determine on application or complaint." Further, section 83 of the *UCA* states "if a complaint is made to the commission, the commission has powers to determine whether a hearing or inquiry is to be had, and generally whether any action on its part is or is not to be taken"; and
>
> H
>
> The Commission reviewed the information provided to date and considers there to be sufficient grounds to warrant a hearing to determine whether SSL is a public utility under the *UCA*.
>
> 1. Pursuant to section 83 of the *Utilities Commission Act* (*UCA*), a written hearing process to determine if SSL- Sustainable Services Ltd. (SSL) is operating as a public utility under the UCA is established as set out in the Regulatory Timetable attached as Appendix A to this order.

5. The City sought party status in the proceeding on Aug 29, 2016, on the basis that the Westhills Energy System is a municipal service fully regulated by the City, including with respect to rates, and that the operator is not a public utility.

6. The City says it is a responsible local government, most closely connected with the needs of its citizens, and does not wish to lose regulatory control over its services. Council is best suited to regulate, and will be most responsive to the concerns of ratepayers.

7. The question before the Commission is one of regulatory jurisdiction. The City submits that the Westhills Energy System does not fall within the definition of

"public utility" and is therefore exempt from Commission regulation. The position of the City is consistent with the language and intent of the relevant statutes. The City opposes the position put forth in the staff submission that the BCUC has the ultimate regulatory jurisdiction over SSL or the Westhills Energy System.

BACKGROUND

8. The Westhills Green Community Master Plan calls for the 210 hectare (517 acre) Westhills comprehensive development to meet Leadership in Energy and Environmental Design (LEED) certification standards for neighbourhood development. Major guiding factors of the design and implementation of the Westhills development are considerations of location, alternative transportation modes, environmental preservation, community agriculture, water efficiency, energy and atmosphere, materials and resources, and indoor environmental quality. These characteristics are demonstrated in the creation of new residential units, supporting commercial, civic and educational uses, with approximately 84 ha (207 acres) of the subject property being designated as park and open space.

9. Included as part of the Westhills Green Community Master Plan is a set of resource efficiency objectives established by the City, and required to be implemented within the plan area. With respect to district energy the plan states:

> ***On Site Power Generation:*** If possible, the Westhills Community should develop a district energy utility to supplement conventional energy sources. To this end the City will encourage geothermal energy, micro-hydroelectric generation, heat harvesting from local sewers and treatment centers for renewable energy.

10. On April 14, 2010, the City entered in to a partnering agreement with SSL, with a commencement date of June 22, 2010.

11. On June 21, 2010, the City adopted the "Multi Utility Bylaw 1291, 2010" that provides for the establishment of a water and energy service. It includes the following (Sections 2, 6 and 7):

> 2. The City of Langford Multi Utility, including Water and Energy Services, is established as a municipal service.
>
> 6. The rates, fees, and charges payable in respect of the Energy Services are those set out in Schedules G & H which are based on the cost of providing, maintaining and expanding the Energy Services and may be different for different properties and buildings based upon the use, capacity and consumption of those properties and buildings.

5. The City may provide the Services directly or through another person or organization (the Service Provider).

City of Langford Mutli Utility Bylaw No. 1291, 2010, (City Document 2.1)

12. The partnering agreement contains the following clause:

NATURE OF AGREEMENT

3. This is a partnering agreement as defined in the Community Charter. It is not an agreement granting an exclusive or limited franchise of any kind, and is not intended to make the City and any other party, or parties, joint venturers or partners with respect to any enterprise.

City of Langford Services Agreement (City Document 5.2)

RELEVANT LEGISLATIVE PROVISIONS

13. *UTILITIES COMMISSION ACT* [RSBC 1996] CHAPTER 473

Definitions

1 In this Act:

"**public utility**" means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for

(a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or

(b) the conveyance or transmission of information, messages or communications by guided or unguided electromagnetic waves, including systems of cable, microwave, optical fibre or radiocommunications if that service is offered to the public for compensation,

but does not include

(c) a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries,

(d) 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,

(e) a person not otherwise a public utility who is engaged in the petroleum industry or in the wellhead production of oil, natural gas or other natural petroleum substances,

(f) a person not otherwise a public utility who is engaged in the production of a geothermal resource, as defined in the *Geothermal Resources Act*, or

(g) a person, other than the authority, who enters into or is created by, under or in furtherance of an agreement designated under section 12 (9) of the *Hydro and Power*

Authority Act, in respect of anything done, owned or operated under or in relation to that agreement;

General supervision of public utilities
23 (1) The commission has general supervision of all public utilities and may make orders about

(a) equipment,
(b) appliances,
(c) safety devices,
(d) extension of works or systems,
(e) filing of rate schedules,
(f) reporting, and
(g) other matters it considers necessary or advisable for

(i) the safety, convenience or service of the public, or
(ii) the proper carrying out of this Act or of a contract, charter or franchise involving use of public property or rights.

(2) Subject to this Act, the commission may make regulations requiring a public utility to conduct its operations in a way that does not unnecessarily interfere with, or cause unnecessary damage or inconvenience to, the public.

Commission must make examinations and inquiries
24 In its supervision of public utilities, the commission must make examinations and conduct inquiries necessary to keep itself informed about

(a) the conduct of public utility business,
(b) compliance by public utilities with this Act, regulations or any other law, and
(c) any other matter in the commission's jurisdiction.

Procedure on application
46 (1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.

(2) The commission has a discretion whether or not to hold any hearing on the application.

(3) Subject to subsections (3.1) to (3.3), the commission may, by order, issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.

(3.1) In deciding whether to issue a certificate under subsection (3) applied for by a public utility other than the authority, the commission must consider

(a) the applicable of British Columbia's energy objectives,
(b) the most recent long-term resource plan filed by the public utility under section 44.1, if any, and
(c) the extent to which the application for the certificate is consistent with the applicable requirements under sections 6 and 19 of the *Clean Energy Act*.

(3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.

(3.3) In deciding whether to issue a certificate under subsection (3) to the authority, the commission, in addition to considering the interests of persons in British Columbia who receive or may receive service from the authority, must consider

(a) British Columbia's energy objectives,
(b) an applicable integrated resource plan approved under section 4 of the *Clean Energy Act*, and
(c) the extent to which the application for the certificate is consistent with the requirements under section 19 of the *Clean Energy Act*.

Jurisdiction of commission to deal with applications
72 (1) The commission has jurisdiction to inquire into, hear and determine an application by or on behalf of any party interested, complaining that a person constructing, maintaining, operating or controlling a public utility service or charged with a duty or power relating to that service, has done, is doing or has failed to do anything required by this Act or another general or special Act, or by a regulation, order, bylaw or direction made under any of them.

(2) The commission has jurisdiction to inquire into, hear and determine an application by or on behalf of any party interested, requesting the commission to

(a) give a direction or approval which by law it may give, or
(b) approve, prohibit or require anything to which by any general or special Act, the commission's jurisdiction extends.

Commission not bound by precedent
75 The commission must make its decision on the merits and justice of the case, and is not bound to follow its own decisions.

Findings of fact conclusive
79 The determination of the commission on a question of fact in its jurisdiction, or whether a person is or is not a party interested within the meaning of this Act, is binding and conclusive on all persons and all courts.

Power to inquire without application
82 (1) The commission

(a) may, on its own motion, and

(b) must, on the request of the Lieutenant Governor in Council,
inquire into, hear and determine a matter that under this Act it may inquire into, hear or determine on application or complaint.

(2) For the purpose of subsection (1), the commission has the same powers as are vested in it by this Act in respect of an application or complaint.

Powers of commission in relation to other Acts
110 The powers given to the commission by this Act apply

(a) even though the subject matter about which the powers are exercisable is the subject matter of an agreement or another Act,
(b) in respect of service and rates, whether set by or the subject of an agreement or other Act, or otherwise, and
(c) if the service or rates are governed by an agreement, whether the agreement is incorporated in, or ratified, or made binding by a general or special Act, or otherwise.

Municipalities may apply
114 (1) In this section, **"municipality"** includes a regional district.

(2) If a municipality believes that the interests of the public in the municipality or a part of it are sufficiently concerned, the municipality may, by resolution, become an applicant, complainant or intervenant in a matter within the commission's jurisdiction.

(3) The municipality may, for subsection (2), take a proceeding or incur expense necessary

(a) to submit the matter to the commission,
(b) to oppose an application or complaint before the commission, or
(c) if necessary, to become a party to a proceeding or appeal under this Act.

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,
(b) an exemption from the application of section 45 granted, with the advance approval of the Lieutenant Governor in Council, by the commission under section 88, and
(c) an exemption from section 45 granted under section 22, only if the public utility meets the conditions prescribed by the Lieutenant Governor in Council.

(3) For the purposes of subsection (2) (c), the Lieutenant Governor in Council may prescribe different conditions for different public utilities or categories of public utilities.

14. *COMMUNITY CHARTER* [SBC 2003] CHAPTER 26

Definitions:
"partnering agreement" means an agreement between a municipality and a person or public authority under which the person or public authority agrees to provide a service on behalf of the municipality, other than a service that is part of the general administration of the municipality;

Municipal purposes
7 The purposes of a municipality include

(a) providing for good government of its community,
(b) providing for services, laws and other matters for community benefit,
(c) providing for stewardship of the public assets of its community, and
(d) fostering the economic, social and environmental well-being of its community.

Fundamental powers
8 (1) A municipality has the capacity, rights, powers and privileges of a natural person of full capacity.

(2) A municipality may provide any service that the council considers necessary or desirable, and may do this directly or through another public authority or another person or organization.

(3) A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:

(a) municipal services;
(b) public places;
(c) trees;
(d) firecrackers, fireworks and explosives;
(e) bows and arrows, knives and other weapons not referred to in subsection (5);
(f) cemeteries, crematoriums, columbariums and mausoleums and the interment or other disposition of the dead;
(g) the health, safety or protection of persons or property in relation to matters referred to in section 63 *[protection of persons and property]*;
(h) the protection and enhancement of the well-being of its community in relation to the matters referred to in section 64 *[nuisances, disturbances and other objectionable situations]*;
(i) public health;
(j) protection of the natural environment;
(k) animals;
(l) buildings and other structures;
(m) the removal of soil and the deposit of soil or other material.

(7) The powers under subsections (3) to (6) to regulate, prohibit and impose requirements, as applicable, in relation to a matter

(a) are separate powers that may be exercised independently of one another,
(b) include the power to regulate, prohibit and impose requirements, as applicable, respecting persons, property, things and activities in relation to the matter, and
(c) may not be used to do anything that a council is specifically authorized to do under Part 14 *[Planning and Land Use Management]* or Part 15 *[Heritage Conservation]* of the *Local Government Act*.

(8) As examples, the powers to regulate, prohibit and impose requirements under this section include the following powers:

(a) to provide that persons may engage in a regulated activity only in accordance with the rules established by bylaw;
(b) to prohibit persons from doing things with their property;
(c) to require persons to do things with their property, to do things at their expense and to provide security for fulfilling a requirement.

(9) A municipality must make available to the public, on request, a statement respecting the council's reasons for adopting a bylaw under subsection (3), (4), (5) or (6).

(10) Powers provided to municipalities under this section

(a) are subject to any specific conditions and restrictions established under this or another Act, and
(b) must be exercised in accordance with this Act unless otherwise provided.

(11) For certainty,
(a) the authority under subsection (2) does not include the authority to regulate, prohibit or impose requirements, and
(b) for the purposes of subsection (3) (a), a service does not include an activity that is merely the exercise of authority to regulate, prohibit or impose requirements and related enforcement.

Spheres of concurrent authority
9 (1)This section applies in relation to the following:

(a) bylaws under section 8 (3) (i) *[public health]*;
(b) bylaws under section 8 (3) (j) *[protection of the natural environment]*;
(c) bylaws under section 8 (3) (k) *[animals]* in relation to wildlife;
(d) bylaws under section 8 (3) (l) *[buildings and other structures]* establishing standards that are or could be dealt with by the Provincial building regulations;
(e) bylaws under section 8 (3) (m) *[removal and deposit of soil and other material]* that

(i) prohibit soil removal, or

(ii) prohibit the deposit of soil or other material, making reference to quality of the soil or material or to contamination.

(2) For certainty, this section does not apply to

(a) a bylaw under section 8 *[fundamental powers]* that is under a provision not referred to in subsection (1) or is in respect of a matter to which subsection (1) does not apply,
(b) a bylaw that is authorized under a provision of this Act other than section 8, or
(c) a bylaw that is authorized under another Act,
even if the bylaw could have been made under an authority to which this section does apply.

(3) Recognizing the Provincial interest in matters dealt with by bylaws referred to in subsection (1), a council may not adopt a bylaw to which this section applies unless the bylaw is

(a) in accordance with a regulation under subsection (4),
(b) in accordance with an agreement under subsection (5), or
(c) approved by the minister responsible.

(4) The minister responsible may, by regulation, do the following:

(a) establish matters in relation to which municipalities may exercise authority as contemplated by subsection (3) (a), either

(i) by specifying the matters in relation to which they may exercise authority, or
(ii) by providing that the restriction under subsection (3) only applies in relation to specified matters;

(b) provide that the exercise of that authority is subject to the restrictions and conditions established by the regulation;
(c) provide that the exercise of that authority may be made subject to restrictions and conditions specified by the minister responsible or by a person designated by name or title in the regulation.

(5) The minister responsible may enter into an agreement with one or more municipalities that has the same effect in relation to the municipalities as a regulation that could be made under subsection (4).

(6) If

(a) a regulation or agreement under this section is amended or repealed, and
(b) the effect of the amendment or repeal is that bylaws that previously did not require authorization under subsection (3) would now require that authorization,
those bylaws affected that were validly in force at the time of the amendment or repeal continue in force as if they had been approved by that minister.

Relationship with Provincial laws
10 (1) A provision of a municipal bylaw has no effect if it is inconsistent with a Provincial enactment.

(2) For the purposes of subsection (1), unless otherwise provided, a municipal bylaw is not inconsistent with another enactment if a person who complies with the bylaw does not, by this, contravene the other enactment.

Partnering agreements
21 If a municipality enters into a partnering agreement for the provision of a service on behalf of the municipality, the council may

> (a) provide assistance, other than tax exemptions, to a business in accordance with the agreement, and
> (b) provide assistance by way of a tax exemption in accordance with Division 7 *[Permissive Exemptions]* of Part 7 *[Municipal Revenue]*.

Agreements granting exclusive or limited franchises
22 (1) A council may, by bylaw adopted with the approval of the electors, enter into an agreement that grants an exclusive or limited franchise for the provision of one or more of the following in accordance with the agreement:

> (a) a public transportation system;
> (b) water through a water supply system;
> (c) sewage disposal through a sewage system;
> (d) gas, electrical or other energy supply system.

(2) The maximum term of an initial agreement or a renewal agreement under this section is 21 years.

STATUTORY INTERPRETATION

15. The modern approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Sullivan on the Construction of Statutes,* 6th ed. (Toronto: Lexis Nexis, 2014 at p. 1). As well, *Sullivan* at p. 421, citing *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 at paras. 23 and 25, instructs that statutes which deal with the same subject:

> ... are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject ... The provisions of each are read in the context of the others and consideration is given to whether they are part of a single scheme. The presumptions of coherence and consistent expression apply as if the provisions of these statutes were part of a single act.

Cowichan Valley R.D. v. Cobble Hill Holdings Ltd. 2016 BCCA 432

["*Cowichan Valley*"] at para. 60

16. The legislative provisions of the *UCA*, and the case law establish that the Commission does not approach its role in decision-making on a narrow basis, and is not limited to making decisions on pure legal rights as between parties. The Commission has a wide jurisdiction to make policy decisions that are said to have a polycentric quality, and to balance the needs and interests of various constituencies, and protect the public interest. The Court has recognized the polycentric decision making role of the Commission:

> It must be borne in mind that the Commission was not answering a pure question of law -- it was making a policy decision. As noted by this Court in *BC Hydro and Power Authority* v. *Terasen Gas (Vancouver Island) Inc.*, 2004 BCCA 346:
>
> [24] ... the legislative scheme emphasizes the expertise of the Commission within its rate-making mandate, including the statutory declarations that just and reasonable rates are questions of fact and Commission findings of fact within its jurisdiction are conclusive. The statutory recognition of the Commission's expertise in determining rates reinforces curial deference. The Commission is required to resolve and balance the economic interests of various constituencies, well illustrated by the parties to these proceedings, which gives its jurisdiction a polycentric quality, as termed by the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration*), [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193, 226 N.R. 201 P36. The Commission's function is pragmatic and often robust.
>
> The present case illustrates the Commission's pragmatic and robust function. The Commission's role was not, as Celgar would have it, restricted to the sole issue of determining whether the risk to BC Hydro ratepayers warranted the inclusion of the restrictions in section 2.5. It had to consider the possibility that the energy market could change and the fact that there was no self-generation policy in the FortisBC service territory. It also had to consider the practicalities of approving the New Agreement without section 2.5 in the absence of the agreement of BC Hydro, together with the effect on FortisBC of the New Agreement not coming into force.

Zellstoff Celgar Limited Partnership v. British Columbia Hydro and Power Authority, [2015] B.C.J. No. 2640 2015 BCCA 497 at para. 63 and 64

17. The courts recognize the unique role of expert tribunals such as the Commission as expressed in their statutes that point to a polycentric decision making role. It contemplates the consideration of numerous interests and the balancing of benefits and costs. Many sections of the Commission's home statute support the wide and "non-legal" considerations that may be considered.

Wier v. British Columbia, 2003 BCSC 1441 at para. 21

18. The provisions of the *UCA* set out above demonstrate the wider polycentric nature of the Commission's jurisdiction.

-General supervision, Sec. 23
-Independent examination and inquiry, Sec. 24
- Discretionary hearing processes Sec. 46(2)
-Discretion on granting, not granting, or amending and granting CPCN's, with or without conditions , Sec. 46(3)
-Consideration of provincial policy , Sec. 46(3.1), (3.3)
-Inquiries with or without application, Sec. 72, 82
-Not bound by precedent, Sec. 75

19. In this case, it is the task of the Commission to determine legislative intention of the legislature as expressed in the *UCA* and the *Community Charter* as a coherent and consistent scheme, and to seek the interpretation that does not result in operational conflict. It is also the Commissions task to interpret the provincial vs. local government regulatory roles with a view to the policy expressed in the multi-statutory scheme.

Cowichan Valley, supra., at para 74,75.

DISCUSSION

20. The Westhhills Energy System is subject to an exclusion from the definition of a public utility under section 1 of the *Utilities Commission Act* (the "*UCA*"). The operative provision reads in part:

> "public utility" means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for
>
> > (a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or
> >
> > […]
>
> but does not include
>
> > (c) a municipality or regional district <u>in respect of</u> services <u>provided by</u> the municipality or regional district within its own boundaries,
> >
> > […]
>
> [<u>Emphasis Added</u>]

21. It is not disputed that the services provided are within the municipal boundaries of the City or that the City is a municipality for the purposes of section 29 of the *Interpretation Act*. The only question at issue then is "in respect of" the Westhills energy services, whether the services are "provided by" the City.

22. In its analysis, the staff submission erroneously points to questions of ownership and operation. That is not the test for exclusion established by the *UCA,* nor any previous decisions of the Commission. The exclusion applies regardless of ownership of the facilities or one or more pieces of equipment. Ownership and operation is the starting place for falling within the definition of public utility. The real question before the panel is whether the exclusion within the definition applies. The test for determining whether an exclusion applies must focus on the basis on which services have come to be provided in the Westhills community.

23. The purposes of a municipality include the provision of services (*Community Charter*, sub-section 7(b)). Further, sub-section 8(2) of the *Community Charter* reads as follows:

> (2) A municipality may provide any service that the council considers necessary or desirable, and may do this directly or through another public authority or another person or organization.
>
> [Emphasis Added]

24. It is within the City's fundamental powers to provide services within its municipal boundaries "through another public authority or another person or organization" (*Community Charter*, sub-sections 7(b), 8(2), 8(3)(a) and 11(1)). This power must be interpreted broadly in accordance with the *Local Government Act* and in accordance with municipal purposes (*Community Charter*, Section 4.)

25. Bylaw No. 1291 which was duly adopted by the City's council creates an energy service, and sets out mechanisms to regulate the rate and fees, and specifically permits the City to provide the services directly or through another person or organization:

> 7. The City may provide the Services directly or through another person or organization (the Service Provider)

26. The fact that the services are provided by the City through a partnering agreement with SSL, a corporation pursuant to the laws of the Province of British Columbia, does not disqualify the City from relying on the exemption under section 1 of the *UCA*. The fact that SSL owns much of the infrastructure and equipment does not take the service outside one in respect of which the services are provided by the municipality.

27. The *Community Charter* provides municipalities with a broad range of tools to efficiently and effectively deliver services. Section 21 of the *Community Charter* explicitly contemplates a municipality entering into a partnering agreement for the provisions of a service “on behalf of” it. A partnering agreement is defined in the definitions Schedule of the *Community Charter* as follows:

> "partnering agreement" means an agreement between a municipality and a person or public authority under which the person or public authority agrees to provide a service on behalf of the municipality, other than a service that is part of the general administration of the municipality;

28. A partnering agreement may be broad including the creation, development and ongoing operations of a capital-intensive service. Nothing dictates who must own the assets deployed to accomplish service provision through a partnering agreement.

29. The staff submission does not attempt to invalidate the partnering agreement between the City and SSL as a true partnering agreement or to otherwise characterize the relationship between SSL and the City. Rather, the staff submission points to sub-section 8(10) of the *Community Charter*, section 10 of the *Community Charter* and section 121 of the *UCA* as the basis for the BCUC having “ultimate regulatory jurisdiction over SSL”. With respect, the staff submission misinterprets the application of the foregoing provisions to the fact pattern in this proceeding.

30. Section 8(10) of the *Community Charter* reads as follows:

> (10) Powers provided to municipalities under this section
>
> (a) are subject to any specific conditions and restrictions established by or under this or another Act, and
> (b) must be exercised in accordance with this Act unless otherwise provided.

31. The staff submission fails to provide any specific conditions or restrictions that the services in question are subject to.

32. The staff submission also refers to section 10 of the *Community Charter* which reads as follows:

> 10 (1) A provision of a municipal bylaw has no effect if it is inconsistent with a Provincial enactment.

(2) For the purposes of subsection (1), unless otherwise provided, a municipal bylaw is not inconsistent with another enactment if a person who complies with the bylaw does not, by this, contravene the other enactment.

33. There is no provincial enactment to the contrary at issue. Certainly, the staff submission does not point to any such provincial enactment. The provision at issue in this proceeding is the exemption set out in section 1 of the *UCA* and, again, the test is whether the services are "provided by" the City.

34. Lastly, the staff submission points to section 121 of the *UCA*. This section is irrelevant to the fact pattern at hand. The Commission has not been conferred with any powers to regulate "services provided by" the City. The services at issue are provided by the City through its partnering powers and, accordingly, the services are exempt from Commission regulation pursuant to the exemption set out in section 1 of the *UCA*.

35. The Commission requested comment on Sec. 36 of the *Community Charter* in its August 30, 2017 letter to the parties. The City does not rely on Sec. 36, and says the section is of no relevance to this proceeding. Sec. 36 is a companion to Sec. 36 of the *UCA*. Because the Commission may effectively order a municipality to allow use of municipal highways by public utilities, once again, the unified scheme provides for the required exception to the prohibitory power a municipality otherwise holds by Sec. 36 of the *Charter*:

UCA:

Use of municipal structures

36 Subject to any agreement between a public utility and a municipality and to the franchise or rights of the public utility, and after any hearing the commission considers advisable, the commission may, by order, specify the terms on which the public utility may use for any purpose of its service

(a) a highway in the municipality, or

(b) a public bridge, viaduct or subway constructed or to be constructed by the municipality alone or jointly with another municipality, corporation or government.

Community Charter:

General authority in relation to highways

36 (1) In addition to its authority in relation to highways as a service, a council may, by bylaw, regulate and prohibit in relation to all uses of or involving a highway or part of a highway.

(2) The authority of a municipality in relation to highways under any provision of this Act is subject to the following:

(e) authority in relation to all electrical transmission and distribution facilities and works that are on, over, under, along or across a highway is subject to the *Utilities Commission Act* and to all orders, certificates and approvals issued, granted or given under that Act.

36. The Commission is faced with two alternative interpretations of two statutes dealing with the same subject matter. The Commission staff urge an interpretation that finds conflict between the two, requiring the application of some legislative paramountcy, as expressed by Sec. 121 of the *UCA*. The City says that the rule of statutory interpretation that seeks to interpret the overall scheme in a cohesive and complementary way is to be preferred, and is the law (*Cowichan Valley,* supra).

37. In finding that the Westhills Energy System is an excluded municipal service, the Commission does not compromise the public interest, or its mandate to ensure that ratepayers receive safe, reliable and non-discriminatory energy services at fair rates. Clearly in this case, there is regulation of the service.

38. Utilities are regulated because they are natural monopolies without a competitive market. This Commission has concluded in the *Spirit Bay Utilities Ltd*. decision (BCUC Order# G-175-16): "that regulation is required when "natural monopoly characteristics are present and there is a need to regulate to protect the public interest…" We agree with this public interest consideration and find it to be an appropriate public interest test."

39. The obvious policy behind the exclusion of utility services provided by local government is that there is regulation at that level, by a responsible and elected body.

40. The current bylaw and Services Agreement in place ensures the City retains the right to regulate the services. Under Bylaw No. 1291, customers have the ability to bring appeals before Council if unsatisfied with the performance of the municipal utility service. The elected Council is accountable to the customers through the municipal election process. Further, customers are protected through the legislative controls in the *Community Charter* relating to municipal service powers, and bylaw adoption procedures, and a body of common law regarding the terms and conditions on which services are to be provided to customers. (*Chastain v. British Columbia Hydro and Power Authority* [1973] 2 W.W. r. 481).

41. Should customers be unsatisfied, the service is not mandatory. Provided customers comply with Bylaw No. 1291, they are permitted to disconnect service agreements and opt to obtain energy services from alternate service providers. The City is aware that several homeowners use electricity only for heat, and have opted out of the Westhills Energy System.

42. The test under section 1 of the *UCA* should be applied in a fashion consistent with the policy, and purpose of the exclusion, and in a keeping with the wider public interest objectives that can be seen in the *UCA* generally.

43. The legislative intent is clear. Municipal services when provided by the municipality within its boundaries are not within the jurisdiction of the Commission.

44. The Commission addressed the interpretation of its mandate to protect the public interest by ensuring "monopolistic elements have been mitigated" in its recent decision in *Spirit Bay Utilities Ltd*. (BCUC Order# G-175-16) as follows:

"When asked what opportunity Spirit Bay lease holders have to participate in the process required for Beecher FN Council to approve terms, conditions and rates set by Spirit Bay Utilities, Spirit Bay Utilities replied:

> Currently, Beecher FN Council meetings where resolutions are passed are not automatically open to the public or to interest-holders. The usual practice is to invite delegations or representations from potentially affected individuals to raise any concerns they have regarding specific agenda items. If the approval of terms, conditions and rates is carried out by Council Resolution, Beecher FN Council has stated that they willing to invite interest-holders to the meeting to make comments and ask questions.

[…]
The evidence shows that Spirit Bay Utilities is a corporation[19] and is therefore not a municipality and is also not excluded from the definition of public utility in the UCA. The Panel also notes that Spirit Bay Developments is a limited partnership and is therefore not a municipality.

The Panel also notes that generally speaking, ratepayers of a municipal utility are entitled to vote in a municipal election. Thereby, municipal councils are accountable to ratepayers for the performance, including rates, of the municipal utility. However, for ratepayers of Spirit Bay Utilities who are not members of Beecher FN, participation in the ratemaking process of Spirit Bay Utilities appears to be limited to making comments and asking questions of Beecher FN Council.

[…]
In the AES Inquiry Report, 35 the Commission concluded that regulation is required when "natural monopoly characteristics are present and there is a need to regulate to protect the public interest…" We agree with this public interest consideration and find it to be an appropriate public interest test. Therefore, if monopoly characteristics are not present, or are somehow mitigated, for example by an alternative regulatory body, an exemption from regulation under the UCA may be warranted.

Under the proposed *Beecher Bay Spirit Bay Utilities Law* the Beecher FN grants Spirit Bay Utilities the exclusive right to provide utility services to all premises within the Economic Development Zone.36 By their very nature, propane, electricity and thermal distribution systems have elements of a natural monopoly. Further, Spirit Bay Utilities is proposing mandatory connection to, and mandatory end-use of, Energy Services provided by Spirit Bay Utilities.37 Mandatory connection and mandatory use extend that

natural monopoly into a “legal” monopoly. In this Application, the onus is on the applicant to demonstrate that these monopolistic elements have been mitigated, and in this case they have failed to do so. In addition, the exemption scheme proposed by Beecher FN, which is the majority owner of Spirit Bay Utilities,38 has the effect of making the regulator the owner of the utility. For these reasons, the Panel finds that there is a potential for abuse of monopoly power and therefore exemption from regulation does not serve the objects and purposes of the UCA and is not in the public interest.

[…]

For Spirit Bay Utilities to state that a dispute resolution process is in place and that civil remedies are available through the courts does not distinguish Spirit Bay Utilities from any other regulated utility in the province, except that it underlines that there is no independent regulator to whom complainants can turn.”

45. In the present case, Bylaw No. 1291 answers all of these policy considerations.

-The right to service in the area is legislated. (sec. 3)
-The Westhills energy system rates are regulated in it. (sec. 6)
-General rate increases are controlled (sec. 9, Schedule G)
-The local elected council controls the rate (sec. 6)
-The terms of service are specified in the bylaw (Schedule F)

46. Council, in its discretion, may amend any schedule to Bylaw No. 1291, including removing and replacing rate schedules.

47. The partnering agreement further evidences that the elected Council maintains control over the provision of the energy service. It does the following:

-Limits rates and charges to those approved by bylaw only (s. 14, 16)
-Ties rates in any event to BC Hydro rates (s. 14)
-Ensures the City retains ownership/control over the facilities (s. 37)
-Sets performance standards (Schedule C)
-Provides detailed rate review processes (Schedule D)

48. There is no legal impediment to the City continuing, through its partner provider, with its regulated service. Bylaw No. 1291 is validly adopted pursuant to clear statutory authority at Sections 7 and 8 of the *Community Charter*. The partnering agreement between SSL and the City is in accordance with the direct statutory authority of the City under sections 8(2) and 21 of the *Community Charter*. Together, Bylaw No. 1291 and the partnering agreement create a legislatively based and authorized scheme to provide a utility service at a local level, subject to local control, with similar regulatory attributes that would be achieved through the Commission regulating a non-municipal service provider.

49. The Westhills Energy System utility service must be regulated. But dual regulation should be avoided. The additional uncertainty, potential conflict, and cost that would result from adding BCUC regulation on top of the regime created

under Bylaw No. 1291 and the Services Agreement (that must never-the less continue) should be avoided.

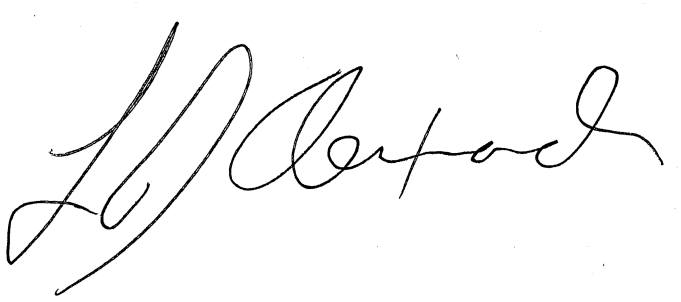
50. There can be not doubt, when read together as a cohesive statutory scheme, that there are two parallel modes of utility regulation in British Columbia. Both allow for a public or private operator, and both provide for either provincial Commission oversight, or local Council oversight, thus protecting the public interest.

51. There is no legal or policy basis to disturb the status quo in respect of the Westhills Energy System, and every reason to avoid the double regulation, and associated cost to the consumers.

52. The City requests that the Commission order or declare that the Westhills Energy System is not a public utility within the definition of public utility in Sec. 1 of the *UCA,* for so long as it continues to provided by and be regulated by the City of Langford as a municipal service.

53. The City reiterates its request to make oral submissions after the parties and interveners have filed all scheduled submissions.

All of which is respectfully submitted.



October 13, 2017

L. John Alexander
Counsel for the City of Langford

Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd., [2016] B.C.J. No. 2269

British Columbia and Yukon Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

D.M. Smith, G. Dickson and G.J. Fitch JJ.A.

Heard: August 17 and 18, 2016.

Judgment: November 3, 2016.

Dockets: CA43548, CA43549

[2016] B.C.J. No. 2269 | 2016 BCCA 432 | 271 A.C.W.S. (3d) 644 | 53 M.P.L.R. (5th) 175 | 91 C.P.C. (7th) 229 | 2016 CarswellBC 3040 | 90 B.C.L.R. (5th) 29 | 404 D.L.R. (4th) 106 | 6 C.E.L.R. (4th) 18 | [2017] 5 W.W.R. 144

Between Cowichan Valley Regional District, Respondent/Appellant on Cross Appeal (Petitioner), and Cobble Hill Holdings Ltd., South Island Aggregates Ltd. and South Island Resource Management Ltd., Appellants/Respondents on Cross Appeal (Respondents)

(96 paras.)

Case Summary

Municipal law — Planning and development — Zoning regulations — Land use — Appeal by quarry owners from decision declaring that appellants' Landfill Facility, Soil Treatment Facility and importing contaminated soil for permanent encapsulation in engineered cells to backfill quarry were not permitted land uses under Zoning Bylaw and granting injunctions restraining appellants from engaging in these activities allowed in part — Cross-appeal by respondent District from refusal to order removal of facilities or product already on site dismissed — Landfill Facility fell under Mines Act and thus within provincial jurisdiction — Activities of Soil Treatment Facility did not fall under mining activity and thus fell under respondent's jurisdiction.

Natural resources law — Mines and minerals — Environmental impact — Reclamation, remediation, rehabilitation and restoration — Re-contouring pit walls and waste dumps — Appeal by quarry owners from decision declaring that appellants' Landfill Facility, Soil Treatment Facility and importing contaminated soil for permanent encapsulation in engineered cells to backfill quarry were not permitted land uses under Zoning Bylaw and granting injunctions restraining appellants from engaging in these activities allowed in part — Cross-appeal by respondent District from refusal to order removal of facilities or product already on site dismissed — Landfill Facility fell under Mines Act and thus within provincial jurisdiction — Activities of Soil Treatment Facility did not fall under mining activity and thus fell under respondent's jurisdiction.

Appeal by Cobble Hill from a decision granting in part a petition by the respondent District declaring that the appellant's Landfill Facility, Soil Treatment Facility and importing contaminated soil for permanent encapsulation in engineered cells were not permitted land uses under the Zoning Bylaw and granting injunctions restraining the appellants from engaging in these activities. Cross-appeal by the respondent from the judge's refusal to order the removal of the facilities or the product already on site, including the deposited encapsulated cells. The appellants operated a rock quarry. Pursuant to permits obtained by them under the Mines Act and the Environmental

Management Act, the appellants were authorized to import contaminated soil to backfill the quarry cavity. The Environmental Management Act permit also authorized them to construct an on-site Landfill Facility for backfilling the quarry and an on-site Soil Treatment Facility for treating the contaminated imported soil. The respondent argued that the quarry operation contravened the permitted uses of land under the Local Government Act. The appellants submitted that the quarry was a mine, that the Province had exclusive jurisdiction under the Mines Act for site reclamation of a mine, and that the backfilling of a quarry was integral to site reclamation. The judge concluded that the appellants' site reclamation was a landfill as these activities were not integral, necessary, core or ancillary to their excavation or extraction activities and were therefore subject to land use regulation by the respondent.

HELD: Appeal allowed in part.

Cross-appeal dismissed. The Province had exclusive jurisdiction to regulate the operation of a quarry and its site reclamation, provided the reclamation activity was integral to restoring the affected landform. The quarry site reclamation was not a landfill. The Landfill Facility was authorized under the Mines Act for site reclamation of the excavated quarry land. It had no resemblance to a municipal waste dump. Both the excavation of the quarry and its Landfill Facility were a use of the land that fell within the respective definitions of "mine" and "mining activity" under the Mines Act. Site reclamation, which included the restoration of the excavated land, was also a use of land that fell within the definition of "mine" and "mining activity". The activities of the Soil Treatment Facility did not fall with the reclamation of a "mine" or "mining activity" under the Mines Act as they were not integral to the restoration of the landform. The bioremediation of the contaminated soil was a processing activity that, to date, had been carried on off-site. Its activities were conducted on the surface of the land, separate from the mine. Even if it was more operationally prudent, more energy efficient and more environmentally sustainable to process the imported soil on-site to backfill the quarry, local government jurisdiction was engaged and must authorize the operation. If the Province wanted to regulate on-site processing of soil imported from off-site for reclamation purposes, it must amend the Mines Act.

Statutes, Regulations and Rules Cited

Environment Management Act, S.B.C. 2003, c.á5, s. 1, s. 14, s. 14(1)

Local Government Act, S.B.C. 2016, c.á1, s. 327, s. 479

Mines Act, R.S.B.C. 1996, c.á293, s. 1, s. 10

Municipal Act, S.B.C. 1957, c.42,

Court Summary:

The appellants are owners of fee-simple land on which they operate a rock quarry pursuant to a mine permit issued under the Mines Act. The quarry cavity was initially backfilled with "clean" soil. The appellants subsequently obtained an amended permit under the Mines Act and a permit under the Environmental Management Act to import contaminated soil that was permanently encapsulated in engineered synthetic-lined cells for the backfilling of the quarry cavity where it is capped with a meter of clay and two meters of soil. The EMA permit also authorized an alternative facility that would permit the appellants to undertake bioremediation of the imported contaminated soil on site. The alternative facility was not included in the amended mine permit and, while constructed, has not been put into operation. The CVRD appealed the EMA permit to the Environmental Appeal Board. The appeal was dismissed. The CVRD then pursued the underlying petition in which it applied for

declaratory and injunctive relief against the appellants on the basis that their operation contravened the permitted uses of land under the Local Government Act. The judge agreed and granted the relief requested. However he dismissed the CVRD's application for mandatory injunctions to remove the contaminated soil already backfilled and the bioremediation facility. On appeal, the appellants submitted that the quarry is a mine, that the Province has exclusive jurisdiction under the Mines Act for site reclamation of a mine, and that the backfilling of a quarry is integral to site reclamation. The CVRD contended that a quarry is not a mine, that only the extraction of the aggregate falls within the exclusive jurisdiction of the Province, and that all other non-extraction activities including site reclamation is subject to local government land use regulation. Held: Appeal allowed in part. Cross appeal is dismissed. Under the Mines Act, a quarry is a mine and its site reclamation, which includes the backfilling of the quarry cavity, is a mining activity. The bioremediation of the imported soil on site is not integral to site reclamation and is subject to local government land use regulation.

Appeal From:

On appeal from an order of the Supreme Court of British Columbia, dated March 21, 2016 (*Cowichan Valley (Reginal District) v. Cobble Hill Holdings Ltd.*, *2016 BCSC 489*, Victoria Docket No. 13-3547).

Counsel

Counsel for the Appellants, Cobble Hill Holdings Ltd., and South Island Aggregates Ltd.: L.J. Alexander, A. Faulkner-Killam.

Counsel for the Appellant, South Island Resource Management Ltd.: K.R. Doerksen, J. Lee.

Counsel for the Respondent: A. Bradley.

[Editor's note: Corrections were released by the Court November 7, 2016; the changes have been made to the text and the corrections are appended to this document.]

[Supplementary reasons for judgment were released May 8, 2017. See [2017 B.C.J. No. 856.]

Reasons for Judgment

The judgment of the Court was delivered by

D.M. SMITH J.A.

Overview

1 The excavation of a rock quarry and its site reclamation are at the center of this longstanding dispute. Excavation is the extraction of aggregate from a landform, which typically leaves the landform with a cavity or pit. Reclamation is the restoration of the affected landform to its pre-quarry state by backfilling the cavity with soil. Soil includes sand, gravel or rock.

2 Reclamation is an integral part of quarrying. An approved site reclamation plan is required under s. 10 of the

Mines Act, R.S.B.C. 1996, c. 293 before the Ministry of Energy and Mines (the "MoM) will issue a quarry permit. Reclamation plans that raise environmental concerns also require a permit from the Ministry of the Environment (the "MoE") under s. 14 of the *Environment Management Act,* S.B.C. 2003, c. 53 (the "*EMA*").

3 The Province has jurisdiction over mining. Using this permitting process, it regulates the extraction of aggregate and site reclamation.

4 The appellants submit the Province has exclusive jurisdiction over mining, which includes quarries. They say it is the sole regulator of quarries and any related on-site activities for the duration of the mine's operation. The respondent submits that other than extraction of the aggregate, all other non-extraction quarry activities, including site reclamation, are a use of land that is subject to local government regulation under the general zoning power in the *Local Government Act,* S.B.C. 2016, c. 1, (the "*LGA"*). The respondent contends the provincial jurisdiction over mining does not override local government's jurisdiction over land use where each jurisdiction is acting within its respective powers.

5 The parties' dispute was triggered when the Province granted the appellants a permit to import contaminated soil onto the quarry site to backfill the quarry cavity.

6 Although multiple issues were raised in the appeal and cross appeal, the central issue in my respectful view is one of jurisdiction. For the reasons below, I am of the view that the Province has exclusive jurisdiction to regulate the operation of a quarry and its site reclamation, provided the reclamation activity is integral to restoring the affected landform.

Background

7 Cobble Hill Holdings Ltd. ("CHH") is the fee-simple owner of a parcel of land south of Shawingan Lake. The land is situated in the Cowichan Valley and the Shawingan Lake watershed on Vancouver Island. On the western slope of the land a quarry excavation cuts into the hill. Surface water flows down the hill, through the excavation and into an ephemeral stream on the neighbouring property, which is also owned by the appellants.

8 South Island Aggregates Ltd. ("SIA") began to operate the rock quarry in 2006. In 2015, South Island Resource Management Ltd. ("SIRM") took over the quarry operation. SIRM is the current operator. I shall refer to these entities collectively as the "appellants."

9 The respondent, Cowichan Valley Regional District (the "CVRD"), is the local government with zoning authority in the area. In 1986, pursuant to the provisions of the *LGA*, the CVRD adopted the Electoral Area "B" Zoning Bylaw No. 985 -- Shawnigan Lake (the "Zoning Bylaw").

10 The Chief Inspector of Mines (the "Chief Inspector") issues permits under the *Mines Act* for mining and quarry operations. The permit includes requirements to reclaim the landform to its "pre-mining state". It also includes a requirement for a level of land productivity at the end of the operation. The Chief Inspector decides if the quarry has been successfully reclaimed at the end of its life.

11 In 2006, the quarry land was zoned for residential use. At that time, the quarry permit authorized the appellants to reclaim the site by importing "clean" soil (albeit all soil contains some contaminants) and restoring the landform to the pre-quarry residential land use.

12 In 2007, the quarry land zoning was changed to F-1 (primary forestry) and industrial uses including excavation, milling and crushing. This was in keeping with the CVRD's Official Community Plan that lists mining as one of its principle objectives. The zoning change allowed the appellants to change the nature of the soil they imported. Under the forest/industrial zoning industrial IL soil (also "clean" soil) could be imported onto the site without a permit. The zoning change also reduced the minimum lot size to 80 hectares beyond the size for residential subdivision.

13 In 2009, the quarry permit was amended. The amendment authorized the site to be reclaimed with imported soil that met MoE Soil Guidelines for backfilling the quarry and, if the MoE required one, a waste management permit before the soil was brought onto the land.

14 In 2011, the appellants applied to the MoE to further amend the quarry permit to allow them to import contaminated soil and associated ash (non-hazardous). They also requested a waste discharge permit to construct an on-site facility for backfilling the quarry (the "Landfill Facility") and an on-site facility for treating the contaminated soil (the "Soil Treatment Facility"). In addition, they applied to upgrade the existing water treatment system and settling pond for the increased discharge of effluent.

15 In August 2013, the MoE granted the permit. The MoE permit (i) requires the imported soil to meet MoE Soil Guidelines for the intended "end land use" (forestry/industrial) when the quarry activities are completed, and (ii) authorizes the management and processing of the contaminated soil by one of two ways: the Landfill Facility or the Soil Treatment Facility. Both are subject to stringent environmental requirements, monitoring and inspections.

16 The Landfill Facility stores contaminated soil in engineered, synthetic-lined cells, that are "permanently encapsulated" in the cavity of the quarry, where they are capped with a meter of clay and two meters of residential-grade soil. No associated ash has been included with the soil to date.

17 The Soil Treatment Facility is a rectangular, asphalt-paved pad (approximately 1,800 square meters) for the bioremediation of the soil to be deposited into the quarry cavity. Bioremediation is a natural waste management technique that uses the naturally occurring processes of organisms to remove, break down or neutralize the concentrations of organic contaminants through biodegradation. The facility has been constructed but has not been put into operation.

18 The MoE permit contemplates monitoring the site reclamation process for the life of the mine, estimated at between 40-50 years. At the completion of the quarry activities, the permit requires the land surface and watercourses to be reclaimed to a forestry/industrial land use (the end land use) and the surface level of the land restored to its prior 3% (flat) slope.

19 After the MoE permit was granted, the MoM amended the quarry permit to provide for the mandatory requirements of the MoE permit. It authorized the Landfill Facility but did not include the Soil Treatment Facility as a requirement for reclamation.

20 The CVRD has acknowledged the need to treat and manage contaminated soil in the Province. However, along with some of its residents, it has continuing concerns about the appellants' modified reclamation plan.

21 In October 2013, the CVRD commenced the underlying petition. In the petition, it claimed that the Landfill Facility and the Soil Treatment Facility were not permitted land uses under the Zoning Bylaw and it requested a number of declaratory and injunctive orders, effectively to prohibit the appellants from continuing the modified on-site reclamation process. It also filed an appeal of the MoE permit with the Environmental Appeal Board (the "EAB"), where it obtained a stay of the MoE permit pending the EAB decision. The appellants successfully applied to vary the stay order, permitting them to complete four of their soil deposit contracts.

22 The EAB hearing occurred over 31 days in March and July 2014. During the hearing, the CVRD raised a number of health and safety concerns about the impact of the modified reclamation process on the environment generally and on the Shawnigan Lake watershed in particular. The CVRD claimed the contaminants would enter the environment and threaten the drinking water and fish habitat. It also claimed the design of the Landfill Facility would not overcome those risks.

23 The EAB found otherwise. It accepted the evidence of the MoE experts, the mine inspectors and other experts who had been brought in to challenge the MoE position that the appellants' operation would not impair the

environment or the watershed. The EAB also found that it would be speculative to commit to monitoring the Landfill Facility after the quarry was abandoned in 40 to 50 years, as that decision would be dependent on the results of ongoing monitoring over the life of the quarry. In March 2015, the EAB dismissed the appeal in comprehensive written reasons.

24 The CVRD then resurrected its petition and proceeded with a 10-day hearing before Mr. Justice MacKenzie.

Relevant legislative provisions

25 The following legislative provisions are relevant to the issues raised in this appeal.

The Mines Act

26 The *Mines Act* provides the following definition of a "mine" and a "mining activity":

> **Definitions**
>
> **1** In this Act:
>
> **"mine"** includes
>
> (a) a place where mechanical disturbance of the ground or any excavation is made to explore for or to produce coal, mineral bearing substances, placer minerals, rock, limestone, earth, clay, sand or gravel,
>
> (b) all cleared areas, machinery and equipment for use in servicing a mine or for use in connection with a mine and buildings other than bunkhouses, cook houses and related residential facilities,
>
> (c) all activities including exploratory drilling, excavation, processing, concentrating, waste disposal and site reclamation,
>
> (d) closed and abandoned mines, and
>
> (e) a place designated by the chief inspector as a mine;
>
> **"mining activity"** means any activity related to
>
> (a) the exploration and development of a
>
> mineral, coal, sand, gravel or rock, or
>
> (b) the production of a mineral, a placer mineral, coal, sand, gravel or rock,
>
> and includes the reclamation of a mine;
>
> [Emphasis added.]

27 A mine therefore includes the excavation of sand, gravel or rock and its site reclamation.

28 A mine permit may be issued under s. 10 of the *Mines Act* only if the applicant has first obtained an approved reclamation plan:

> **10**(1) Before starting any work in, on or about a mine, the owner, agent, manager or any other person must hold a permit issued by the chief inspector and, as part of the application for the permit, there must be filed with an inspector a plan outlining the details of the proposed work and a program for ... the protection and reclamation of the land ... affected by the mine ...
>
> (2.01) Without limiting subsection (1.1) or (2), terms and conditions imposed under those subsections may include terms and conditions respecting any or all of the following;

...

(d) environmental protection and reclamation.

[Emphasis added.]

The LGA

29 In the *Municipal Act*, S.B.C. 1957, c.42, "land" was defined as:

> "Land" means the soil or ground without improvements, and includes land covered by water, and all quarries and substances in or under the land other than mines or minerals. [Emphasis added.]

30 The *Municipal Act Amendment Act,* S.B.C. 1959, c. 56, changed the definition of "land" to its current wording in the *LGA.* The *LGA* incorporated the definition of "land" from the *Community Charter*, S.B.C., 2003, c.26 (the "*CC*"), which no longer includes quarries:

> **Definitions**
>
> **"land"**
>
> (a) for the purposes of assessment and taxation, means land as defined in the Assessment Act, and (b) for other purposes, includes the surface of water, but does not include
>
> (i) improvements
>
> (ii) mines or minerals belonging to the Crown, or
>
> (iii) mines or minerals for which title in fee simple has been registered in the land title office;

31 The 1959 *Municipal Act Amendment Act* also added the local government zoning power to its jurisdiction. The general zoning power is now found in s. 479 (formerly s. 903) of the *LGA.* It may only be exercised in relation to "land" as defined by the *LGA*. Section 479(1) provides:

> **Zoning bylaws**
>
> **479**(1) A local government may, by bylaw, do one or more of the following:
>
> ...
>
> (c) regulate within a zone
>
> (i) the use of land, buildings and structures
>
> ...
>
> (3) The power to regulate under subsection (1) includes the power to prohibit any use or uses in a zone.

32 Section 327 (formerly s. 723) of the *LGA* sets out the authority for a regional district to regulate or prohibit a service in relation to the deposit and removal of soil:

> **Removal and deposit of sand, gravel and other soil**
>
> **327**(1) This section applies to a regional district only if the regional district provides a service in relation to the control of the deposit and removal of soil and the control and deposit of other materials.
>
> (2) The board may, by bylaw, regulate or prohibit
>
> (a) the removal of soil from, and
>
> (b) the deposit of soil or other material on any land in the regional district or in any area of the regional district.

...

(4) Section 9 [spheres of concurrent authority with the *LGA*] of the *Community Charter* applies to a provision in a bylaw under subsection 2 that

(a) prohibits the removal of soil, or

(b) prohibits the deposit of soil or other material and that makes reference to quality of soil or material or to contamination.

[Emphasis added.]

33 The CVRD does not provide a service for the deposit of soil and does not have a soil deposit bylaw.

34 Sections 8 and 9 of the *CC,* which are incorporated into the *LGA,* provide:

Fundamental Powers

8(3) A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:

...

(m) the removal of soil and the deposit of soil or other material.

Spheres of concurrent authority

9(1) This section applies in relation to the following:

(e) bylaws under section 8 (3) (m) *[removal and deposit of soil and other material]* that

(i) prohibit soil removal, or

(ii) prohibit the deposit of soil or other material, making reference to quality of the soil or material or to contamination.

(2) For certainty, this section does not apply to

(a) a bylaw under section 8 that is under a provision not referred to in subsection (1) or is in respect of a matter to which subsection (1) does not apply,

(b) a bylaw that is authorized under a provision of this Act other than section 8, or

(c) a bylaw that is authorized under another Act, even if the bylaw could have been made under an authority to which this section does apply.

(3) Recognizing the Provincial interest in matters dealt with by bylaws referred to in subsection (1), a council may not adopt a bylaw to which this section applies unless the bylaw is

(a) in accordance with a regulation under subsection (4),

(b) in accordance with an agreement under subsection (5), or

(c) approved by the minister responsible.

[Emphasis added.]

35 Section 4.2 of the Zoning Bylaw provides that land may only be used as specifically permitted:

4.2 Land or the surface of water shall not be used and structures shall not be constructed, altered, located or used except as specifically permitted by this bylaw.

36 Section 4.4 of the Zoning Bylaw also permits uses accessory to the permitted principal use in the F-1 zone. It provides:

> **4.4** Except where otherwise specifically stated all uses permitted by the bylaw include those uses accessory to the permitted principle uses and all buildings or structures include all buildings or structures reasonably auxiliary to buildings and structures constructed located or used with respect to permitted principal uses.
>
> [Emphasis added.]

"Accessory" is defined as "ancillary or subordinate to a principal use".

"Principal" with respect to a use is defined as "primary and chief".

37 The permitted land uses are listed in s. 7.4(a) of the Zoning Bylaw. Only the listed uses "and no others" are permitted. They include:

> **7.4 F-1 - Primary Forestry**
>
> (a) Permitted uses
>
> The following uses and no others are permitted in an F-1 zone:
>
> (1) The management and harvesting of primary forest products excluding sawmilling and all manufacturing and dry land log sorting operations;
>
> (2) Extraction crushing milling concentration for shipment of mineral resources or aggregate materials excluding all manufacturing;
>
> (3) Single family residential dwelling or mobile home;
>
> (4) Agriculture silviculture horticulture;
>
> (5) Home based business;
>
> (6) Bed and breakfast accommodation;
>
> (7) Secondary suite or small suite on parcels that are less than 10.0 hectares in area;
>
> (8) Secondary suite or a second single family dwelling on parcels that are 10.0 hectares or more in area.
>
> [Emphasis added.]

38 Section 5.20 of the Zoning Bylaw deals with contaminated soil and waste. It provides:

> **5.20 Contaminated Soil and Waste**
>
> Unless explicitly permitted in a zone, no parcel shall be used for the purpose of storing contaminated waste or contaminated soil, if the contaminated material did not originate on the same legal parcel of land that it is being stored on.

39 The CVRD has not received approval for this bylaw from the minister responsible.

The EMA Act

40 The Code does not define "land" or "land use". However, s. 1 of the *EMA* defines "land" as "the solid part of the earth's surface including the foreshore and land covered by water".

41 The introduction of waste into the environment requires a permit under the *EMA*. Section 14 mandates:

14(1) A director may issue a permit authorizing the introduction of waste into the environment subject to requirements for the protection of the environment that the director considers advisable and, without limiting that power, may do one or more of the following in the permit:

(a) require the permittee to repair, alter, remove, improve or add to works or to construct new works and to submit plans and specifications for works specified in the permit;

(b) require the permittee to give security in the amount and form and subject to conditions the director specifies;

(c) require the permittee to monitor, in the manner specified by the director, the waste the method of handling, treating, transporting, discharging and storing the waste and the places and things that the director considers will be affected by the discharge of the waste or the handling, treatment, transportation or storage of the waste;

(d) require the permittee to conduct studies and to report information specified by the director in the manner specified by the director;

(e) specify procedures for monitoring and analysis, and procedures or requirements respecting the handling, treatment transportation, discharge or storage of the waste that the permittee must fulfill;

(f) require the permittee to recycle certain wastes and to recover certain reusable resources, including energy potential from wastes.

42 The EAB imposed conditions in the MoE permit under most of the categories listed in s. 14(1)(a)--(f).

The Judgment

43 Before MacKenzie J., the appellants submitted that (i) the Province has exclusive jurisdiction to regulate all activities associated with reclaiming a quarry because a quarry is a "mine" and (ii) site reclamation is a "mining activity" as defined under the *Mines Act.* They argued that the CVRD's jurisdiction to regulate their use of the land will only be re-engaged when the quarrying activities, including reclamation, are complete. In the alternative, they submitted that reclamation is an integral, necessary and core aspect of "extraction", which is a permitted land use under s. 7.4(a)(ii) of the Zoning Bylaw, and is also an "ancillary use" to the permitted principal use of "extraction" under s. 4.4 of the Zoning Bylaw.

44 The CVRD contended that it has the jurisdiction to regulate the appellants' deposit and placement of reclamation soil under its general zoning power in s. 479 of the Zoning Bylaw. It argued that (i) the appellants' reclamation activities are effectively a landfill, and that a landfill is a use of land subject to regulation by the CVRD; (ii) all of the appellants' non-extraction activities, which include associated or related "mining activities, are not excluded from the definition of "land" in s. 1 of the *LGA,* based on the interpretation of "land" in the *LGA* in *Squamish (District) v. Great Pacific Pumice Inc. et al., 2003 BCCA 404* [*Pumice*] and are prohibited as they do not fall within the permitted uses in s. 7.4(a)(ii) of the Zoning Bylaw; and (iii) based on *Pumice,* the storage and processing of materials approved under a provincial permit can be regulated or prohibited by the local government's general zoning power, absent the use of the land being expressly permitted under s. 7.4(a).

45 The judge agreed with the CVRD. He concluded that the appellants' reclamation activities are not integral, necessary, core or ancillary to their excavation or extraction activities and are therefore subject to land use regulation by the CVRD. In particular, he held:

(1) Based on *Vernon (City) v. Okanagan Excavating (1993) Ltd. (1995), 9 B.C.L.R. (3d) 331* (C.A.), the extraction of aggregate is a *profit à prendre* (a right to take something from the land) and therefore is not subject to local government land use regulation; however based on *Pumice,* all other "non-extraction" activities are subject to zoning regulation:

[79] ... there is no issue local governments do not have the authority to regulate extraction of aggregate material (see [*Vernon*]).The CVRD submits however, that while extraction of a mineral or aggregate material is not a land use, all other "related activities" are land uses and subject to zoning, citing [*Pumice*], and that a mining permit does not trump local government zoning. That is, the CVRD says all "non-extraction components" are subject to zoning bylaws.

[Emphasis added.]

(2) While "extraction" is a permitted land use under s. 7.4(a)(ii) of the Zoning Bylaw, reclamation is not; nor is it an "integral", "core", or "necessary" activity to the extraction activity (accepting the opinion of the CVRD's expert that the appellants' reclamation activities were not "necessary" or "normal" for a small quarry):

[86] In my view, it is only activities that are integral to extraction of the resource that can escape local land use regulation. Moreover, I am unable to agree that reclamation is an integral and necessary aspect of the actual extraction process, such that a local government is precluded from exercising its zoning power to restrict reclamation activities. In my view, to accede to the submission advanced by the [appellants] would be contrary to the general principles enunciated in both *Great Pacific Pumice* and *Vernon.*

...

[90] The CVRD's intention or purpose in passing the bylaw was to permit the extraction of resources, including other specific mining activities. However, in my view, this does not mean the petitioner intended to relinquish its jurisdiction to control what land use activities occur on land where a resource is being extracted, as long as any land use restriction does not interfere with or prohibit extraction of the resource. I cannot agree with the [appellants] when they say that if I interpret extraction to exclude reclamation, they could not extract the aggregate and this would mean the CVRD did not intend to allow mining. As the Court of Appeal outlined in *Neilson v. Langley (Township),* *[1982] B.C.J. No. 2313*, at para. 18, the interpretation of municipal bylaws should be done with a view to giving effect to the intention of the municipal council. I am satisfied the intent of the CVRD is clearly to permit extraction and the specified processing activities, at the same time enforcing the zoning bylaw.

[91] In my view, even though there must be a reclamation plan in order to obtain a mining permit, reclamation is not a "core" or integral mining activity that escapes local zoning regulations. It is different than extraction of the mineral or aggregate. As a result, I am satisfied that the [CVRD] has jurisdiction to regulate non-extraction mining activities, including reclamation activities.

[92] For the same reasons, I am unable to agree with the [appellants'] other argument that any activity [emphasis in original] that might be considered reclamation is a principal permitted use. While this bylaw specifically permits other mining activities, I am satisfied that even if the importation and encapsulation of this material could be considered reclamation, as this activity is not integral to the extraction of the aggregate, it cannot be considered a permitted land use under s. 7.4 of the zoning bylaw.

[Emphasis added.]

(3) The site reclamation was not an "accessory use" to the authorized principle "extraction" activity:

[96] ... I am satisfied the purpose broadly served by the F-1 zone is to allow for the extraction of minerals and aggregate, as well as crushing, milling and concentration for shipment, and that the purpose of s. 4.4 is to allow uses that are ancillary, or necessary, to the actual permitted uses, that is, activities that are required in order to extract the aggregate and get it to the marketplace. As a result, I am unable to agree with the [appellants] that the activities taking place on the property are "accessory" to extraction, crushing or milling, such that they can be considered a permitted accessory use.

[Emphasis added.]

(4) The reclamation process of permanent encapsulation of waste soil in engineered cells for deposit into the cavity of the quarry is a landfill and therefore subject to the Zoning Bylaw, which does not expressly permit the land to be used as a landfill:

> [113] ... I also agree with the CVRD that whether the respondents are operating a landfill or reclaiming the quarry depends on the context of the activity and what is actually occurring on site. While I give due weight to the opinions of both experts, having regard to the totality of the evidence, I am satisfied the [CVRD] has established that the permanent encapsulation of waste soil in the engineered cells has, in fact, created a landfill that is properly characterized as a land use, and is subject to the zoning bylaw. Moreover, I am satisfied a landfill is not a permitted use, either under the "implied exclusion approach" and the operation of s. 4.2 and s. 7.4 of the zoning bylaw, or pursuant to the test of statutory interpretation as outlined in *Paldi* [*Paldi Khalsa Diwan Society v. Cowichan Valley (Regional District)*, *2014 BCCA 335*].
>
> [Emphasis added.]

(5) There is no operational conflict between the activities of the appellants under the quarry permit issued pursuant to s. 10 of the *Mines Act,* and the CVRD's prohibition of their site reclamation activities under the Zoning Bylaw pursuant to the *LGA*, if the appellants restrict their reclamation activities to only those land uses permitted by the CVRD:

> [89] I am unable to accept that such a conflict exists. In my view, these enactments are capable of existing together harmoniously as an integrated regulatory scheme pertaining to land use and mining legislation. The CVRD is not attempting to prohibit reclamation activities; it simply seeks to restrict them to comply with permitted land uses under zoning bylaw. As for the MoE permit, it gives permission to the respondents to import waste and permanently encapsulate it if they so desire. The permit in no way compels [emphasis in original] the respondents to do anything, nor does the zoning bylaw prohibit in any way extraction of the aggregate material (see *Greater Vancouver (Regional District) v. Darvonda Nurseries Ltd.,* *2008 BCSC 1251*). I conclude the regulations can co-exist.

(6) In light of his conclusion that the "landfilling of imported waste on the property is not a permitted principle or accessory land use", it was unnecessary to decide what the judge referred to as the appellants' alternative submission, namely that s. 5.20 (which prohibits the storage of contaminated soil), was a valid and enforceable provision of the Zoning Bylaw. He observed in *obiter*:

> [117] What was somewhat inconsistent, however, was the [appellants] then went on to submit that adding soil to the land "is the deposit of soil, which whether worded as storage or otherwise, cannot be controlled without a s. 723 bylaw, and cannot be controlled as to quality without ministerial approval."
>
> [118] Be that as it may, it was only if the petitioner was unsuccessful on its primary argument would it be necessary to consider the [appellants] 'alternative' argument that s. 5.20 is *ultra vires* the CVRD's power to zone land uses, on the basis that, if a local government wishes to control the quality of soil being deposited on land, contaminated or not, that power is found in s. 723 of the *LGA* (as it then was), not pursuant to the land use power in s. 903, and that without ministerial approval, local governments cannot pass any provision that refers to the quality of soil.

46 In the result, the judge found that the appellants' site reclamation was a landfill that was subject to land use regulation under the CVRD's general zoning power. As it was not an expressly permitted use under s. 7.4(a), the site reclamation activities were prohibited. He granted the CVRD's request for declaratory orders that the Landfill Facility, Soil Treatment Facility and importing contaminated soil for permanent encapsulation in engineered cells were not permitted land uses under the Zoning Bylaw, as well as injunctions restraining the appellants from engaging in each of those activities.

47 The judge declined to order a mandatory injunction for the removal of the facilities or the "product" already on site, including the deposited encapsulated cells, relying on the expertise of the MoE and EAB as to the safety of the "product". He also declined to order a mandatory injunction for the removal of the concrete lock blocks in the soil management area and the upgraded water treatment system, which he found "can be a legitimate and important

use within the parameters of extraction and the other permitted mining activities of crushing and milling" under s. 7.4(a)(ii) of the Zoning Bylaw 9 at para. 125.

48 The appellants appeal the judge's declaratory and injunction orders. The respondent cross appeals the orders dismissing its applications for mandatory injunctions.

Issues

49 The appellants raise several issues on appeal. They submit the judge:

(a) erred in law by concluding that a regional district has legislative authority to regulate mines and mandatory mine activities that take place within them (paras. 86 and 91);

(b) erred in law by concluding that a regional district can, by virtue of general land use or "zoning power", control or regulate the deposit of soil, particularly with reference to quality (paras. 117 and 118). They say the judge misconstrued the issue as applicable only to the appellants' alternative arguments, failed to apply the statutory scheme, and ignored applicable authority that a bylaw, which in effect, regulates soil deposit, (at least with respect to quality) absent appropriate ministerial approval, is not enforceable;

(c) erred in interpreting the purpose of the Zoning Bylaw (at paras. 90 and 92) and in concluding that the reclamation activity constitutes a "landfill" that the CVRD intended the Zoning Bylaw to prohibit (para. 113); and

(d) erred in concluding that only uses accessory to extraction, and not to mining, are permitted under accessory use (para. 96).

50 In the cross appeal, the CVRD submits the judge erred in not ordering the appellants to remove the Landfill Facility, the Soil Treatment Facility, and waste materials from the site when he found they were in breach of the Zoning Bylaw. In those circumstances, it submits, "the public interest is at stake in the enforcement of a zoning bylaw", citing *Langley (Township) v. Wood, 1999 BCCA 260* at para. 17.

On Appeal

51 I propose first to address the judge's finding that the appellants' site reclamation is a landfill, which, if the judge were correct, would determine the appeal. The operation of a landfill is a land use that is subject to local government zoning. A quarry permit under the *Mines Act* does not authorize a landfill.

A. Is the quarry site reclamation a landfill?

52 The quarry site reclamation is not a landfill. The finding that the appellants are operating a landfill appears to have been derived principally from the language in the EAB decision. In its reasons, the EAB refers to the initial quarry permit under the *Mines Act* as the "mine permit" and defines the MoE permit as "the Permit".

53 The EAB report noted that the MoE permit applies to "the discharge of refuse from a contaminated soil treatment and to the landfill facility". It described the authorized works as "a landfill, engineered lined landfill cells ..." and the context of this "landfill" as the deposit of the imported soil contained in these engineered lined cells into the cavity of the quarry. It stated: "'Landfilling' in this case does not mean that contaminated soils are simply deposited into the quarry; rather, the soil will be encapsulated in engineered cells." It also used the term "landfill" interchangeably with "backfill" and "reclamation" to describe depositing the soil into the excavated land. This was in contrast to its description of the "discharge" of liquid effluent, or "emission" of air contaminants. In short, the purpose of the soil deposit was clear; it was always meant to backfill the quarry pit.

54 There is no evidence that the Landfill Facility was intended to create a landfill *per se,* as that term is generally

understood, namely a municipal waste dump where all types of refuse are deposited. The MoE permit authorizing the Landfill Facility is governed by the *EMA,* which includes 47 regulations. The *EMA* regime regulates the discharge of environmental "waste", including waste streams from air emissions, liquid effluent streams, and soil deposits. The *EMA* also defines "municipal solid waste" as "refuse that originates from residential, commercial, institutional, demolition, land clearing or construction sources" or "refuse specified by a director to be included in a waste management plan". Municipal solid waste does not include soil.

55 The Landfill Facility was authorized under the *Mines Act* for site reclamation of the excavated quarry land. It bears no resemblance to a municipal waste dump.

56 In my opinion, it was factually incorrect for the judge to characterize the appellants' reclamation activities as a landfill. Such a characterization ignored the context of the *EMA* regime in approving and regulating the construction and operation of the Landfill Facility.

B. Is a quarry a "mine" and its reclamation a "mining activity" under the *Mines Act?*

57 A quarry is a mine and its site reclamation is a mining activity.

58 Historically, quarries were included in the definition of "land" in the 1957 *Municipal Act.* The 1959 *Municipal Act Amendment Act* changed the definition of "land" by deleting any reference to quarries.

59 The appellants submit the quarry and its site reclamation fall within the definition of a "mine" and a "mining activity", respectively, under the *Mines Act.* The CVRD contends a quarry is not a mine as it does not fall within the "mines" exclusions in the definition of land in the *LGA,* and that its non-extraction activities fall within the definition of "land" based on the historical meaning of the "mines" exclusion in the *LGA,* as interpreted in *Pumice.*

60 The modern approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Sullivan on the Construction of Statutes,* 6th ed. (Toronto: Lexis Nexis, 2014 at p. 1). As well, *Sullivan* at p. 421, citing *Canada (Attorney General) v. Public Service Alliance of Canada, [1991] 1 S.C.R. 614* at paras. 23 and 25, instructs that statutes which deal with the same subject:

> ... are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject ... The provisions of each are read in the context of the others and consideration is given to whether they are part of a single scheme. The presumptions of coherence and consistent expression apply as if the provisions of these statutes were part of a single act.

61 The modern approach to statutory interpretation also requires that the words of a legislative provision be interpreted in a manner that takes into account their context. See *Peachland (District) v. Peachland Self Storage Ltd., 2013 BCCA 273* at para. 19; and *R. v. Summers, 2014 SCC 26* at para. 55.

62 In my view, both the excavation of the quarry and its Landfill Facility are a use of the land that falls squarely within the respective definitions of "mine" and "mining activity" under the *Mines Act*: a "'mine' includes a place where mechanical disturbance of the ground or any excavation is made to explore for ... rock ...and site reclamation"; and "'mining activity' means any activity related to the reclamation of a mine." The use of land refers to the use of the surface of the land. It is the disturbance of the surface of the land for the excavation of rock that is, by definition, a "mine" and a "mining activity".

63 Site reclamation, which includes the restoration of the excavated land, is also a use of land that falls within the definition of "mine" and "mining activity". Reclaiming land to its pre-mining state refers to restoration of the surface of the land, in this case to the forest/industrial use. The permit refers to the restoration of the surface of the land to a certain level of productivity consistent with its pre-mining state.

64 It is clear from these provisions that reclamation is an integral part of the unified regulatory regime for the oversight of mining in the Province. In short, excavation of a quarry and its site reclamation are simply two sides of the same coin.

C. Does the Province have exclusive jurisdiction over the regulation of mines and their related site reclamation activities?

65 Mines and mining activities include depositing soil for site reclamation. The movement of soil is regulated under a comprehensive regime developed by experts, administered by statutory decision makers, and subject to specialized administrative tribunal appeal.

66 The Province's interest in mining is significant. That is evident by the extensive requirements that must be met before a MoM permit and, where required, a MoE permit, are issued.

67 The Legislature clearly intended to ensure that the Province's jurisdiction over the regulation of mines and mining activities is maintained because of the importance of mining to the provincial economy. That intention is apparent in the following legislative provisions: (i) the express exclusion of "mines" in the definition of land in the *CC*; (ii) the express recognition of the provincial interest in mining in s. 9(1) of the *CC,* adopted in the *LGA,* that requires a council to obtain the approval of the minister responsible before a bylaw prohibiting the deposit of contaminated soil will be enforceable; and (iii) related legislative provisions and statutes that reserve control of mines and mining activities to the Province to ensure a unified provincial regulatory scheme, including the following: *Health, Safety and Reclamation Code,* Part 10 (reclamation standards) [the "Code"]; *Building Act,* S.B.C. 2015, c. 2, s. 2(b); *Contaminated Sites Regulation,* Part 1 (the definition of "soil") and Part 6, *Metalliferous Mines Regulation Act,* R.S.B.C. 1948, c. 218, s. 2 (the definition of "mine"); *Land Act,* R.S.B.C. 1996, c. 245, s. 19 (quarrying land); *Mineral Tenure Act,* R.S.B.C. 1996, c. 292, s. 1 (definition of "mineral"); and *Mines Fee Regulation,* (definition of "mineral or coal mine", and "pit or quarry").

68 The CVRD contends the "mines" exclusions in the *LGA* definition of "land" is limited to only those mines or minerals that were historically registered in the land titles office separately from the land. It relies on the comments in *Pumice,* which I shall discuss below, to support this position. However, regardless of whether "mines" in the definition of "land" in the *LGA* refers to its historical meaning as "substances on or under the surface" that are capable of severance from the surface as a separate tenement (as found in *Pumice*), or extends to its modern and broader meaning that is captured by the definitions in the *Mines Act,* it is clear that the Legislature intended to exclude some forms of mines and mining activities from the definition of "land" in the *LGA.*

69 That intention is also apparent in the legislative requirement for provincial oversight of bylaws for the removal and deposit of soil. Section 9(3) of the *CC,* which is incorporated into the *LGA,* expressly requires the approval of the minister responsible in order for a soil deposit bylaw to be enforceable. This is expressly stated for the purpose of "[r]ecognizing the Provincial interest in matters dealt with by bylaws ..." that "prohibit soil removal or ... prohibit the deposit of soil or other matter, making reference to quality of the soil or material or to contamination."

70 The CVRD does not provide a service for controlling soil deposits and removals. Nor does it have a soil deposit bylaw issued under s. 327 of the *LGA*; it has been unable to obtain provincial approval for such a bylaw. The CVRD cannot regulate or prohibit a specific use of land under its general zoning power in s. 479 of the *LGA,* which requires bylaws to be passed to regulate or prohibit a specific land use within a zone. The CVRD can only regulate the use of land if (i) the land to be regulated falls within the definition of "land" in s. 1 of the *LGA,* and (ii) if the use of land is one that is expressly permitted under s. 7.4(a)(ii) of the Zoning Bylaw as that provision authorizes "no others". In the absence of a soil deposit bylaw, the CVRD cannot regulate or prohibit the deposit of soil on the appellants' land.

71 The CVRD submits that it has the authority to prohibit the deposit of contaminated soil on the appellants' land under s. 5.20 of the Zoning Bylaw. Section 5.20 prohibits storing contaminated soil if the soil does not originate on

the same land. The CVRD attempted to distinguish this provision by its use of the word "storage" rather than "deposit" to circumvent the requirements of s. 327. In my respectful view, this is a distinction without a difference. Storing soil that does not originate on the same land requires the soil to be deposited on site. In short, s. 5.20 is a soil deposit bylaw that in my view is unenforceable, absent provincial approval.

72 In the alternative, the CVRD submits that because s. 5.20 was passed in 2004 it is not subject to the requirement for ministerial approval. However, the requirement for ministerial approval under the *CC* came into effect on January 1, 2004 and therefore s. 5.20 would have been subject to ministerial approval to be enforceable when it was passed. In any event, ss. 723(4) and (4.1) of the *LGA* were also in effect on January 1, 2004 and those sections require ministerial approval for any bylaws that prohibit the removal or deposit of soil, or that reference the quality or contamination of soil.

73 The necessity of provincial approval for an enforceable soil removal bylaw was confirmed in *Vernon.* There, the Court held that the local government did not have the authority to regulate the removal of soil (including sand, gravel and rock) from the land in the absence of ministerial approval of a bylaw prohibiting its removal. Subsequent to this decision, the bylaw was amended to include the requirement for ministerial approval of a bylaw for "the deposit of soil or other matter, making reference to quality of soil or material or to contamination."

74 In my opinion, the CVRD has not demonstrated a legislative intention that would authorize it to regulate or prohibit the deposit of soil on the appellants' property pursuant to (i) the general zoning power under s. 479 of the *LGA*, (ii) the specific requirements for a soil deposit bylaw under s. 327 of the *LGA*, or (iii) under s. 5.20 of the Zoning Bylaw.

75 In these circumstances there is no operational conflict between the *Mines Act* and the *LGA.*

Pumice

76 I turn then to *Pumice.* The circumstances in *Pumice* involved an off-site storage and processing facility for the mineral pumice. The mining of the mineral took place some 65 kms away. In that context, the Court held that those activities (storing and processing the pumice) did not fall within the "mines" exclusion for the definition of "land" in s. 1 of the *LGA.* This was based on an interpretation of the word "mine" in the exclusion of "land" in the *LGA* as being the "excavation o[f] substances on or under the surface" (at para. 49), and that did not include "all mining activities on the surface of land" (at para. 48) [emphasis added]. In those circumstances, the Court held that the off-site land on which the pumice was stored and processed was subject to municipal land use regulation.

77 The Court also recognized the significance of "the mining regime" from the *Mines Act* and the Code:

> [41] ...The *Mines Act* and the regulations promulgated under it constitute a code that governs the development of a mine from exploration until closure or abandonment, designed to protect people's health and safety, the environment, and cultural resources, and to ensure reclamation.
>
> ...
>
> [43] Under the *Mineral Act*, ... and its successors up to and including the *Mineral Tenure Act* ... the Legislature has provided security of tenure of minerals to the mining industry...With that mineral lease comes not only the right to extract the minerals, but also the afore-mentioned surface rights and the controls in the *Mines Act, supra*, and the Health, Safety and Reclamation Code for Mines in British Columbia, 1997.
>
> [44] The mining industry is also subject to the *Mineral Tax Act*, R.S.B.C. 1996, c. 291, the *Mining Right of Way Act*, R.S.B.C. 1996, c. 294, the *Canadian Environmental Protection Act,* 1999, S.C. 1999, c. 33, the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187, and the *Waste Management Act, R.S.B.C. 1996, c. 482*. The respondent and the intervenors see great harm and no good in being subject as well to the municipal zoning power in the exercise of their surface rights to access their minerals.

[Emphasis added.]

78 In the result, the Court decided that the mining regime does not "trump" the local government regime, as was argued by Great Pacific Pumice Inc., where the impugned activities involved off-site storage and processing of a mined mineral. In those circumstances, the Court concluded that a piece of land, not designated by the Province as a mine, did not fall within the exclusive jurisdiction of the Province simply because it was being used for a purpose tangentially related to mining.

79 To appreciate the reasoning in *Pumice,* it is necessary to review the submissions of the parties in that case. The respondents had argued that all mining activities, both on-site and off-site, even if they were unrelated to reclamation of the affected land, were subject to exclusive provincial regulation, as mining legislation "trumps" municipal legislation. In the course of addressing this submission, the Court undertook a review of the historical evolution of the relevant municipal legislation, including the *Municipal Act,* R.S.B.C 1936, c. 199, and the 1957 *Municipal Act*. The former Act had defined "land" as "the ground or soil and everything annexed to it by nature, or that is in or under the soil (except mines and minerals, precious or base, belonging to the Crown), and shall include the interest of a person in land held under timber lease or timber licence from the Crown in the right of the Dominion." The latter Act had defined "land" as the "soil or ground without improvements," and it included "land covered by water, and all quarries and substances in or under the land other than mines or minerals." The 1959 *Municipal Act Amendment Act* removed quarries from the definition of "land". In 1989, the *Mines Act* was first enacted and it included a definition of "mine" that would appear to include a quarry. At para. 27 the Court observed:

> [27] This understanding of the phrase "mines or minerals" is also consistent with the definition of mine in the *Mineral Act*, 1896, c. 34, s. 2, to which reference was made in the *Land Registry Act Amendment Act, 1905, supra*:
>
> > "Mine" shall mean any land in which any vein or lode, or rock in place, shall be mined for gold or other minerals, precious or base, except coal:
>
> If this remains the meaning of "mines or minerals," [i.e. the excavation of substances in or under the ground] the exemption [in the *LGA*] cannot apply to the respondent's Squamish facility [the off-site storage and processing of pumice].

80 The Court concluded:

> [48] In concluding the Legislature did not intend to broaden the meaning of "mines" [in the exclusions of "mines" in the definition of "land" in the *LGA*] so as to include all mining activities on the surface of the land, I have not forgotten that "every enactment must be construed as always speaking" and that the vernacular use of the word "mines" in the 21st century in British Columbia is broader than its vernacular meaning in the 19th century in the United Kingdom.

81 The focus of these comments then was to clarify the meaning of the exclusion of mines in the definition of "land" in the *LGA.* It did not include an analysis of the definition of "mine" or "mining activity" in the *Mines Act.* With respect to the *Mines Act,* the Court observed generally:

> [39] In the exercise of its responsibility to the citizens of British Columbia generally, the Legislature has enacted a comprehensive regime governing the mining industry's use of publically owned minerals. It is not a resource allocation or land use scheme.
>
> ...
>
> [41] Over the years, those historic rights have been increasingly regulated. Section 5 of the *Ministry of Energy and Mines Act,* R.S.B.C. 1996, c. 298, empowers the Minister "to regulate all mining activity" and section 4 provides that his duties, powers and functions "extend to and include all matters relating to energy, mineral resources and petroleum resources." The *Mines Act* and the regulations promulgated under it constitute a code that governs the development of a mine from exploration until closure or

> abandonment, designed to protect people's health and safety, the environment, and cultural resources, and to ensure reclamation.

82 *Pumice* did not address the issue before us, namely whether a quarry and its site reclamation are captured by the definition of mine and mining activity in the *Mines Act.* If a quarry and its site reclamation are captured by the definition, then in my opinion, they are subject to the exclusive jurisdiction of the Province.

83 The CVRD contends that, based on the comments in *Pumice,* any surface area on which a quarry or mine operates falls within the definition of "land" in the *LGA,* and is subject to ss. 4.2 and 7.4(a)(ii) of the Zoning Bylaw, which expressly permits only "extraction" of the aggregate. The CVRD maintains that as none of the appellants' non-extraction activities are expressly permitted under s. 7.4(a)(ii), those activities can be prohibited pursuant to the general provisions of the Zoning Bylaw or s. 5.20. With respect, I cannot agree.

84 The ratio of *Pumice* is that off-site storage and processing activities are not site reclamation. I agree. Reclamation is the restoration of that part of the landform affected by excavation. Off-site mining activities do not meet that purpose. Both the excavation of the land and its reclamation must take place on-site. It was in this context that the Court held a "mine" was "confined to an excavation of substances on or under the surface" (at para. 49) and did not include "all mining activities on the surface of land" (at para. 48) [emphasis added]. The Court did not find that site reclamation was not a "mine" or "mining activity" under the *Mines Act.*

85 The oft-quoted passage in *Quinn v. Leathan,* [1901] A.C. 495 (H.L.) is apposite in these circumstances:

> ...there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides.
>
> [Emphasis added.]

86 The CVRD's submission that the land cannot be returned to its pre-mining state if the engineered capsules remained buried beneath the surface incorrectly narrows the meaning of "pre-mining state". Reclamation does not require the land to be returned to the exact condition it was in before the amended quarry permit was issued. The MoM permit requires the surface of the land to be restored to a level of productivity after the operation is complete consistent with the forestry/industrial end land use. Ultimately, however, it is the decision of the Chief Inspector as to whether the appellants have successfully reclaimed the quarry.

87 The CVRD accepted the appellants' jurisdiction to reclaim the quarry land with "clean" soil. SIRM operates the quarry under an integrated mining and environmental permitting process that has continued since the quarry began in 2006 and, until 2013, with the CVRD's concurrence. Only when the nature of the soil was changed did the CVRD challenge the Province's jurisdiction to reclaim the quarry land in this manner.

88 In my view, it is clear that the Province has exclusive jurisdiction over the regulation of quarries/mines and their related site reclamation activities.

D. The soil treatment facility

89 As previously stated, reclamation is the process of restoring the surface of the mined land to the landform that existed before the mining permit was granted. It continues until the mining activities are complete, after which the local government's jurisdiction over the use of the surface of the land is re-engaged. The Landfill Facility involves depositing soil to backfill the quarry cavity. The objective of this facility is to restore the excavated landform.

90 It is not clear to me that the same can be said of the Soil Treatment Facility. It seems to me, that the purpose of

the Soil Treatment Facility is independent of, and not integral to, restoring the landform. Currently, however, managing and treating the soil is done off-site and then the soil is imported onto the appellants' property.

91 The issue is whether the activities of the Soil Treatment Facility fall within the reclamation of a "mine" or "mining activity" under the *Mines Act.* In my view they do not. They are not integral to the restoration of the landform.

92 The bioremediation of the contaminated soil is a processing activity that, to date, has been carried on off-site. Its activities are conducted on the surface of the land, separate from the mine. In this context, it is similar to *Pumice* as well as *Cowichan Valley (Regional District) v. Lund Small Holdings Ltd.,* (09 November 2000) Victoria 00/2934 (B.C.S.C.), where the on-site treatment of imported contaminated soil was enjoined. To be clear, it is the use of the land to process off-site materials, not the construction of the physical facility, that is subject to local government regulation. When the quarry activities are complete, the Soil Treatment Facility will have to be dismantled just like any other of the remaining mining apparatuses used in the excavation.

93 In sum, even if it may be more operationally prudent, more energy efficient and more environmentally sustainable to process the imported soil on-site to backfill the quarry, local government jurisdiction is engaged and must authorize the operation. If the Province wants to regulate on-site processing of soil imported from off-site for reclamation purposes, it must amend the *Mines Act.*

94 In these circumstances, I agree with the judge that the Soil Treatment Facility is subject to the CVRD land use jurisdiction. As it is not a permitted use of the land under s. 7.4(ii) of the Zoning Bylaw, its operation, not the physical structure which may have other uses, is enjoined.

E. Disposition

95 The Province has exclusive jurisdiction over mines, which include quarries, and site reclamation. The Landfill Facility reclaims the appellants' quarry. The Soil Treatment Facility does not.

96 In the result, the appeal is allowed, save and except for the order enjoining the appellants from operating the Soil Treatment Facility. The cross appeal is dismissed.

D.M. SMITH J.A.
G. DICKSON J.A.:— I agree.
G.J. FITCH J.A.:— I agree.

* * * * *

CORRECTIONS

Released: November 7, 2016

On the title page and headers of the reasons for judgment released November 3, 2016, the name of the judgment is corrected to read "Cowichan Valley (Regional District)" rather than "(Reginal District)".

At the third sentence of para. 4: "... are a use of land that are subject to ... " is changed to "... are a use of land that is subject to ... ".

At the first sentence of para. 91: "The issue is whether the activities of the Soil Treatment Facility fall with "... is changed to "The issue is whether the activities of the Soil Treatment Facility fall within ...".

British Columbia (Hydro and Power Authority) v. Terasen Gas (Vancouver Island) Inc., [2004] B.C.J. No. 1250

British Columbia and Yukon Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

Lambert, Mackenzie and Oppal JJ.A.

Heard: May 3 - 5, 2004.

Judgment: June 23, 2004.

Vancouver Registry Nos. CA030969 and CA030984

[2004] B.C.J. No. 1250 | 2004 BCCA 346 | 200 B.C.A.C. 233 | 30 B.C.L.R. (4th) 305 | 131 A.C.W.S. (3d) 954

IN THE MATTER OF The Utilities Commission Act, R.S.B.C. 1996, c. 473 AND IN THE MATTER OF Centra Gas British Columbia Inc. (now Terasen Gas (Vancouver Island) Inc.) 2002 Rate Design Application AND IN THE MATTER OF British Columbia Utilities Commission Decision Pronounced June 5, 2003 and Order Number G-42-03 Issued June 5, 2003 Between British Columbia Hydro and Power Authority, appellant, and Terasen Gas (Vancouver Island) Inc., Howe Sound Pulp & Paper Limited Partnership, Norske Skog Canada Limited, Pope & Talbot Ltd., and Western Pulp Limited Partnership, doing business as the Vancouver Island Gas Joint Venture, Consumers' Association of Canada (B.C. Branch), B.C. Old Age Pensioners' Organization, Council of Senior Citizens' Organizations, Senior Citizens Association of British Columbia, Tenants Rights Action Coalition, Vancouver Island Public Sector Natural Gas Consumers Group, and Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Minister of Energy and Mines, respondents (Vancouver Registry No. CA030969) And between Howe Sound Pulp & Paper Limited Partnership, Norske Skog Canada Limited, Pope & Talbot Ltd., and Western Pulp Limited Partnership, doing business as the Vancouver Island Gas Joint Venture, appellants, and Terasen Gas (Vancouver Island) Inc., British Columbia Hydro and Power Authority, Consumers' Association of Canada (B.C. Branch), B.C. Old Age Pensioners' Organization, Council of Senior Citizens' Organizations, Senior Citizens Association of British Columbia, Tenants Rights Action Coalition, Vancouver Island Public Sector Natural Gas Consumers Group and Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Minister of Energy and Mines, respondents (Vancouver Registry No. CA030984)

(53 paras.)

Case Summary

Administrative law — Judicial review and statutory appeal - - Standard of review — Public utilities — Commissions — Regulation.

Appeals by Hydro and Power Authority and others from decisions by the Utilities Commission to include a contribution to Terasen Gas's revenue deficiency in the Authority's transmission service rates. The Authority also objected to the rate set by the Commission. Terasen operated a pipeline that supplied natural gas and distributed natural gas to individual customers. The Authority bought natural gas directly from the pipeline and did not use the distribution network. When the industry was restructured in 1995, the restructuring agreement provided for a Special Direction for rate-making purposes, issued by the Lieutenant Governor in Council to the Utilities Commission, which allowed the creation of a revenue deficiency account and set out the rules governing it. The Authority claimed that the revenue deficiency resulted from the distribution network.

HELD: Appeals dismissed.

The standard of review had to be determined on a question-by-question basis. The Utilities Commission was correct in concluding that the Authority was a customer as per the Special Direction for the purposes of including the contribution to revenue deficiency in its rate. The level of contribution was a question of fact and was not outside the Utilities Commission's rate-setting mandate or general jurisdiction.

Statutes, Regulations and Rules Cited

Vancouver Island Natural Gas Pipeline Act, s. 7.

Counsel

R.W. Lusk, Q.C. and B.W. Dixon: Counsel for British Columbia Hydro and Power Authority

D.L. Larson and K.E. Gustafson, Q.C.: Counsel for Vancouver Island Joint Venture

C.B. Johnson: Counsel for Terasen Gas (Vancouver Island) Inc.

J.L. Quail: Counsel for Consumers' Association of Canada (B.C. Branch), B.C. Old Age Pensioners' Organization, Council of Senior Citizens' Organizations, Senior Citizens Association of British Columbia, Tenants Rights Action Coalition, and Vancouver Island Public Sector Natural Gas Consumers Group

G.A. Fulton: Counsel for the BC Utilities Commission

The judgment of the Court was delivered by

MACKENZIE J.A.

1 These appeals, with leave, are from an order of the British Columbia Utilities Commission (the "Commission" or "BCUC") setting rates for the transmission and distribution of natural gas on Vancouver Island. The Commission's Order No. G-42-03 fixed rates for service effective 1 January 2003 for Centra Gas British Columbia Inc., now Terasen Gas (Vancouver Island) Inc. ("Centra").

2 The issues arise out of the Commission's determination to include in the transmission service rates for the appellant, British Columbia Hydro and Power Authority ("BC Hydro"), a contribution to the amortization of an accumulated shortfall between Centra's revenues and its cost of service. This "revenue deficiency", starting in 1996, has grown to a balance of $87.9M as at the end of 2002. This balance is recorded in a Revenue Deficiency Deferral Account (the "Deficiency Account" or "RDDA"). BC Hydro contends that including a contribution to revenue deficiency recovery in its tolls is unlawful, essentially because it conflicts with a Special Direction (the "Special Direction"), issued by the Lieutenant Governor in Council, that the Commission must follow in determining Centra's rates. BC Hydro also contends that the Commission erred by establishing a revenue to cost ratio of 1.25 for the

purpose of setting the rates paid by BC Hydro. The 1.25 ratio facilitates the recovery of the revenue deficiency through BC Hydro's rates. The annual contribution to recovery from BC Hydro's tolls is estimated at $4.5M.

3 The appellants - Howe Sound Pulp & Paper Limited Partnership, Norske Skog Canada Limited, Pope & Talbot Ltd., and Western Pulp Limited Partnership, doing business as the Vancouver Island Gas Joint Venture (the "Joint Venture") - support BC Hydro and raise other related issues with respect to revenue deficiency recovery in transmission tolls. The Joint Venture is not directly impacted by the Commission's decision because its tolls are set by a formula in a long term transportation service agreement (the "Joint Venture Agreement") that does not include any revenue deficiency recovery. However, the Joint Venture has an interest in BC Hydro's tolls because if they were lower than the tolls in the Joint Venture Agreement, the Joint Venture has the option of terminating the agreements on notice and seeking tolls equivalent to those for BC Hydro.

The Centra Utility Undertaking

4 There are two parts to the Centra utility undertaking - a high pressure main transmission pipeline (the "Pipeline") that crosses the Strait of Georgia, and a lower pressure distribution system (the "Distribution System") connected to the Pipeline on Vancouver Island and the Sunshine Coast. The appellants are all connected directly to the Pipeline and purchase natural gas from producers upstream of the Pipeline rather than from Centra. They contract with Centra for transmission service to transport their gas through the Pipeline to their facilities. They do not use any part of the Distribution System.

5 Residential, commercial, and small industrial customers are connected to the Distribution System. They buy gas from Centra at their point of delivery and their rates include a charge for the commodity cost of the gas in addition to the charge for gas transportation through the Pipeline and the Distribution System. Some Distribution System customers have the option of buying gas from producers and contracting with Centra for transmission service only, but such arrangements are rare.

History of the Natural Gas Service to Vancouver Island

6 Natural gas transmission and distribution on Vancouver Island and the Sunshine Coast of British Columbia commenced in 1991 when the Vancouver Island Natural Gas Pipeline was completed. The high pressure transmission Pipeline transports gas from the Lower Mainland to distribution systems serving commercial and residential customers. The Pipeline also transports gas for the Joint Venture and, since 2001, to BC Hydro's electricity co-generation plant at Elk Falls, near Campbell River. Until service to BC Hydro commenced, the Joint Venture and Squamish Gas were the only shippers connected directly to the Pipeline.

7 Until 1996, the Pipeline was owned and operated separately from the distribution systems by Pacific Coast Energy Corporation, a wholly owned subsidiary of Westcoast Energy Inc. The distribution systems connected to the Pipeline were operated by three wholly owned Westcoast subsidiaries, Centra Gas British Columbia Inc., Centra Gas Victoria Inc., and Centra Gas Vancouver Island Inc. The companies encountered financial difficulties from the inception of their operation.

The 1995 Centra Restructuring

8 In 1995 the companies were restructured: Pacific Coast Energy Corporation acquired the gas distribution assets of the Centra companies and then changed its name to Centra. The restructuring was documented by the Vancouver Island Natural Gas Pipeline Agreement (the "Agreement" or "VINGPA") dated 14 December 1995. The parties to the Agreement were the Province, the Centra distribution companies, Pacific Coast Energy Corporation and its then parent company, Westcoast Energy Inc. As part of the restructuring, the provincial government contributed $120M to the capital costs, which reduced the utility rate base by a corresponding amount. The Province also agreed to provide further assistance in the form of gas royalty credits estimated to contribute between $19.7M and $26.8M per year in revenues. These payments will end in 2011.

The Special Direction

9 The Agreement provided for a Special Direction to be issued to the Commission for rate-making purposes by the Lieutenant Governor in Council, acting under the authority of s. 7 of the Vancouver Island Natural Gas Pipeline Act, R.S.B.C. 1996, c. 474. Section 7 elevates the status of a special direction above any other inconsistent provisions, statutory or otherwise, relating to rate-making by the Commission, and makes plain the importance of a special direction as an instrument of government policy:

> 7(1) The Utilities Commission Act and the Gas Utility Act apply to the proponent and a local distribution utility except to the extent otherwise provided in this section or in a regulation under this section.
>
> (2) The Lieutenant Governor in Council may make regulations as follows:
>
> (a) ordering that prescribed provisions of the Utilities Commission Act or of the Gas Utility Act do not apply in respect of
>
> (i) the proponent,
>
> (ii) the local distribution utilities, or
>
> (iii) a particular local distribution utility;
>
> (b) prescribing limitations and conditions for the purposes of a regulation under paragraph (a).
>
> (3) **Despite Parts 3 and 6 of the Utilities Commission Act, the Lieutenant Governor in Council may issue directions to the British Columbia Utilities Commission, specifying one or more of the following:**
>
> (a) **the factors, criteria and guidelines that the commission must or must not use in regulating and fixing rates for the proponent or a local distribution utility;**
>
> (b) classes of customers of the proponent or of a local distribution utility, according to volume of natural gas taken, location, date of application for natural gas service, type of premises or on any other basis the Lieutenant Governor in Council considers appropriate;
>
> (c) the rates that may be permitted to be charged under the Utilities Commission Act by the proponent to its customers or by a local distribution utility to its customers, and, in specifying rates under this paragraph, the Lieutenant Governor in Council may differentiate among the classes of customers specified under paragraph (b);
>
> (d) limitations or principles that must be applied by the commission in fixing or varying the rates charged by the proponent to its customers or by a local distribution utility to its customers, and, for any specification of limitations or principles under this paragraph, differentiating, or requiring or empowering the commission to differentiate, among the classes of customers specified under paragraph (b);
>
> (e) for all or part of any year since the commencement of operation of the pipeline, one or more of the following:
>
> (i) the cost of service of the proponent or a local distribution utility;
>
> (ii) the manner of determining the proponent's or a local distribution utility's cost of service;
>
> (iii) the components, factors and considerations that must or must not be taken into account in making a determination under subparagraph (ii);
>
> (f) an order that has been made by the British Columbia Utilities Commission and is or may be relevant to the proponent, one or more local distribution utilities, or both, and doing either or both of the following:

(i) requiring the commission to apply or to refrain from applying that order or a specified portion or aspect of that order to the proponent, one or more local distribution utilities, or both;

(ii) directing the commission as to the extent or manner in which it must or must not apply that order or a specified portion or aspect of that order to the proponent, one or more local distribution utilities, or both.

(4) **Despite the Utilities Commission Act and the Gas Utility Act,**

(a) **the British Columbia Utilities Commission must comply with a direction issued under subsection (3) of this section, and**

(b) **if a direction issued under subsection (3) of this section is inconsistent or in conflict with the Utilities Commission Act or the Gas Utility Act, the direction prevails.** [Emphasis added]

The "proponent" referred to is Pacific Coast Energy Corporation, later Centra.

10 The Special Direction was issued 13 December 1995 as contemplated by the Agreement. It is divided into five parts. The first part includes definitions and s. 1.4 which reinforces the pre-eminence of the Special Direction in these terms:

1.4 General

The BCUC shall regulate the Utilities and fix the rates charged by the Utilities in accordance with the requirements of this Special Direction, and in accordance with the requirements of the Utilities Commission Act and such regulatory principles that are otherwise applicable to the Utilities from time to time that are not inconsistent with this Special Direction. **In the event of any inconsistency between this Special Direction and any requirement of the Utilities Commission Act or any regulatory principles that would otherwise be applicable to the Utilities, the BCUC shall follow the provisions of this Special Direction.** For greater certainty, the BCUC shall not apply any provisions of the Utilities Commission Act (including, without limitation, Sections 64, 65, 66, and 67) in any manner which has the effect, directly or indirectly, of eliminating or varying any rates that have been specified in, or determined in accordance with, this Special Direction, or eliminating or varying any other determination or matter provided for herein. [Emphasis added]

11 At the date of the Agreement the assets of the Distribution System and the Pipeline were held by separate companies, as noted above, and Parts 2 and 3 of the Special Direction recognized that separation. Part 2 sets out detailed directions to the Commission with respect to rates for the Distribution System. Part 3 gives direction with respect to rates for the Pipeline. The Special Direction also recognized the intent of the Agreement to combine all the utility assets in a single entity and Part 4 is entitled "DETERMINATION OF ANNUAL REVENUE DEFICIENCY, RATE BASE, CAPITAL STRUCTURE AND RETURN ON EQUITY WHERE THE PIPELINE AND THE CENTRA DISTRIBUTION SYSTEM ARE OWNED BY A SINGLE ENTITY". The Pipeline and the Distribution System became a single entity as of 1 January 1996, or very shortly after the Special Direction was issued. The remaining Part 5 of the Special Direction has no application to the issues in these appeals.

12 "Annual Revenue Deficiency" is a term defined in s. 2.10 of the Special Direction as the amount by which Centra's adjusted cost of service exceeds its actual revenues in any year, and the Commission is directed to determine the balance of the Deficiency Account as the total of accumulated annual deficiencies. Section 2.10 also sets out detailed provisions for the determination of rate base, debt financing, deemed equity and return on equity. Critical to the issues on these appeals are two subsections of the Special Direction: s. 2.10(j), concerning the amortization of the Deficiency Account; and s. 4.1, directing that the calculation for annual deficiencies and the

Deficiency Account be made for the single entity after its creation. The relevant portions of the provisions read:

> 2.10 Cost of Service and Revenue Deficiency
>
> **Subject to Part 4 of this Special Direction**, the BCUC shall determine Centra's cost of service and shall make the various associated determinations, all as described in, and in accordance with, the following directions.
>
> . . .
>
> (j) Deemed Redemption or Repayment of Instruments for the Determination of Cost of Service and Setting of Rates
>
> For each year beginning January 1, 2003, **the cost of service of Centra that is approved by the BCUC for the purpose of determining the rates to be charged to Centra's customers shall include an amount** for the deemed redemption of Class "A" Instruments or repayment of Class "B" Instruments **that the BCUC determines to be appropriate in order to amortize the balance of the Revenue Deficiency Deferral Account over the shortest period reasonably possible, having regard for Centra's competitive position relative to alternative energy sources and the desirability of reasonable rates.**
>
> 4.1 Annual Revenue Deficiencies
>
> **The BCUC shall determine Annual Revenue Deficiencies and the balance of the Revenue Deficiency Deferral Account for a Single Entity in the manner set out in Section 2.10 based upon the actual revenue and the cost of service associated with both the Centra Distribution System and the Pipeline** but without taking into account any revenue or costs that relate to any other business conducted, or assets owned, by the Single Entity. [Emphasis added]

13 The provisions of Part 4, including s. 4.1, prevail over Part 2 to the extent of any inconsistency. Before the creation of the single entity, Centra, as defined, refers to the companies owning the Distribution System; afterward it refers to the single entity. The reference to Class "A" and Class "B" instruments relates to the manner of financing the revenue deficiency until its amortization and does not require further explanation for the purposes of these reasons.

The Issues

14 The issues in these appeals largely turn on whether the Commission complied with the Special Direction in setting rates for the appellants.

15 BC Hydro's complaint essentially is that the balance in the Deficiency Account represents accumulated deficiencies between revenues and cost of service in the Distribution System and no part of its recovery should be included in the rates charged to BC Hydro and the other large transmission service end users who take delivery of their gas directly from the Pipeline and do not use the facilities of the Distribution System. BC Hydro contends that the Special Direction precludes the Commission from including a contribution to amortization of the Deficiency Account recovery in BC Hydro's rates.

16 The Commission's reasons for concluding that it may include a contribution to the revenue deficiency in BC Hydro's rates were as follows:

> In resolving the issue of whether or not it was the intention of the Special Direction that the RDDA be collected from [High-Pressure Transmission System ("HPTS")] customers other than the Joint Venture and Squamish Gas, the Commission has to consider the words and provisions of the Special Direction as a whole, as well as related documents such as the VINGPA and the Joint Venture TSA. In other words, the Commission must assess the factual matrix.

> After reviewing and considering the evidence and the arguments, the Commission determines that the interpretations of Centra, CAC (BC) et al. and the Public Sector Consumers are more consistent with the applicable documents. The Commission finds that the Special Direction does not prohibit the Commission from allowing Centra to recover some of the RDDA in its transmission tolls from HPTS customers other than the Joint Venture and Squamish Gas, as well as in rates to distribution system customers on the [Centra Distribution System ("CDS")].
>
> An argument advanced to support the position that tolls on the CDS and the HPTS should be treated separately, is based on the use of the word "customers" in Section 2.10(j) of the Special Direction. BC Hydro argues that this excludes parties who only transport gas on the HPTS system, since those parties are referred to as "shippers" in the Joint Venture TSA and the [Pacific Coast Energy Corporation] Terms and Conditions (Schedule H to the Special Direction). The Commission rejects that interpretation. If natural gas service were unbundled on the Centra system, then distribution system customers who chose to purchase gas from a third-party shipper would be able to avoid RDDA recovery in contrast to similar customers who continue to purchase gas from Centra. Also, as pointed out by Centra in argument, the VINGPA uses the term customers in a way that is consistent with the use of the word in Section 2.10(j) of the Special Direction (see, for example, the ninth recital of the VINGPA). Finally, if the distinction raised by BC Hydro was intended, the Commission would expect that "shippers" and "customers" would be defined terms in the Special Direction (as are many other terms), but they are not.
>
> The Commission agrees with BC Hydro that the terms of the Special Direction only prevail over the provisions of the Act and applicable regulatory principles if they are inconsistent with the Special Direction (BC Hydro Argument, p. 20). The Commission notes that it is directed in Sections 2.8, 2.10(d) and 3.7 of the Special Direction, to apply normal regulatory principles. For reasons discussed later in this Decision, the Commission also concludes that its interpretation is consistent with normal regulatory principles, and with the requirements of the UCA. [Emphasis in original]

17 There are certain aspects of the Deficiency Account that are clear and non-controversial. Section 4.1, set out above, specifically directs the Commission to determine the annual revenue deficiencies and the balance of the Deficiency Account for a single entity based on the revenue and cost of service of the combined Distribution System and the Pipeline. The Commission is also specifically directed to establish a single rate base, capital structure and return on equity for the combined single entity.

18 BC Hydro submits that Parts 2 and 3 of the Special Direction established separate rate-making criteria for "customers" of the distribution system and "shippers" connected directly to the Pipeline, and that the separation of the two groups is maintained notwithstanding the combination of the Distribution System and the Pipeline into a single entity. BC Hydro argues that the revenue deficiency results from a shortfall between revenue and cost of service of the Distribution System and is not attributable to the cost of service of the Pipeline. BC Hydro argues that it is not a "customer" within the Part 2 rate-making methodology and that s. 3.7 excludes BC Hydro and other Pipeline shippers from contributing to amortization of the revenue deficiency.

The Standard of Review

19 The first question to be answered is the standard of review to be applied in addressing the issues. The Supreme Court of Canada jurisprudence is extensive but the principles may be conveniently summarized. Courts are directed to take a robust and pragmatic approach to review and to consider four factors for determining the appropriate standard. They are: 1) the presence or absence of a privative clause or statutory right of appeal; 2) the expertise of the tribunal relative to that of the reviewing judge on the issue in question; 3) the purposes of the legislation, and of the provision in particular; and 4) the nature of the problem: Barrie Public Utilities v. Canadian Cable Television Assn., *[2003] 1 S.C.R. 476*, *225 D.L.R. (4th) 206*, *2003 SCC 28* [paragraph] 10; see also Alberta Union of Provincial Employees v. Lethbridge Community College, *[2004] S.C.J. No. 24*, *2004 SCC 28*.

20 Addressing the first factor, s. 101 of the Utilities Commission Act provides for a right of appeal, with leave, to this Court from orders of the Commission. Section 105(2) bars other forms of judicial review. The ambit of an

appeal is limited by s. 79 which states:

> The determination of the commission on a question of fact in its jurisdiction ... is binding and conclusive on all persons and on all courts.

21 The Commission's exclusive jurisdiction over rates is further expanded by ss. 59(4) and (5):

> (4) It is a question of fact, of which the commission is the sole judge,
>
> (a) whether a rate is unjust or unreasonable,
>
> (b) whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate or service, or
>
> (c) whether a service is offered or provided under substantially similar circumstances and conditions.
>
> (5) In this section, a rate is "unjust" or "unreasonable" if the rate is
>
> (a) more than a fair and reasonable charge for service of the nature and quality provided by the utility,
>
> (b) insufficient to yield a fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property, or
>
> (c) unjust and unreasonable for any other reason.

22 The legislative scheme also includes power for the provincial government to give special directions to the Commission under two sections, both of which are similar: s. 3(1) of the Utilities Commission Act and ss. 7(1) to (4) of the Vancouver Island Natural Gas Pipeline Act, set out above.

23 I have set out the statutory provisions at length because they express the determination of the Legislature to insulate the Commission from judicial review of its specialized rate-making jurisdiction and they establish a close policy connection between the government and the Commission through the mechanism of special directions which take precedence over inconsistent provisions of the Commission's governing statutes or regulatory principles otherwise applicable. This implies a high degree of judicial deference within the terms of a special direction but less deference in the interpretation of terms that are mandatory and do not import an element of discretion.

24 Moving on to the second and third factors to be considered in determining the standard of review, the legislative scheme emphasizes the expertise of the Commission within its rate-making mandate, including the statutory declarations that just and reasonable rates are questions of fact and Commission findings of fact within its jurisdiction are conclusive. The statutory recognition of the Commission's expertise in determining rates reinforces curial deference. The Commission is required to resolve and balance the economic interests of various constituencies, well illustrated by the parties to these proceedings, which gives its jurisdiction a polycentric quality, as termed by the Supreme Court of Canada in Pushpanathan v. Canada (Minister of Citizenship and Immigration), *[1998] 1 S.C.R. 982*, *160 D.L.R. (4th) 193*, *226 N.R. 201* [paragraph] 36. The Commission's function is pragmatic and often robust.

25 The final factor is the nature of the problem or question. Here the appellants have raised several questions and, as the Supreme Court of Canada has observed, the standard of review may be different for different questions.

BC Hydro's First Issue

26 The first question raised by BC Hydro was defined by the Commission's conclusion, set out above, that the Special Direction does not prohibit the Commission from allowing Centra to recover some of the revenue deficiency from transmission tolls of BC Hydro.

27 BC Hydro is the only high pressure transmission service customer apart from the Joint Venture and Squamish Gas, and it disputes its designation as a "customer", for reasons discussed below. BC Hydro submits that this question goes to the delineation of the Commission's mandate and the standard of review is correctness. The Commission agrees that it must be correct in answering that question. Centra also agrees that at the broad jurisdictional level, the appropriate standard is correctness on the question of whether the Special Direction prohibits the Commission from setting rates for BC Hydro that include a contribution for amortization of the Deficiency Account balance. I propose to apply the standard of correctness to the first issue as so defined.

28 Centra and Centra Distribution System are both defined terms in the Special Direction. The Centra Distribution System is defined as the physical assets comprising the distribution system and not the entity holding those assets. Centra has a dual meaning. When the Distribution System assets and the Pipeline are held by separate entities, Centra means the entities holding the Distribution System assets only. After the assets are combined in a single entity, Centra means that entity, which includes both the Distribution System and Pipeline assets. Therefore there is no definitional impediment to construing references to Centra in Part 2, post combination, as including the Pipeline, to the extent that Part 4 applies the terms of Part 2 to the single entity.

i) The "customer" argument

29 BC Hydro contends that "customer" in Part 2 is limited to Distribution System customers who pay Centra a bundled rate for transportation and the commodity cost of gas delivered, as opposed to shippers who are charged a toll for transportation only and purchase the gas separately from gas producers. The Commission, in its reasons quoted above, rejected that submission, noting that if natural gas service were unbundled on the Centra system, then Distribution System customers who chose to purchase gas from a third-party shipper would be able to avoid Deficiency Account recovery, in contrast to customers who continue to purchase gas from Centra. The Commission further noted that the use of "customer" for which Centra contends is consistent with its use in s. 2.10(j) of the Special Direction - the Special Direction does not define "customer" and generically the term is capable of including end users of transportation service as well as purchasers of both transportation service and the gas commodity from Centra. BC Hydro refers to the definition of "Shipper" as any person who enters into a "Service Agreement" - defined as a gas transportation service agreement with Pacific Coast Energy Corporation, as set out in the general conditions for gas transportation service approved and attached as a schedule by s. 3.5 of the Special Direction - as applicable to all transportation service agreements. BC Hydro also relies on the division of customers in s. 2.2 of the Special Direction into "Pioneer Customers" and "New Customers".

30 The Commission rejected BC Hydro's submission that shippers under transportation service agreements could not be customers for the reasons quoted above. Centra supported the Commission's conclusion by noting that the distinction between Pioneer and New Customers, with one limited exception, had no application after 31 December 2002, the effective commencement date for the single entity. The distinction was not intended to be exclusive because it referred to other customers who were neither Pioneer nor New Customers. The reference to persons entering into transportation service agreements as "shippers", for the purposes of the terms and conditions of those transportation agreements, does not preclude them from being customers generically; they are customers in the ordinary sense of the word as they purchase a service from Centra. "Shipper" is not a defined term in the Special Direction other than its reference to the transportation service agreements' general terms and conditions, and Centra contended that the absence of any restrictive definition to limit the generic meaning of customer supports the conclusion that shippers were included within customers of the single entity for the purposes of s. 2.10(j).

ii) The section 3.7 argument

31 BC Hydro contended that its position was supported by s. 3.7 of the Special Direction which makes reference to the Deficiency Account. It states:

3.7 Rates and Transportation Tolls Otherwise Applicable to the Joint Venture, Squamish Gas, and Centra

> For the purpose of fixing transportation tolls to be charged by [Pacific Coast Energy Corporation] other than as directed in Sections 3.2, 3.3 and 3.4, the BCUC shall, subject to the exception set out below, apply such regulatory principles that are generally applied by the BCUC from time to time to gas utilities operating within British Columbia. In no event whatsoever shall the rates or transportation tolls that are approved for the Joint Venture or Squamish Gas pursuant to this Section 3.7 include any amount for the recovery in whole or in part, directly or indirectly, of dividends or interest as described in paragraph 2.10(h), or for the amortization, reduction, or recovery of the Revenue Deficiency Deferral Account balance.

This provision clearly excludes the tolls of the Joint Venture (and Squamish Gas) from any contribution to revenue deficiency recovery. BC Hydro contended that the intent of s. 3.7 was to exclude all persons with transportation service contracts from contributing to the deficiency recovery and the specific reference to the Joint Venture and Squamish Gas was only for greater certainty, out of an abundance of caution. BC Hydro notes that the Joint Venture and Squamish Gas were the only parties with transportation service contracts when the Special Direction was issued.

32 BC Hydro's argument contains an implicit admission that without the specific reference, s. 3.7 is otherwise potentially ambiguous. Centra argued that s. 3.7 makes specific reference to exemptions for the Joint Venture and Squamish Gas and is not a general exemption for those with transportation service agreements. Centra relied on the implied exclusion argument that:

> Whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded: R. Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham: Butterworths, 2002) at 186; see also 65302 British Columbia Ltd. v. Canada, *[1999] 3 S.C.R. 804*, *179 D.L.R. (4th) 577*, *69 B.C.L.R. (3d) 201* [paragraph] 65.

Centra contended that s. 3.7 supports the Commission's conclusion that persons with transportation service agreements other than those specifically exempted were not intended to be excluded from revenue deficiency recovery.

iii) The revenue deficiency source argument

33 BC Hydro argued that the revenue deficiencies resulted entirely from revenue deficits on the Distribution System and that the Pipeline transportation users were paying their full cost of service on the Pipeline and not contributing to the deficiency. The Commission was unable to determine that the entire revenue deficiency arose solely as a result of costs exceeding revenues on the Distribution System and it concluded that: "The Pipeline would not have been viable without the combined loads and the government support provided to deliver gas to Vancouver Island" and "the transmission facilities would not have been constructed if the expectation had been to only serve large volume customers taking transmission service." The Pipeline and the Distribution System were interrelated from the inception of the project. The government's interest is reflected in the $120M contributed under the Vancouver Island Natural Gas Pipeline Agreement, conditional on the creation of the merger of the Pipeline and the Distribution System under that agreement, and supports the government's policy interest in combining the two for the economic viability of the system as a whole.

34 The Commission recognized that the availability of fuel oil and electricity as competitive alternative fuels for residential and commercial customers limited the rates for natural gas to those customers. The Commission established a "soft cap" mechanism which limited rates to those customers to the maximum that the residential and commercial customers could be expected to pay given the price of alternative fuels. BC Hydro and the Joint

Venture did not challenge the rationale or methodology of the soft cap mechanism before the Commission, and a BC Hydro witness agreed that setting rates for residential and commercial customers relative to the price of oil and electricity was not unreasonable. The rates set under the soft cap mechanism were projected to amortize only a portion of the Deficiency Account by 2011.

35 The ability of Centra to earn a fair return on its utility rate base is an imperative of the Special Direction and the regulatory scheme. General regulatory principles require the Commission to grant a utility the opportunity to earn a fair return: Hemlock Valley Electrical Services Ltd. v. British Columbia (Utilities Commission) *(1992), 66 B.C.L.R. (2d) 1*, *12 B.C.A.C. 1* [paragraph] 57. The "soft cap" on rates paid by Distribution System customers because of the competition from alternative energy sources imposed a pragmatic limit on the revenue that could be obtained from those customers. The rates for the Joint Venture and Squamish Gas were fixed by formulas in their transportation service agreements and confirmed by the Special Direction. While the rates set for Distribution System customers are projected to make some contribution to the amortization of the accumulated revenue deficiency, they will still leave a substantial portion outstanding in 2011, when the royalty credits will end, with a corresponding increase in the cost of service. The alternatives facing the Commission were to set rates for BC Hydro that provided for a contribution to the amortization or defer substantial recovery to an uncertain future after 2011. The submission of Mr. Quail, on behalf of the Consumers' Association of Canada (BC Branch) and other residential consumer groups, emphasized the continued financial vulnerability of the utility if amortization of the Deficiency Account were deferred to an indefinite, uncertain future. The Special Direction instructs the Commission to set rates that will amortize the Deficiency Account balance "over the shortest period reasonably possible" (s. 2.10(j)). The legislative scheme, the Special Direction and economic exigencies of the single entity utility all look to BC Hydro (and any new transportation service contracts) to contribute substantially to the amortization of the accumulated deficiency.

36 I am satisfied that the Commission was correct in concluding that the term "customer" in Part 2 of the Special Direction included transmission shippers following the establishment of the Single Entity and the coming into effect of the Part 4 provisions. I agree with Centra's submission that the meaning of "customers" of the single entity extends to include transportation shippers and 2.10(j) applies to BC Hydro's rates. I think that the limited exemption of the Joint Venture and Squamish Gas in s. 3.7 reinforces the conclusion that other transportation service contracts were not exempted. In my view, there is nothing in the Special Direction or otherwise in the regulatory scheme that precluded the Commission from setting rates for BC Hydro that included amortization of the Deficiency Account balance. Accordingly, I would reject BC Hydro's first ground of appeal.

BC Hydro's Second Issue

37 BC Hydro submits that the Commission erred in establishing tolls for BC Hydro at a revenue to cost ratio of 1.25, that is forecast revenues from BC Hydro's tolls that exceed its allocated cost of service by 25 per cent. BC Hydro's statement of this issue acknowledges that the 1.25 ratio is linked to BC Hydro's contribution to the amortization of the Deficiency Account. In that respect, the second issue is a variant of BC Hydro's first issue. I have concluded above that a contribution to amortization is within the Commission's rate setting mandate under the Special Direction. The only additional element posed by the second issue is whether a 1.25 revenue to cost ratio is an erroneous exercise of its mandate. The legislative provisions quoted above state that whether a rate is unjust or unreasonable is a question of fact and that the Commission's determination of a question of fact is binding and conclusive. The ambit of judicial review is therefore very limited.

38 Centra is entitled to rates designed to recover the revenue requirement approved by the Commission. The maximum revenues that can be recovered from the distribution customers are constrained by the competitive alternatives reflected in the soft cap mechanism. The rates for the Joint Venture and Squamish Gas are fixed by formulas in their transportation service contracts. The revenue requirement allocated to BC Hydro's tolls, as the only other user of the system, is the residual amount of the revenue requirement remaining after the revenues produced from the distribution service rates and the fixed transportation contract formulas have been determined. It simply reflects the tolls BC Hydro is required to pay if Centra is to have a reasonable opportunity to recover its revenue requirement, including a contribution to the revenue deficiency, the determination of which, following the

resolution of the first issue, is within the Commission's mandate. The 1.25 ratio is within the range of revenue to cost ratios of rates for particular classes of Distribution System customers, which vary from 0.84 to 1.42.

39 As I understand BC Hydro's submission, it does not challenge the rate as reviewable under the Commission's general mandate. Rather it contended that the Special Direction prevails over the statutory provisions otherwise applicable and the 1.25 ratio conflicts with the Special Direction. BC Hydro argued that s. 3.1 of the Special Direction requires that its cost of service be determined on a separate rate base for the Pipeline as provided in that section. However, s. 3.1 is expressly stated to be "Subject to Part 4 of this Special Direction". Part 4 includes, in s. 4.2, a direction to determine a single rate base, capital structure and return on equity for the Single Entity. Section 4.1 requires that the Commission determine annual revenue deficiencies and the balance of the Deficiency Account for the single entity. In my view, Part 4 of the Special Direction was clearly intended to combine the rate base of the Pipeline and the Distribution System once the assets were merged in the single entity, and the Deficiency Account is explicitly stated to be one account for the single entity. In my opinion, the Special Direction did not preclude the Commission from setting tolls for BC Hydro that provided for a contribution to amortization of the Deficiency Account that resulted in a 1.25 ratio. The rate set was not otherwise outside the Commission's rate-setting mandate in the exercise of its general jurisdiction.

40 Accordingly, I do not think that there is merit in BC Hydro's second ground of appeal.

The Joint Venture Appeal

41 The Joint Venture is not directly affected by the Commission's order because its tolls are determined independently by formulas in the Joint Venture Transportation Service Agreement dated 14 December 1995 which the Commission was directed to approve under s. 3.2 of the Special Direction. The Joint Venture may elect to terminate the Joint Venture Agreement on one year's notice and move to tolls otherwise determined by the Commission, which presumably would be comparable to tolls set by the Commission for BC Hydro. The Joint Venture thus has a prospective interest in lower tolls for BC Hydro and therefore supported BC Hydro's appeal. It also raised other issues arising from the Special Direction and the terms of the Joint Venture Agreement.

42 The Joint Venture submitted that the Commission erred in failing to distinguish between the Pipeline and the Distribution System, as required by s. 4.5 of the Special Direction and s. 60(1)(c) of the Utilities Commission Act. The Joint Venture also contended that the Commission has abandoned cost-based rate design principles required by article 11.01(b) of the Joint Venture Agreement and that the tolls set for BC Hydro are discriminatory within the meaning of s. 59(1)(a) of the Utilities Commission Act and contrary to article 11.01(c) of the Joint Venture Agreement.

i) The cost-based rates issue

43 The Joint Venture contended that Centra and the Commission failed to comply with the separate records requirement of s. 4.5 of the Special Direction as follows:

4.5 Separate Records

> The BCUC shall require that the Single Entity keep separate records relating to the Pipeline and the Centra Distribution System sufficient at all times to differentiate, where appropriate, between all activities related to the construction and operation of the Pipeline and the Centra Distribution System.

Centra's position is that it kept separate records for the pipeline and the distribution system in compliance with s. 4.5 of the Special Direction and the adequacy of those records was a matter that the Commission settled in favour of Centra. In my view, that was a matter within its specialized expertise and there was no reviewable error.

(ii) The Pipeline/Distribution System Distinction

44 The Joint Venture's second issue is founded on article 11.01(b) of the Joint Venture Agreement that reads:

> 11.01 Covenants. Pacific Coast covenants with and in favour of Shipper that Pacific Coast:
>
> . . .
>
> (b) shall, in respect of the tolls to be charged to any new Third Party Shipper of gas through the Pacific Coast System, apply to the BCUC for approval of tolls which are determined in accordance with the full fixed-variable cost of service methodology and which, in the case of the mainline sections of the Pacific Coast System, are determined on a rolled-in basis as opposed to an incremental basis; and . . .

Article 11.01(b) is a covenant of Pacific Coast Energy, later Centra, which the Joint Venture contended was a condition of Centra's application for rates that the Commission was obliged to respect. The Joint Venture submitted that BC Hydro was a "Third Party Shipper" within article 11.01(b) and both Centra's application and the Commission's decision were not in accordance with "the full fixed-variable cost of service methodology" required.

45 The Joint Venture's submission is in part a restatement of the customer/shipper distinction advanced by BC Hydro. In my view, it fails for the same reason, namely that "customer" is not a defined term in the Special Direction. Its meaning can extend to include "shippers" on the pipeline for the purposes of s. 2.10(j) with respect to the Deficiency Account because of the application of Part 4 of the Special Direction to the single entity. The amortization of the Deficiency Account consequently becomes a part of the cost of service for Distribution System customers and Pipeline shippers (apart from the Joint Venture and Squamish Gas specifically exempted by s. 3.7) and therefore included in any "full fixed-variable cost of service methodology". According to the Commission's reasons, quoted in paragraph 16 above, the inclusion of revenue deficiency amortization in the cost of service is consistent with regulatory principles.

46 In my view, determination of cost of service and allocation of that cost among users of the utility services for rate-making purchases is at the heart of the Commission's specialized expertise. Curial deference to that expertise is underlined by the statutory provisions that declare just and reasonable rates to be factual questions on which the Commission's determination is conclusive.

47 Centra submitted in its factum that:

> A full fixed-variable cost of service methodology is one in which the fixed costs are allocated by way of a demand determinant and the variable costs are allocated by way of a commodity or variable determinant. Centra's Rate Design Application as it related to the firm transportation rate for service on the transmission facilities conformed with a full fixed-variable cost of service methodology.

The Commission rejected the Joint Venture's argument that Centra's application and the Commission's approach breached article 11.01(b). The Commission concluded:

> The Joint Venture's concerns about potential breach[es] of Section 11.01(b) seem to hinge on collection of [Revenue Deficiency Deferral Account] in the rates of other [High Pressure Transmission System] shippers. That has been dealt with elsewhere in the Special Direction.

In my view, the Commission recognized that the rate-making treatment of the Deficiency Account was the real complaint and, as concluded above, its treatment of that account accorded with its Special Direction mandate. To the extent that the Special Direction departed from general regulatory principles otherwise applicable, the Special Direction governed. The Commission concluded that the Special Direction and general regulatory principles were not inconsistent and there was no breach of article 11.01(b). Once the conclusion is reached that the Commission was correct in interpreting its Special Direction mandate, the Commission's determination was within its rate-making

jurisdiction and does not contain any reviewable error. In my view, there is no basis for this Court to disturb the order of the Commission on this ground of appeal.

iii) Discrimination

48 The Joint Venture also contends that the Commission has set discriminatory rates contrary to 11.01(c) of the Joint Venture Agreement that reads:

> (c) Pacific Coast will operate the Pacific Coast System so as to provide Firm Transportation Service and Interruptible Transportation Service under the General Terms and Conditions for Gas Transportation Service on a non-discriminatory basis in respect of gas to be transported and delivered to Shipper, Third Party Shippers and to the Centra Distribution System.

49 The Commission determined that the transmission tolls set for BC Hydro were non-discriminatory. The tolls for the Joint Venture are negotiated charges defined by the Joint Venture Agreement and confirmed by the Special Direction. BC Hydro's tolls inevitably were going to be different unless the Commission simply imposed the Joint Venture Agreement formulas, which was not advocated by the Joint Venture or any other party. Indeed, imposing formula rates would defeat the Joint Venture's objective of rates for BC Hydro that were lower than those rates. In my opinion, there was no error in the Commission's conclusion that the tolls set for BC Hydro were non-discriminatory.

50 The Joint Venture also raises a difference between curtailment rights applicable to the Joint Venture and to other industrial customers connected to the Distribution System. The curtailment rights with respect to the Joint Venture are negotiated terms agreed in a peaking gas management agreement between the parties and reflect the fact that the Joint Venture pulp and paper mills each have alternative heavy fuel oil burning capability. It was not unreasonable for the Commission to conclude that it was not discrimination to accept different curtailment rights for other customers who may not have had similar standby capability.

51 I am satisfied that none of the issues raised by the Joint Venture involve a reviewable error by the Commission.

Conclusion

52 The economic viability of a utility, and service to its customers, depends upon its ability to meet its revenue requirement through tolls set by its regulator for its customers. No party to these appeals has questioned the revenue requirement determined by the Commission for Centra. Recovery of the Deficiency Account balance is part of the revenue requirement as mandated by the Special Direction. The share of Centra's revenue requirement that can be recovered from Distribution System customers is limited by competition from alternative fuels, reflected in the soft cap mechanism which all parties accept is a reasonable response to the competitive exigencies. The Joint Venture tolls are fixed by the Joint Venture Agreement and the Special Direction expressly excludes recovery of any part of the revenue deficiency from the Joint Venture. The only remaining source of customer revenue available for contribution to amortization of the revenue deficiency is BC Hydro. The Commission was faced with the choice of setting tolls for BC Hydro that included contribution to the amortization or deferring amortization into an indefinite future, likely after 2011 when Centra will lose the contribution to revenue from gas royalty credits, and its ability to meet its revenue requirement may become more precarious. The Special Direction instructed the Commission to set rates that would amortize the accumulated deficiency "over the shortest period reasonably possible". The Special Direction does not preclude the Commission from including a contribution to amortization in BC Hydro's tolls. In light of the other constraints on the sources of revenue available to meet the revenue requirement, setting tolls for BC Hydro that includes a contribution to amortization simply recognizes the economic realities of the Centra utility. In my opinion, it was not an unreasonable determination by the Commission in the exercise of its jurisdiction and there was no reviewable error in the Commission's order.

53 I would dismiss both appeals.

MACKENZIE J.A.
LAMBERT J.A.:— I agree.
OPPAL J.A.:— I agree.

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Zellstoff Celgar Limited Partnership v. British Columbia Hydro and Power Authority, [2015] B.C.J. No. 2640

British Columbia and Yukon Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

S.D. Frankel, D.F. Tysoe and G.J. Fitch JJ.A.

Heard: November 3 and 4, 2015.

Judgment: December 3, 2015.

Docket: CA42066

[2015] B.C.J. No. 2640 | 2015 BCCA 497 | 380 B.C.A.C. 120 | 261 A.C.W.S. (3d) 101 | 2015 CarswellBC 3519

Between Zellstoff Celgar Limited Partnership, Appellant, and British Columbia Hydro and Power Authority, FortisBC Inc. and British Columbia Utilities Commission, Respondents

(70 paras.)

Case Summary

Natural resources law — Public utilities — Electricity — Appeal by Zellstoff Celgar Limited Partnership from dismissal of application for reconsideration of order approving sale agreement for sale of electricity from BC Hydro to FortisBC dismissed — Agreement contained provision restricting sale of electricity from FortisBC to self-generating customers who were selling electricity that was not in excess of their own needs — There was some evidentiary foundation, as well as policy reasons, for continuing restrictions — There was no substance to claim of procedural unfairness.

Appeal by Zelstoff Celgar from the dismissal of its application for a reconsideration of the BC Utilities Commission order approving an agreement for the sale of electricity by BC Hydro to FortisBC. Upon application by BC Hydro, the Commission approved an agreement for the sale of electricity by BC Hydro to FortisBC. The agreement contained a provision with restrictions that affected FortisBC customers who generated electricity, including the appellant. The provision prevented self-generating customers from purchasing electricity thought FortisBC, while, simultaneously selling electricity that was not in excess of its needs. After the close of the evidentiary record of the proceeding, BC Hydro and FortisBC agreed to amend the provision. The Commission determined that the agreement was not unjust, unreasonable, unduly discriminatory or unduly preferential. It concluded that although the restrictions were no longer necessary, it was premature to remove them because FortisBC's self-generation policies were not sufficiently developed. The appellant applied for reconsideration of the Commission's order approving the agreement with the amended provision, arguing that the Commission made errors of mixed fact and law in approving the agreement and that there was procedural unfairness. The Commission denied the application for reconsideration. The appellant appealed arguing that there was no evidentiary foundation or proper regulatory purpose to support the inclusion of the restrictions in the agreement.

HELD: Appeal dismissed.

The Commission's decision was reasonable. There was some evidentiary foundation, as well as policy reasons, for continuing the restrictions in the amended provision. There was no substance to the claim of procedural unfairness. While the appellant was not given the opportunity to make further submissions on the amendment, it

was not able to say what further evidence it would have wanted to introduce.

Statutes, Regulations and Rules Cited

Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 11, s. 58

Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 2(4), s. 59, s. 79, s. 99, s. 101

Court Summary:

Upon an application by BC Hydro, the BC Utilities Commission approved an agreement for the sale of electricity by BC Hydro to FortisBC. The agreement contained a provision with restrictions that affected FortisBC customers who generated electricity, including the appellant. BC Hydro and FortisBC had agreed to amend the provision after the close of the evidentiary record of the proceeding. The appellant applied for reconsideration of the Commission's order approving the agreement with the amended provision, arguing that the Commission made errors of mixed fact and law in approving the agreement and that there was procedural unfairness. The Commission denied the appellant's application for reconsideration. The appellant now appeals this decision. The appellant submits that there was no evidentiary foundation or proper regulatory purpose to support the inclusion of the restrictions in the agreement. Held: Appeal dismissed. The standard of review is reasonableness. After assessing the reasons offered, or that could be offered, to support the Commission's decision to deny reconsideration, the decision fell within the range of possible, acceptable outcomes defensible in respect of the facts and law. There was some evidentiary foundation, as well as policy reasons, for continuing the restrictions in the amended provision. There is no substance to the claim of procedural unfairness.

Appeal From:

On appeal from an order of the British Columbia Utilities Commission, dated July 10, 2014 (*Zellstoff Celgar Limited Partnership Application for Reconsideration of Order G-60-14*, Order G-93-14).

Counsel

Counsel for the Appellant: J.K. McEwan, Q.C. and E.A. Kirkpatrick.

Counsel for the Respondent, British Columbia Hydro and Power Authority: L.L. Bevan.

Counsel for the Respondent, FortisBC Inc.: L.B. Herbst.

Counsel for the Respondent, British Columbia Utilities Commission: P.R. Miller and R.R. Veerapen.

Reasons for Judgment

The judgment of the Court was delivered by

D.F. TYSOE J.A.

Introduction

1 On May 6, 2014, the British Columbia Utilities Commission (the "Commission") issued an order (the "Original Order") by which, among other things, it approved a power purchase agreement (as amended) and associated agreements between British Columbia Hydro and Power Authority ("BC Hydro") and FortisBC Inc. ("FortisBC").

2 Zellstoff Celgar Limited Partnership ("Celgar"), one of the interveners in the proceedings before the Commission, requested a reconsideration of the Original Order. By order dated July 10, 2014 (the "Reconsideration Order"), the Commission denied Celgar's reconsideration application.

3 Under s. 101 of the *Utilities Commission Act*, *R.S.B.C. 1996, c. 473*, an appeal from the two orders lies to this Court with leave of a justice of the Court. On October 21, 2014, Madam Justice MacKenzie granted Celgar leave to appeal the Reconsideration Order. Although she did not grant leave to appeal the Original Order, Madam Justice MacKenzie noted that the decision of the Commission giving rise to that order would be part of the record and would inform the Court's review of the Reconsideration Order, which is treated as an affirmation of the Original Order.

Background

4 In 1993, BC Hydro and FortisBC (by its predecessor, West Kootenay Power and Light Company, Limited) entered into a power purchase agreement (the "1993 Agreement") for the sale of electricity by BC Hydro to FortisBC over a period of 20 years, expiring on September 30, 2013. The rates for the electricity supplied under the agreement were those set out in BC Hydro Rate Schedule 3808 ("RS 3808").

5 The rates under RS 3808 are known as embedded cost rates. These represent the weighted average cost of power supplied from all sources available to BC Hydro. They are relatively low rates because one of the sources of power available to BC Hydro is low-cost legacy or "heritage" energy generated by its hydro plants.

6 Like BC Hydro, FortisBC is also in the business of selling power. FortisBC acquires the power it sells from various sources. The amount of power FortisBC purchases from BC Hydro represents approximately 28% of the total power sold by FortisBC to its customers.

7 One of FortisBC's customers is Celgar, which operates a pulp mill within FortisBC's service area. Celgar also operates a biomass electricity-generation facility, and it is therefore known as a "self-generating customer".

8 Section 2.1 of the 1993 Agreement provided that FortisBC could not export any electricity outside its service area during any given hour it was purchasing power from BC Hydro at the RS 3808 rates. In September 2008, BC Hydro applied to the Commission to amend section 2.1 to provide that FortisBC could not sell power acquired at the RS 3808 rates to any customer when that customer was selling self-generated electricity that was not in "excess of its load".

9 The application was made by BC Hydro to prevent a practice known as arbitrage. In this context, arbitrage is the practice of a self-generating customer purchasing embedded cost electricity through FortisBC while simultaneously selling electricity on the open market at higher prices. This has the potential of being harmful to BC Hydro ratepayers because BC Hydro will have to acquire more expensive power to meet demand or will lose the opportunity of exporting its power at higher prices during peak periods.

10 In 2009, the Commission approved the amendment to section 2.1 of the 1993 Agreement for the remaining term of the 1993 Agreement. The effect of this amendment was that RS 3808 electricity (at embedded cost rates) could not be sold by FortisBC to a self-generating customer if the customer was selling self-generated electricity that was not in excess of its own needs (referred to as plant load). This is called the "net-of-load" methodology of dealing with arbitrage. This approach has the effect of prohibiting a self-generating customer from buying electricity from the utility at the same time as it is selling electricity.

11 Another method of dealing with arbitrage is called the generator baseline concept. This is a method used by BC Hydro with some of the self-generating customers in its service area. BC Hydro and the customer agree on a generator baseline, which is based on the historical amount of self-generated electricity used to service the customer's plant. Once agreed upon, the generator baseline establishes the amount of self-generation output required before the customer can rely on the utility to serve its additional load. Unlike the net-of-load methodology, this concept permits the self-generating customer the opportunity to sell electricity at the same time as it is buying electricity from the utility at embedded cost rates.

12 As the 1993 Agreement was set to expire on September 30, 2013, BC Hydro and FortisBC negotiated a new agreement. On or about May 21, 2013, they entered into a power purchase agreement (the "New Agreement") for a term ending September 30, 2033. The term was to begin on October 1, 2013, provided that certain conditions precedent had been fulfilled. One of the conditions precedent was that the Commission had approved the New Agreement (including amended RS 3808) without imposing changes that were not acceptable to both parties.

13 The price structure under the New Agreement is different than under the 1993 Agreement. Rather than embedded cost rates for all electricity sold under the 1993 Agreement, the New Agreement provides for different rates for two tranches of power. The first tranche is 1,041 GWh/year at a rate based on BC Hydro's embedded cost of power. The second tranche is 711 GWh/year at a higher rate based on BC Hydro's long run marginal cost. In projections provided to the Commission, it was forecast that FortisBC would not take more than 1,041 GWh/year in any year during the term of the New Agreement and would not purchase any power at the higher Tranche 2 rates.

14 One of the provisions of the New Agreement was section 2.5, which was a revised version of section 2.1 of the 1993 Agreement. The relevant portions of section 2.5 read as follows:

> (a) Electricity taken under this Agreement:
>
> * * *
>
> (ii) shall not be sold to any FortisBC customer with self-generation facilities, or used by FortisBC to serve any such customer's load, when such customer is selling self-generated Electricity unless a portion of the customer's load equal to or greater than the customer-specific baseline is being served by Electricity that is not Electricity taken under this Agreement, where such customer-specific baseline is as agreed between the Parties (acknowledging that such baseline shall be determined in a manner consistent with how BC Hydro establishes a generator baseline for its own customers), failing which agreement either Party may submit the matter for dispute resolution in accordance with Section 13; and ...
>
> * * *
>
> (b) For greater certainty, Section 2.5(a)(ii) is intended to prevent FortisBC from increasing its purchases of Electricity under this Agreement if such increased purchases would be a result of FortisBC's customers with self-generation facilities purchasing Electricity from FortisBC at regulated rates and simultaneously selling Electricity at higher rates, except as otherwise approved by the Commission.

15 On May 24, 2013, BC Hydro applied to the Commission for approval of the New Agreement and associated agreements. In considering such an application, the Commission is guided by s. 59 of the *Utilities Commission Act*, which provides that a public utility must not make, demand or receive a rate that is "unjust, unreasonable, unduly discriminatory or unduly preferential".

16 Numerous parties registered as interveners in the proceeding considering BC Hydro's application. The interveners included FortisBC, Celgar, British Columbia Municipal Electrical Utilities, British Columbia Pensioners' and Seniors' Organization, and several others. One of the five members of British Columbia Municipal Electrical Utilities is the City of Nelson (Nelson Hydro), which, like Celgar, is a self-generating customer of FortisBC. The application was heard by way of written submissions made by BC Hydro and the interveners.

17 After the Commission received final submissions and had begun its deliberations, the Commission decided to reopen the record because it had unresolved concerns about section 2.5 of the New Agreement. On December 13, 2013, the Commission requested supplemental submissions with respect to section 2.5.

18 After the supplemental submissions were received and the Commission was continuing in its deliberations, the Commission received a letter on April 9, 2014 from BC Hydro advising that it and FortisBC had agreed to an amendment to section 2.5. Clause (a)(ii) was amended to read as follows:

> (a) Electricity taken under this Agreement:
>
> * * *
>
> (ii) shall not be sold to any FortisBC customer with self-generation facilities, or used by FortisBC to serve any such customer's load, when such customer is selling self-generated Electricity unless a portion of the customer's load equal to or greater than the customer-specific baseline is being served by Electricity that is not Electricity taken under this Agreement, where such customer-specific baseline is as <u>determined in accordance with Commission-approved guidelines and in consultation with the customer</u>; and ...
>
> [Underlining added.]

The underlined words replaced the previous ending of the clause.

19 The Commission requested further supplemental submissions in response to BC Hydro's proposal. With the exception of Celgar and one other intervener which took the position that the amendment violated procedural fairness, all of the interveners who made further supplemental submissions supported the amendment.

<u>The Original Decision</u>

20 In its original decision dated May 6, 2014 (the "Original Decision"), the Commission first considered the New Agreement apart from section 2.5. It then dealt with section 2.5 in its unamended form ("Unamended s. 2.5"). Finally, it addressed section 2.5 in its amended form ("Amended s. 2.5").

21 The Commission concluded that the New Agreement, without consideration of section 2.5, was not unjust, unreasonable, unduly discriminatory or unduly preferential.

22 In considering the Unamended s. 2.5, the Commission first expressed a concern that the generator baselines under the section were to be established by BC Hydro and FortisBC without any meaningful input from the self-generating customers. The Commission felt there were insufficient guidelines to assist in establishment of the baselines and it was highly likely that a lengthy regulatory proceeding would be required each time a baseline needed to be determined. The Commission saw little regulatory efficiency in this approach. The Commission also

found that the Unamended s. 2.5 would further complicate the rate design for transmission voltage customers in FortisBC's service territory.

23 The Commission then considered whether the restrictions in Unamended s. 2.5 remained necessary. It expressed the view that a more global solution regarding arbitrage would be preferable.

24 The Commission observed that when it approved the amendment to section 2.1 of the 1993 Agreement, it determined that self-generating customers in FortisBC's service territory should not be permitted to engage in arbitrage to the detriment of FortisBC's other ratepayers as well as to the detriment of BC Hydro's ratepayers. The Commission noted that Unamended s. 2.5 protected BC Hydro's ratepayers but did not serve to create a self-generation policy in FortisBC's service territory. The Commission agreed with BC Hydro that there should be a self-generation policy in the FortisBC service territory but felt that it should not be achieved through the New Agreement.

25 The Commission then considered whether there was any material risk of harm to BC Hydro's ratepayers under the terms of the New Agreement that warranted a continuation of the restrictions in Unamended s. 2.5. It noted the different rate structure for purchases under the New Agreement, with embedded cost rates applicable to the first tranche of energy and rates based on BC Hydro's long run marginal cost applicable to the second tranche of energy.

26 The Commission noted the expectation that the electricity supply in the Pacific Northwest will remain in surplus for the foreseeable future along with the continuation of low spot market prices. It found that relatively low spot markets did not incent FortisBC's self-generation customers to arbitrage but it agreed with the assertion made by the British Columbia Pensioners' and Seniors' Organization that, in view of the unpredictability of energy supply markets and spot market prices, the situation would likely change over the term of the New Agreement.

27 The Commission concluded that "as long as there is an energy surplus and spot markets are low there is very little risk to BC Hydro ratepayers of FortisBC using its excess Tranche 1 energy to supply any incremental load". It found that although the current energy surplus would not necessarily provide protection to BC Hydro's ratepayers over the entire term of the New Agreement, "it does provide protection in the near future where the greatest amount of risk lies". The Commission also found that, in view of the higher rates applicable to Tranche 2 energy, there would not be any material harm to BC Hydro's ratepayers if such energy was used for arbitrage purposes.

28 The Commission concluded that under the terms of the New Agreement "there is no significant material risk of harm to BC Hydro that warrants it reasonable to continue to include the restrictions" contained in the Unamended s. 2.5. It stated that, in the interest of regulatory efficiency, its preferred solution would be to immediately remove the restrictions contained in section 2.5 but concluded, however, that it may be somewhat premature to remove the restrictions because FortisBC's self-generation policies were not sufficiently developed.

29 The Commission recognized that although the restrictions in Unamended s. 2.5 were no longer necessary, the "Parties would gain a considerable amount of comfort if the Self-Generation Policy Issue in the FortisBC service territory was formally addressed and resolved once and for all". This statement appears to have been in response to BC Hydro's supplemental submission that, in the absence of certainty regarding the rules that FortisBC would apply to its self-generating customers, FortisBC and its customers would not be motivated to negotiate arrangements to protect BC Hydro's customers.

30 After discussing the matter, the Commission concluded that the self-generation policy issue in the FortisBC service territory should be resolved. The Commission directed FortisBC to initiate a consultation process to address or ensure four things, including to address the potential benefits of self-generation and to ensure that arbitrage is not allowed.

31 The Commission then turned its consideration to Amended s. 2.5. It noted the support for the amendment by most parties (including British Columbia Municipal Electrical Utilities) and stated that it offered a "solution" to move forward with prompt approval of the New Agreement, which was "becoming increasingly critical for FortisBC". The

Commission also stated that it allowed for a separate consultation process to increase transparency for determination of generator baselines that would culminate in an application to the Commission for approval of guidelines.

32 The Commission did not accede to Celgar's assertion in its further supplemental submissions that there was procedural unfairness as a result of the amendment to section 2.5 being made after the close of the evidentiary record. It accepted BC Hydro's submission that the Commission had the power to control its own processes. It also noted that the Amended s. 2.5 approximated what Celgar had proposed in its earlier objections.

33 The Commission concluded that, as a result of the amendments to section 2.5, which removed most of the Commission's earlier fundamental concerns with the exception of regulatory efficiency, it would:

(a) direct BC Hydro to initiate a consultation process to formulate guidelines for setting generator baselines under Amended s. 2.5;

(b) approve the New Agreement effective July 1, 2014; and

(c) permit the net-of-load methodology to apply under the New Agreement until the Commission approved the guidelines for setting generator baselines.

34 The Commission concluded the Original Decision by reiterating that its preferred solution would have been to approve the New Agreement without any restrictions in section 2.5. However, that solution appeared premature as FortisBC's self-generating policies were not yet sufficiently developed and BC Hydro came forward with a solution that most parties saw as a first practical step towards resolving the issues. The Commission expressed hope that once the two consultation processes had been completed, it would receive submissions as to whether it would be reasonable to remove the restrictions in section 2.5 "in pursuit of improved regulatory efficiency".

The Reconsideration Decision

35 The Commission received a letter from Celgar's counsel dated June 6, 2014 seeking a reconsideration of the Original Order under s. 99 of the *Utilities Commission Act*. Section 99 simply provides that the Commission may, on application or on its own motion, reconsider a decision.

36 Although s. 99 does not provide any guidance with respect to reconsideration applications, the Commission has issued a guide dealing with many aspects of proceedings before it, including reconsideration applications. The guide explains that an application for reconsideration proceeds in two phases. The first phase is an initial screening phase, which requires the applicant to establish a *prima facie* case sufficient to warrant full reconsideration. If necessary, the second phase involves full arguments on the merits of the application.

37 The guide explains that the Commission will generally apply four criteria to decide whether or not a reasonable basis exists for reconsideration. The one criterion relevant to this appeal is whether the Commission has made an error in fact or law that has significant material implications.

38 Celgar asserted in its June 6, 2014 letter that the Commission made errors of mixed fact and law in approving the New Agreement with section 2.5 included in it, maintaining the net-of-load methodology and approving the Amended s. 2.5 after the evidentiary record of the proceeding had been closed.

39 In accordance with the procedure set out in its guide, the Commission wrote a letter dated June 11, 2014 to BC Hydro and copied to the interveners. It invited BC Hydro and the interveners to make submissions as to whether it should proceed with a reconsideration of the Original Order, addressing whether the Commission had made an error in fact or law and, if so, whether the error had significant material implications. After receiving and considering the submissions, the Commission issued the Reconsideration Order denying Celgar's application and a written decision containing its reasons for doing so (the "Reconsideration Decision").

40 In the Reconsideration Decision, the Commission reviewed the submissions made by the parties. It observed that while it concluded BC Hydro's ratepayers did not need protection in the short term, this finding was based on a forecast and circumstances are known to change. The Commission therefore considered it prudent to maintain the status quo with the net-of-load methodology as an intermediate solution. The Commission expressed its hope that the parties could work together to accept the removal of the restrictions from section 2.5 and commented that "[l]ack of acceptance could trigger another round of applications or complaints and resultant regulatory inefficiencies".

41 The Commission noted that it had already dealt with Celgar's complaint of procedural unfairness in the Original Decision. It reiterated that it accepted BC Hydro's submission that the Commission had the power to control its own processes and that the amendments to section 2.5 approximated Celgar's earlier proposal.

42 The Commission's determination was as follows:

> The Panel finds that the arguments of BC Hydro and Celgar are circular and that the very nature of those arguments highlights the need for the two concurrent consultation processes to run their course before the status quo be changed.
>
> The Panel further finds Celgar's observations regarding the debate over the sharing of benefits of self-generation by different ratepayer/customer groups most insightful. Sharing these benefits truly is the crux of the issue. Therefore, it is crucial that all parties with an interest in this matter can participate in the consultation processes to make their case in a collaborative fashion. The Panel considers that it is counterproductive to commence a reconsideration process which would unravel the progress made following the clearly laid out road map towards eventual removal of the restrictions from section 2.5 of the New PPA.
>
> For clarity, the Panel reiterates its goal to have the self-generation policy issue in the FortisBC service territory resolved once and for all. The two consultation processes directed by the Panel are an interim step in the pursuit of the solution as the parties were asked to go away and work it out. With the respective filing deadlines of November 1, 2014 and December 31, 2014 given to BC Hydro and FortisBC, the consultations are expected to take place expeditiously. If there is no agreement by the parties, the Commission will continue with its own process to bring the matter to its ultimate conclusion.
>
> **The Commission Panel determines for reasons outlined above that Celgar has not met the test for proceeding to Phase Two of reconsideration.** The Commission made no error in fact or law, and even if the Commission made any such error, it has no significant material implications. The Panel is unable to find in Celgar's submissions any persuasive demonstration of significant material implications. ... **Accordingly, Celgar's Reconsideration Application is denied.**
>
> [Emphasis in original.]

Errors Alleged on Appeal

43 Celgar asserts that the Commission erred in the following three respects in the Reconsideration Decision:

(a) by failing to apply the proper test on reconsideration;

(b) by considering factors irrelevant to the determination of whether to reconsider the Original Order; and

(c) by acting unreasonably in concluding that the Original Order did not give rise to an error of fact or law.

44 The main thrust of Celgar's submissions at the hearing of the appeal was that the Commission erred by approving the New Agreement with the restrictions in Amended s. 2.5 when there was no proper regulatory purpose for them. Celgar says the Commission took irrelevant considerations into account, which were unconnected to any

purpose in the *Utilities Commission Act*, and there was no evidence to support the inclusion of the restrictions in the New Agreement. Thus, Celgar submits, the Commission erred in law, and its decision to deny the reconsideration request was unreasonable.

Standard of Review

45 The Commission is an administrative tribunal. Although s. 101 of the *Utilities Commission Act* refers to "an appeal" to this Court, it is not like an appeal from a decision of the Supreme Court of British Columbia. It is more akin to a judicial review proceeding, and the standard of review is determined by administrative law principles generally and by specific provisions of the Commission's enabling statute (for example, s. 79 of the *Utilities Commission Act* provides that the Commission's determination on a question of fact is binding and conclusive on all persons and all courts).

46 On the basis of the factums of the parties, it appeared there would be a dispute with respect to the standard of review to be applied to different types of determinations made by the Commission. The genesis of the potential dispute is comments made by the Supreme Court of Canada in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, *2010 SCC 43* at paras. 27 and 78, to the effect that the provisions of s. 58 of the *Administrative Tribunals Act*, *S.B.C. 2004, c. 45*, applied to decisions of the Commission.

47 As clarified by this Court in *Lavender Co-operative Housing Association v. Ford*, *2011 BCCA 114* at para. 51, the provisions of the *Administrative Tribunals Act* made applicable to the Commission by s. 2(4) of the *Utilities Commission Act* do not include s. 58. Hence, the common law governs the standard of review to be applied by this Court to decisions of the Commission.

48 At the hearing of the appeal, all of the parties were agreed that the standard of review in respect of each of the three errors alleged by Celgar was one of reasonableness.

49 In *Dunsmuir v. New Brunswick*, *2008 SCC 9*, the decision in which the Supreme Court of Canada decided to collapse the two previous reasonableness standards of review (reasonableness *simpliciter* and patent unreasonableness) into one reasonableness standard, Justices Bastarache and LeBel set out the meaning of the revised reasonableness standard:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

50 Justices Bastarache and LeBel went on to discuss the meaning of deference:

> [48] ... What does deference mean in this context? ... deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. ... We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, *2011 SCC 62* at

para. 12, Madam Justice Abella quoted further from Professor Dyzenhaus's article to the effect that the court must first seek to supplement reasons of an administrative tribunal before it seeks to subvert them.

Analysis

51 As reflected by the oral submissions at the hearing of the appeal, the three errors alleged by Celgar can essentially be condensed into a single argument. The first two alleged errors are that, in considering the reconsideration application, the Commission failed to apply the proper test and considered irrelevant factors. The third alleged error is that the Commission acted unreasonably in concluding there was no error of fact or law in the Original Decision. The position of Celgar is that if the Commission applied the proper test and considered only relevant factors, it should have concluded there was an error in the Original Decision.

52 Celgar says there were two errors of law made by the Commission in the Original Decision. The first is there was no evidentiary foundation for approving the New Agreement with the restrictions in Amended s. 2.5 and the Commission approved it for an improper purpose. The second alleged error, which was not pressed at the hearing of the appeal, is there was a denial of natural justice by allowing the amendment to section 2.5 without giving Celgar an opportunity to test the amended application in the context of the evidentiary record.

53 In order to properly assess the Original Decision, it is useful to consider the full context of the situation before the Commission. The Commission was being asked to approve the New Agreement, which would replace the 1993 Agreement. It was a condition precedent to the New Agreement coming into effect that the Commission approve it without imposing changes that were not acceptable to the parties.

54 BC Hydro was opposed to the practice of arbitrage by the self-generating customers in FortisBC's service territory. In 2008, it applied to the Commission for an amendment of the 1993 Agreement to prohibit arbitrage by way of the net-of-load methodology. In negotiating the New Agreement, BC Hydro and FortisBC agreed on the Unamended s. 2.5, which continued the net-of-load methodology unless BC Hydro and FortisBC agreed on a generator baseline in respect of a self-generating customer, in which case the generator baseline concept would become operative.

55 The Commission was concerned about the fact that the generator baselines under Unamended s. 2.5 were to be negotiated between BC Hydro and FortisBC without meaningful input from the self-generating customers. The Commission felt this would lead to lengthy regulatory proceedings (the costs of which would be included in the rates paid by FortisBC's customers).

56 As a result of its concern, the Commission considered whether it was necessary to have the restrictions in Unamended s. 2.5 to protect BC Hydro's ratepayers. It considered the rate structure under the New Agreement and the electricity supply market in the Pacific Northwest. It concluded that as long as the market stayed the same, there was very little risk to BC Hydro ratepayers of being harmed by arbitrage. However, the Commission acknowledged that the market could change over the term of the New Agreement. Contrary to Celgar's submissions, the Commission did not find that there was a complete absence of risk to BC Hydro ratepayers, and there was some evidentiary foundation for continuing the restrictions.

57 The Commission concluded that, in view of the regulatory inefficiency that would result from Unamended s. 2.5 and the lack of a significant material risk of harm to BC Hydro ratepayers in the near future, it would have preferred for the restrictions in Unamended s. 2.5 to be removed. Just as the Commission had ordered an amendment to section 2.1 of the 1993 Agreement, it had the jurisdiction to approve the New Agreement without section 2.5.

58 There were, however, at least two difficulties facing the Commission. The first was that FortisBC did not have a finalized self-generation policy, including a policy dealing with arbitrage, for its service territory. There was still some risk for the BC Hydro ratepayers if the energy market changed, and there was no arbitrage policy protecting the FortisBC ratepayers. The other difficulty facing the Commission was that BC Hydro was not required to go forward with the New Agreement in the absence of section 2.5. One of the conditions precedent in the New Agreement

would not have been fulfilled, and the New Agreement would not come into force. Although this difficulty was not specifically mentioned in the Original Decision, I have no doubt that the Commission was cognizant of the implications of its decision for the parties. The condition precedent was contained in the New Agreement under review by the Commission, and the Commission had noted that approval of the New Agreement was becoming increasingly critical for FortisBC.

59 The situation facing the Commission until it received the advice from BC Hydro that it had agreed with FortisBC on the Amended s. 2.5 was that it could do one of two things:

(a) approve the New Agreement, including section 2.5; or

(b) approve the New Agreement without section 2.5 (or with an amended section 2.5 as the Commission may have been prepared to revise it).

The Commission did not prefer the first alternative because of the regulatory inefficiencies that would result and its view that there was a lack of significant material risk to BC Hydro ratepayers in the near future. The Commission preferred the second alternative, but it was concerned that FortisBC did not have a self-generation policy for its service territory. In addition, there was a risk that BC Hydro may not have waived the condition precedent in the New Agreement providing that it must be approved by the Commission without any changes that were not acceptable to BC Hydro (or FortisBC).

60 It is within this context that the Commission saw the amendment to section 2.5 as a "solution" (as the Commission referred to it in the last paragraph of the Original Decision). It allowed the Commission to approve the New Agreement without any changes unacceptable to BC Hydro, so that the New Agreement would come into force. The finalization of the New Agreement was something the Commission considered to be of critical importance to FortisBC. It also gave the Commission the opportunity of commencing two consultation processes for the formulation of guidelines for setting generator baselines and the establishment of a self-generation policy in the FortisBC service territory.

61 The fact that the amendment to section 2.5 was seen as a solution was succinctly encapsulated in the April 15, 2014 letter from British Columbia Municipal Electrical Utilities to the Commission in support of the amendment:

> The BC [tilde] MEU generally supports the proposal for the reasons of providing a mechanism to:
>
> * Move forward with the PPA application, and
>
> * Providing clarity on customer specific baselines (in a process separate from this application).

62 When viewed in the full context of the proceeding before the Commission, I see no error in the Commission approving the New Agreement with Amended s. 2.5. It provided certainty because the condition precedent in the New Agreement would be fulfilled and the New Agreement would come into effect. It allowed for the prospect of regulatory efficiency, which was of primary concern to the Commission. It provided an opportunity to finalize a self-generation policy for the FortisBC service territory and to develop guidelines for generator baselines for self-generating customers in the FortisBC service territory. It was hoped that these consultative processes would lead to a voluntary removal of section 2.5 from the New Agreement. The alternative of approving the New Agreement without section 2.5 would have produced uncertainty and may well have been counterproductive.

63 It must be borne in mind that the Commission was not answering a pure question of law -- it was making a policy decision. As noted by this Court in *BC Hydro and Power Authority v. Terasen Gas (Vancouver Island) Inc.*, *2004 BCCA 346*:

> [24] ... the legislative scheme emphasizes the expertise of the Commission within its rate-making mandate, including the statutory declarations that just and reasonable rates are questions of fact and Commission findings of fact within its jurisdiction are conclusive. The statutory recognition of the Commission's expertise

> in determining rates reinforces curial deference. The Commission is required to resolve and balance the economic interests of various constituencies, well illustrated by the parties to these proceedings, which gives its jurisdiction a polycentric quality, as termed by the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, *[1998] 1 S.C.R. 982*, *160 D.L.R. (4th) 193*, *226 N.R. 201* P36. The Commission's function is pragmatic and often robust.

64 The present case illustrates the Commission's pragmatic and robust function. The Commission's role was not, as Celgar would have it, restricted to the sole issue of determining whether the risk to BC Hydro ratepayers warranted the inclusion of the restrictions in section 2.5. It had to consider the possibility that the energy market could change and the fact that there was no self-generation policy in the FortisBC service territory. It also had to consider the practicalities of approving the New Agreement without section 2.5 in the absence of the agreement of BC Hydro, together with the effect on FortisBC of the New Agreement not coming into force.

65 In the Reconsideration Decision, the Commission stated that it made no error in fact or law in the Original Decision. Celgar says that the Commission did not specifically discuss why approving the New Agreement with Amended s. 2.5 (and continuing the net-of-load methodology until implementation of the generator baseline concept) did not constitute an error. Celgar also says that, as a result, the Commission did not follow its own test for reconsideration and that the Commission took irrelevant factors into consideration.

66 In my view, the Commission was endeavouring to explain in the Reconsideration Decision why it did not err in the Original Decision. It made reference to the fact that its decision was based on a forecast, and circumstances could change. The Commission also made reference to some of the policy considerations it took into account in deciding not to approve the New Agreement without section 2.5. It referred to its decision as an "intermediate solution". It referred to the debate over the sharing of benefits of self-generation and its goal to have a self-generation policy for the FortisBC service territory finalized. It thought that a reconsideration process would be "counterproductive". I am not persuaded that the Commission deviated from its own test for consideration or took irrelevant factors into consideration.

67 I turn briefly to Celgar's position that an error in the Original Decision was the Commission's approval of the New Agreement with Amended s. 2.5 when the amendment was introduced after the evidentiary record was closed. I agree with the Commission's reasoning in the Original Decision that it has the power to control its own processes (confirmed in s. 11 of the *Administrative Tribunals Act*), particularly when those processes relate to an intervener. BC Hydro did not introduce any evidence other than the amendment itself, and Celgar was given the opportunity to make submissions with respect to the amendment. At the hearing of the appeal, Celgar was not able to say what further evidence it would have wanted to introduce. Celgar would have had no complaint if the Commission had made the amendment itself (as Celgar had advocated at one stage). I see no error in the Commission finding no substance in Celgar's complaint of procedural unfairness.

68 In the Reconsideration Decision, the Commission stated that even if it had made an error in the Original Decision, the error had no significant material implications. The Commission did not expand on its statement, but it may have been referring to the prospect that the net-of-load methodology would have continued if BC Hydro had refused to waive the condition precedent in the New Agreement in the event the Commission approved the New Agreement without section 2.5.

69 Based on the reasons offered or which could have been offered in support of the Reconsideration Decision, I conclude that the Commission's finding that it did not err in the Original Decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Hence, the Reconsideration Decision was reasonable and should be afforded deference by this Court.

Conclusion

70 I would dismiss the appeal.

D.F. TYSOE J.A.
S.D. FRANKEL J.A.:— I agree.
G.J. FITCH J.A.:— I agree.

End of Document

Wier v. British Columbia (Environmental Appeal Board), [2003] B.C.J. No. 2221

British Columbia and Yukon Judgments

British Columbia Supreme Court

Smithers, British Columbia Ross J.

Heard: July 29 and 30, 2003.

Judgment: September 24, 2003.

Smithers Registry No. 12731

[2003] B.C.J. No. 2221 | 2003 BCSC 1441 | 19 B.C.L.R. (4th) 178 | 8 Admin. L.R. (4th) 71 | 4 C.E.L.R. (3d) 296 | 125 A.C.W.S. (3d) 443 | [2003] B.C.T.C. 1441

Between Josette Wier, petitioner, and Environmental Appeal Board and Minister of Forests of The Province of British Columbia, respondents

(51 paras.)

Case Summary

Pollution control — Environmental Legislation — Licensing or approval — Judicial review.

Application by Wier for judicial review of a decision by the respondent Environmental Appeal Board to issue a pesticide use permit to the respondent Minister of Forests. The permit authorized the Minister to use monosodium methane arsenate, MSMA, to control pests. The Board accepted medical evidence that the arsenic compounds in MSMA would have acute and chronic effects on the human body if ingested. However, the Board found no evidence of any such risk to workers applying MSMA under the terms of the permit.

HELD: Application allowed.

Considering the decision of the Board as a whole, it appeared that the Board took into account the evidence relating to general toxicity. However, the Board excluded from its consideration evidence relevant to the question of whether the risk it had identified was reasonable or unreasonable. Accordingly, the matter was remitted back to the Board to approach the question of unreasonable adverse effects by considering viable alternatives disclosed by the evidence.

Statutes, Regulations and Rules Cited

Canadian Charter of Rights and Freedoms, 1982, s. 7.
Environment Management Act, R.S.B.C. 1996, c. 118.
Pest Control Products Act, R.S.C. 1985, c. P-9.
Pest Control Products Regulation.
Pesticide Control Act, R.S.B.C. 1996, c. 360, ss. 1, 6, 6(1), 6(2), 6(3), 6(3)(a)(ii), 15, 15(7).
Pesticide Control Act Regulation, B.C. Reg. 319.81.

Counsel

T.R. Buri, Q.C. and R.J. Overstall, for the petitioner. E. Rowbotham, for the respondent Minister and for the Attorney General.

ROSS J.

INTRODUCTION

1 Pursuant to an application dated November 10, 2000, the Deputy Administrator, Pesticide Control Act, *R.S.B.C. 1996, c. 360*, (the "Act") issued a Pesticide Use Permit No. 402-582-01/03 (the "Permit") to the Minister of Forests, Morice Forest District (the "Permit Holder"). The Permit authorizes the Permit Holder to use Monosodium Methane Arsenate ("MSMA"), sold under the trade name "Glowon", to control Spruce Bark beetles and Mountain Pine beetle in the Morice Forest District and Tweedsmuir Provincial Park.

2 Bark beetles are small insects that kill mature trees by boring into the tree and laying eggs under the bark, in the phloem area. After the eggs hatch, the larvae mine the phloem area, cutting off the tree's supply of water and nutrients. Once the larvae mature, the beetles emerge and fly to neighbouring trees to lay their eggs and begin the cycle anew.

3 The Permit contained several conditions. Condition E authorized the Permit Holder to apply MSMA to individual Bark beetle infested trees using the injection method which involves injecting the pesticide into cuts made at the base of the tree. The pesticide is then transported up in the tree through the natural processes of moisture and nutrient flow.

4 Other conditions prescribed the rate of application, the total quantity of MSMA to be applied and the area of application. Several conditions dealt with the protection of water bodies and water used for domestic purposes and irrigation. Condition F provided for the applications to occur during the period of May 14, 2001 to October 31, 2003.

5 The petitioner, Josette Wier, appealed the decision to issue the Permit to the Environmental Appeal Board (the "Board"). The Board framed the issues on appeal as follows:

(a) Ms. Wier contended that the use of MSMA in accordance with the Permit would result in adverse effects on the environment and human health; and,

(b) Counsel for Ms. Wier also contended that the two-step test generally applied by the Board in determining whether there is an adverse effect as defined in the Act has been affected by the decision of the Supreme Court of Canada in 114957 Canada Ltee. (Spraytech, Societe d'arrosage) v. Hudson (Town), *[2001] 2 S.C.R. 241*, *[2001] S.C.J. 42*.

6 The Board, by reasons dated July 23, 2002, in Appeal No. 2001-PES-003(a), confirmed the decision of the Deputy Administrator to issue the Permit, subject to amendments to the Permit to reduce the total volume of MSMA approved for use by the equivalent of 57,500 trees and the removal of Tweedsmuir Provincial Park. The Board held at p. 19 of its decision, *[2002] B.C.E.A. No. 43*:

(a) the majority decision in Spraytech, supra, does not affect the legal test applied by the Board in pesticide appeals;

(b) the legal test is as set out in Canadian Earthcare Society v. British Columbia (Environmental Appeal Board) ("Earthcare") *(1987), 2 C.E.L.R. (N.S.) 254*, *[1987] B.C.J. No. 1747*.

7 The Board at p. 20 of its decision articulated that test as follows:

> The Board has considered the issue of adverse effect and whether it is reasonable in numerous past decisions. Recently, in Matz et al. v. Deputy Administrator, Pesticide Control Act, *[2002] B.C.E.A. No. 32* (Environmental Appeal Board, Appeal Nos. 2001-PES-005/006/007/011 and 2001-PES-010, May 29, 2002) the Board made the following findings which this Panel adopts regarding the test that must be followed:
>
> > The British Columbia Court of Appeal has ruled that the Environmental Appeal Board can consider a registered pesticide to be generally safe when used in accordance with the label (Canadian Earthcare Society... However, it is also clear that the fact that a pesticide is federally registered does not mean that it can never cause an unreasonable adverse effect. It is clear that the test for "unreasonable adverse effect" is site specific and application specific.

8 The Board ultimately granted the permit, albeit with amendments. Ms. Wier commenced these proceedings seeking judicial review of the decision.

ISSUE

9 The issue in this application for judicial review is whether the Board erred in its application of the test articulated in Earthcare, supra, by:

(a) improperly limiting its consideration of evidence concerning toxicity to evidence in relation to site specific considerations; and

(b) concluding that there was some risk but that the risk was not unreasonable without undertaking the appropriate analysis.

10 I have concluded for the reasons set out below that the Board did err in its application of the test and accordingly order the matter remitted to the Board for re-consideration.

LEGISLATION

11 Federal legislation requires registration of a pesticide under the Pest Control Products Act, R.S.C. 1985, P-9 and the Pest Control Products Regulation, *C.R.C. c 1253* before the pesticide can be manufactured, imported, sold, used or disposed in Canada. In addition, the federal legislation requires instructions for a pesticide's use and storage is included on its label.

12 The use of pesticides in the province is regulated under the Act and the Pesticide Control Act Regulation *B.C. Reg. 319/81*. Pursuant to Section 6(1) of the Act, no pesticide may be applied without a permit or approved plan. Pursuant to Section 6(3) of the Act, a permit may be issued under such terms as are considered appropriate, where the Administrator is satisfied that prescribed requirements are met and the application authorized will not cause an unreasonable adverse effect. Sections 6(1) to (3) read:

> Pesticide must be applied in accordance with permit or approved plan
>
> (1) Except as provided in the regulations, a person must not apply a pesticide to a body of water or an area of land unless the person
>
> (a) holds a permit or approved pest management plan, and
>
> (b) applies the pesticide in accordance with the terms of the permit or approved pest management plan.

(2) An application for a permit or the approval of a pest management plan must

(a) be made to the administrator,

(b) be in the form required by the administrator,

(c) contain the information prescribed by regulation and any other information required by the administrator, and

(d) be accompanied by the applicable fee established by regulation

(3) The administrator

(a) may issue a permit or approve a pest management plan if satisfied that

(i) the application meets the prescribed requirements, and

(ii) the pesticide application authorized by the permit or plan will not cause an unreasonable adverse effect, and

(b) may include requirements, restrictions and conditions as terms of the permit or pest management plan.

13 An adverse effect is defined in Section 1 of the Act as an effect that results in damage to humans to the environment.

14 Decisions of the Administrator made pursuant to Section 6 of the Act may be appealed to the Board pursuant to Section 15 of the Act. That section provides that on an appeal, the Board may conduct the appeal by way of a new hearing. Section 15(7) provides that:

On an appeal, the appeal board may

(a) send the matter back to the person who made the decision being appealed, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

STANDARD OF REVIEW

15 In considering the appropriate standard of review, the court is to adopt the pragmatic and functional approach described in Pushpanathan v. Canada (Minister of Citizenship and Immigration),[1998] 1 S.C.R. 982 in which the central inquiry in determining the standard of review is to determine the legislative intent of the statute creating the tribunal whose decision is being reviewed.

16 Four factors are relevant in determining the intent of the legislature:

a) the presence or absence of a privative clause or statutory right of appeal;

b) the tribunal's expertise relative to that of the reviewing court on the issue in question;

c) the general purpose of the statute and the particular purpose of the provision in question: and

d) the nature of the question - law, fact, or mixed law and fact

See Dr. Q v. College of Physicians and Surgeons of British Columbia, *[2003] S.C.J. No. 18*, *2003 SCC 19* at para. 26.

17 The proper focus of the reviewing court is on the relative expertise of the court and decision maker in relation to

the particular issue in question; see Barrie Public Utilities v. Canadian Cable Television Association, *[2003] S.C.J. No. 27*, *2003 SCC 28* at para. 12.

18 In the case at bar, there are no privative clauses and no statutory rights of appeal under the Act or the Environment Management Act, *R.S.B.C. 1996, c. 118*, which creates the Board. This factor is therefore neutral with respect to the level of deference.

19 There are three dimensions to evaluating the second factor: the tribunal's expertise; the reviewing court's expertise relative to the tribunal's; and the nature of the issue relative to the tribunal's expertise, see (Pushpanathan, supra, para. 33; Dr. Q, supra, para. 28).

20 The issue in this case is whether the Environmental Appeal Board erred in its articulation of the two-step legal test as required by s. 6(3)(a)(ii) of the Act as interpreted in Earthcare. This is a pure question of law. The Board does not enjoy greater expertise relative to the court with respect to this issue. Its factual expertise will not assist in the interpretation of the decision of the Court of Appeal in Earthcare. Thus, the second factor suggests that the appropriate standard is correctness.

21 With respect to the third factor, in my view, the purpose of the statute is to an extent polycentric in that it contemplates the consideration of numerous interests and the balancing of benefits and costs for many parties or interests. Again however, this aspect is, in my view, less engaged with respect to the issue on this application for judicial review; namely did the Board err in its interpretation of the test under Earthcare?

22 The final factor is the nature of the question. Less deference is generally associated with pure questions of law and in circumstances in which the determination has the potential to apply widely to many cases. The question here is a pure question of law. The petitioner has provided a brief of decisions of the Board in other cases. Review of these decisions shows that the issue of the Board's interpretation of the test is one that has the potential to apply to many other cases. Thus the final factor favours the standard of correctness.

23 In my view, having considered the relevant factors, the appropriate standard of review is that of correctness. This conclusion is consistent with the approach taken by Mr. Justice Tysoe in Beazer East, Inc. v. British Columbia (Environmental Appeal Board), *[2000] B.C.J. No. 2358*, *2000 BCSC 1698*.

ANALYSIS

Evidence of Toxicity

24 One of the issues in Earthcare, supra, was the Board's refusal in that case to consider evidence of toxicity on the basis of the assumption made by the Board that the process of federal registration for a pesticide and compliance with the authorized method of use generally provides an assurance of safety. Mr. Justice Lander compared the federal and provincial Acts, noting the absence of detailed provisions regarding the necessary scientific evidence in the provincial Act, stating at para. 11:

> The Federal Pest Control Products Act, 1968-69, c. 50 requires a pesticide to be federally registered before that pesticide can be sold or imported into Canada. Under the federal regulations a pesticide will only be registered after the applicant has submitted scientific evidence on the result of 13 separate tests (Pest Control Product Regulations, R. 9(2)). The Federal Act and regulations set out a comprehensive framework with respect to the evidence required before a pesticide can be registered. There are no similar provisions in the British Columbia Act. The British Columbia legislation merely states that a pesticide use permit will be granted unless the application of the pesticide would cause an "unreasonable adverse effect". The question arises whether the British Columbia Act would permit the Board to ignore the detailed tests required for a federal registration and to rehear the same evidence on toxicity already heard by the Federal Board? If this were the case, one would logically assume that the British Columbia Act would contain similar detailed provisions regarding the required scientific evidence as in the Federal Act.

25 He then concluded that the Board had not erred in its refusal to hear the evidence, stating at para. 12:

> Common sense dictates that the fact that a federally registered pesticide has undergone extensive testing must have some probative value. I have concluded that the Board did not commit a jurisdictional error by assuming a federally registered pesticide to be generally safe. It is important to bear in mind that the Board did not state that a federally registered pesticide could never cause an unreasonable adverse effect. The Board was willing to hear evidence on toxicity to the extent that the evidence showed that the specific site in question prevented safe application of the pesticide. They further heard evidence whether the proposed pesticide use was contrary to registration intent and restrictions or that the permit holder was unable to apply the pesticide safely.

26 The Court of Appeal upheld this aspect of the decision. Mr. Justice Taggart, speaking for the Court, stated at para. 18 of its decision:

> I agree with that. It is a correct interpretation, in my view, of what is inherent in the quotation I have made from the board's reference to the toxicity issue. It follows that I would reject the first ground of appeal advanced by the appellant.

27 The petitioner accepts that the test articulated in the Earthcare decision is the correct test to be applied by the Board. However, the petitioner submits that the Board has fallen into error by adopting as a conclusive presumption of law the conclusion that the use of a federally registered pesticide in accordance with the instructions will cause no adverse effect. The effect is that the Board will consider only evidence relating to site specific and application specific concerns.

28 In the petitioner's submission such a presumption is not required by the Earthcare decision and, moreover, is contrary to both the decision of the Supreme Court of Canada in Spraytech, supra, and to the precautionary principle.

29 The respondent contends that the Board complied with the Earthcare test. The respondent emphasizes the fact that the federal and provincial legislative regimes are complementary and that the province has chosen not to legislate in the area of general toxicity, leaving that area to the federal process. In such circumstances, the respondent submits that it is appropriate for the Board to refuse to consider evidence relating to general toxicity.

30 To my mind it is one thing to say that the Board, relying upon the federal registration process, does not err in refusing in a particular case to address evidence of toxicity, and another to say that it would err if it chose to consider such evidence. In other words, the decision in Earthcare that the Board did not fall into error failing to undertake an inquiry it was obliged to undertake, does not, in my view, mean that the Board is prohibited in every case from such an inquiry.

31 In my view the Board, in its discretion, is entitled to consider such evidence. It may well be that in the vast majority of cases there would be no reason for the Board to go beyond the fact of federal registration in relation to issues of general toxicity. However, there are situations in which consideration of evidence in relation to general toxicity of a pesticide that has received federal registration could be important in the analysis of possible adverse effects. One example would be where new evidence relating to toxicity that is not specific to the site in question, has become available only after the federal process was complete.

32 In my view, neither the language of the Act nor the decision of the Court in Earthcare would preclude the Board from considering such evidence in such a circumstance. The Act contains no language that would require the Board exclude from its consideration in all cases evidence relating to toxicity. The reasons of Lander J. provide examples of the kind of inquiry that the Board did undertake, but did not purport to provide an exhaustive list of permissible inquiries.

33 This interpretation of the test articulated in Earthcare is also consistent with both the decision of the Supreme Court of Canada in Spraytech, supra and with the precautionary principle.

34 The facts in the Spraytech case were that:

> The appellants are landscaping and lawn care companies operating mostly in the greater Montreal area, with both commercial and residential clients. They make regular use of pesticides approved by the federal Pest Control Products Act in the course of their business activities and hold the requisite licences under Quebec's Pesticides Act. In 1991 the respondent Town, located west of Montreal, adopted By-law 270, which restricted the use of pesticides within its perimeter to specified locations and for enumerated activities. The definition of pesticides in By-law 270 replicates that in the Pesticides Act. Under s. 410(1) of the Quebec Cities and Towns Act ("C.T.A."), the council may make by-laws to "secure peace, order, good government, health and general welfare in the territory of the municipality", while under s. 412(32) C.T.A. it may make by-laws to "regulate or prohibit the ... use of ... combustible, explosive, corrosive, toxic, radioactive or other materials that are harmful to public health or safety, in the territory of the municipality or within l km therefrom". In 1992 the appellants were charged with having used pesticides in violation of By-law 270. They brought a motion for declaratory judgment asking the Superior Court to declare By-law 270 to be inoperative and ultra vires the Town's authority. The Superior Court denied the motion, and the Court of Appeal affirmed that decision.

35 Madam Justice L'Heureux-Dube speaking for the majority, noted that environmental policy informed the legal inquiry. With respect to the significance of that policy she stated at 248-49:

> The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment. In the words of the Superior Court judge: "Twenty years ago, there was very little concern over the effect of chemicals such as pesticides on the population. Today, we are more conscious of what type of an environment we wish to live in, and what quality of life we wish to expose our children [to]" (*(1993), 19 M.P.L.R. (2d) 224*, at p. 230). This Court has recognized that [page 249] "[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment ... environmental protection [has] emerged as a fundamental value in Canadian society": Ontario v. Canadian Pacific Ltd., *[1995] 2 S.C.R. 1031*, at para. 55. See also Friends of the Oldman River Society v. Canada (Minister of Transport), *[1992] 1 S.C.R. 3*, at pp. 16-17.
>
> Regardless of whether pesticides are in fact an environmental threat, the Court is asked to decide the legal question of whether the Town of Hudson, Quebec, acted within its authority in enacting a by-law regulating and restricting pesticide use.
>
> The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity. La Forest J. wrote for the majority in R. v. Hydro-Québec, *[1997] 3 S.C.R. 213*, at para. 127, that "the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels" (emphasis added). His reasons in that case also quoted with approval a passage from Our Common Future, the report produced in 1987 by the United Nations' World Commission on the Environment and Development. The so-called "Brundtland Commission" recommended that "local governments [should be] empowered to exceed, but not to lower, national norms" (p. 220).

36 In dismissing the appeal L'Heureux-Dubé J. noted that the federal legislation is permissive rather than exhaustive and there is no operational conflict with the By-Law under consideration.

37 Her Ladyship further noted that the values reflected in international law help to inform the contextual approach

to statutory interpretation. She noted at 266-67 that the By-Law in question respected the precautionary principle:

> To conclude this section on statutory authority, I note that reading s. 410(1) to permit the Town to regulate pesticide use is consistent with principles of international law and policy. My reasons for the Court in Baker v. Canada (Minister of Citizenship and Immigration), *[1999] 2 S.C.R. 817*, at para. 70, observed that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review". As stated in Driedger on the Construction of Statutes, supra, at p. 330:
>
> > [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]
>
> The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle", which is defined as follows at para. 7 of the Bergen Ministerial Declaration on Sustainable Development (1990):
>
> > In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for [page267] postponing measures to prevent environmental degradation.
>
> Canada "advocated inclusion of the precautionary principle" during the Bergen Conference negotiations (D. VanderZwaag, CEPA Issue Elaboration Paper No. 18, CEPA and the Precautionary Principle/Approach (1995), at p. 8). The principle is codified in several items of domestic legislation: see for example the Oceans Act, S.C. 1996, c. 31, Preamble (para. 6); Canadian Environmental Protection Act, 1999, *S.C. 1999, c. 33, s. 2*(1)(a); Endangered Species Act, *S.N.S. 1998, c. 11, ss. 2*(1)(h) and 11(1).
>
> Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment" (D. Freestone and E. Hey, "Origins and Development of the Precautionary Principle", in D. Freestone and E. Hey, eds., The Precautionary Principle and International Law (1996), at p. 41. As a result, there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law" (J. Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in ibid., at p. 52). See also O. McIntyre and T. Mosedale, "The Precautionary Principle as a Norm of Customary International Law" (1997), 9 J. Env. L. 221, at p. 241 ("the precautionary principle has indeed crystallised into a norm of customary international law"). The Supreme Court of India considers the precautionary principle to be "part of the Customary International Law" (A.P. Pollution Control Board v. Nayudu, 1999 S.O.L. Case No. 53, at para. 27). See also Vellore Citizens Welfare Forum v. Union of India, [1996] Supp. 5 S.C.R. 241. In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action.

38 Thus, consistent with Spraytech, the precautionary principle, as articulated in that decision should help to inform the process of statutory interpretation and judicial review. In the circumstances of the case at bar, application of the precautionary principle would favour an interpretation that permitted the Board to consider evidence of toxicity beyond that limited to site specific and application specific concerns. An interpretation that precluded the Board from considering such evidence in any circumstance does not reflect the precautionary principle.

39 The next step is to review what the Board actually did in the case at bar with respect to the evidence of toxicity. The reasons of the Board do not make it entirely clear what approach they took to the question. On the one hand, the reasons contain several statements that suggest that the Board considered, incorrectly in my view, that it was required to consider only site and application specific evidence. For example:

> Ms. Wier expressed concern that toxic substances move through the environment once they have been applied. She is concerned that wild animals may be exposed to the arsenic. In particular, she spoke of

> mountain goats and woodpeckers. u>However, Ms. Wier had no evidence of site specific concerns arising out of the use of MSMA as authorized under the Permit. (p. 5, EAB decision) (emphasis added)
>
> The Board applies a two-step legal test in appeals of pesticide use permits and pest management plans issued under the Act. First, the Board determines whether the use of the pesticide in accordance with the permit or plan will cause an adverse effect on human health or the environment. If so, then the Board considers whether the adverse effect is unreasonable. The second step involves a risk-benefit analysis to determine whether the adverse effect is unreasonable, and includes consideration of alternative methods of pest control. The test is site specific. For example, the Board may consider evidence of whether the pesticide can be used safely at a particular site. (p. 9, EAB decision) (emphasis added)
>
> In Shuswap Thompson Organic Assn., *[1998] B.C.E.A. No. 24*, the appellant argued that the Board should consider the precautionary principle as a basis for rescinding three pesticide use permits. The Board stated:
>
> > It is well-established law that the Board can assume that a federally registered pesticide is generally safe...
> >
> > The test for "adverse effect", however, must be site specific and application specific - it must be shown that at a specific site the application of the herbicides by the applicant will cause damage to the environment. While there may be a presumption that if the pesticide issued in accordance with the label that there will not be an "adverse effect", an inquiry must be made into whether or not at the specific site, the particular applicant will be able to use the pesticide in accordance with the label directions. (p. 14, EAB decision) (emphasis added)

40 On the other hand, despite what it had to say about the site specific limitation to the scope of inquiry, in fact, the Board both heard and concluded that it accepted the evidence of Dr. Cullen relating to the question of toxicity. Dr. Cullen testified with respect to the acute and chronic effects on the human body of the arsenic compounds found in MSMA. It would appear, although that is not explicitly stated in the reasons, that this evidence formed part at least of the basis of the Board's conclusion at p. 22 that the Permit as issued, absent the amendments it imposed, created a risk "to the environment and workers who apply the MSMA". This suggests that the Board did take the evidence relating to general toxicity into account in its deliberations.

41 I have concluded that, considering the Reasons as a whole, the Board did consider the evidence of Dr. Cullen in its deliberations. The actual assessment of that evidence is a matter of fact that falls squarely within the Board's specialized jurisdiction. It is an area in which the Board is entitled to considerable deference from the court. In the result, I find no error with respect to the first aspect of the issue on review.

Two-Step Test

42 A second issue in Earthcare, supra, was whether the Board had been entitled to decline to consider alternative treatment methods and silviculture practices. On this issue Mr. Justice Lander concluded at para. 15 that where the Board finds some risk, it must, in order to determine whether the risk is reasonable or unreasonable, weigh the risk against the intended benefit. In that context, evidence of alternative methods and silviculture practice is relevant to the issue of reasonableness. Lander J. wrote at paras. 14-15:

> I suggest that the issue is not whether after finding there to be no unreasonable adverse effect can the Board consider evidence of silvicultural practices and alternative methods but instead the issue is whether or not in determining the unreasonableness or reasonableness of an adverse effect can the Board consider evidence of alternative methods and silvicultural practices.
>
> Should the Board find an adverse effect (i.e., some risk) it must weigh that adverse effect against the intended benefit. Only by making a comparison of risk and benefit can the Board determine if the anticipated risk is reasonable or unreasonable. Evidence of silvicultural practices will be relevant to measure the extent of the anticipated benefit. Evidence of alternative methods will also be relevant to the issue of reasonableness. If the same benefits could be achieved by an alternative risk free method then surely the use of the risk method would be considered unreasonable.

43 Lander J. went on to conclude at para. 17 that in the case before him, the Board had concluded that there was no evidence of any adverse effect and therefore was not required to consider alternative methods and silviculture practice because the question of reasonableness did not arise. Lander J. held at paras. 16-17:

> The Board erred in holding that the evidence of silvicultural practices and alternative methods was outside its jurisdiction. However, the issue of silvicultural practices and alternative methods would only be relevant to determine the reasonableness of any adverse effect. If the Board found no adverse effect there would be no need for the board to hear evidence on silvicultural practices and alternative methods.
>
> On the facts of the case at hand, the Board found no evidence of any adverse effect. The petitioner presented no evidence to rebut the Board's assumption that a federally registered pesticide was generally safe. Therefore, although the Board committed a jurisdictional error, that error did not affect its decision. See Swist et al. v. Alberta Assessment Appeal Board *[1976] 1 W.W.R. 204*. This court has the discretion to refuse to grant certiorari notwithstanding the Board's jurisdictional error.

44 In Earthcare, at the Court of Appeal, *(1988), 3 C.E.L.R. (N.S.) 55*, *[1988] B.C.J. No. 3109*, Mr. Justice Taggart, speaking for the Court, concluded that Mr. Justice Lander had stated the test correctly. However, the Court concluded that the Board had in its reasons concluded that there were adverse effects, but that these were not unreasonable. In the circumstances, the Board fell into error by refusing to address the evidence with respect to alternative methods and silviculture practices. In the result, the appeal was allowed and the matter remitted to the Board in order that it could approach the question of unreasonable adverse effect taking into consideration the viable alternatives as disclosed by the evidence. At paras. 23-27, Mr. Justice Taggart wrote:

> So far, I agree with the Chambers Judge. I think the analysis which the Judge made is a proper one and the statement of the issue is also correct. However, immediately following the passage which I set out above appears this sentence:
>
> > "On the facts of the case at hand, the Board found no evidence of any adverse effect."
>
> It is to be noted that the Judge makes no reference to the word "unreasonable" coupled, as I think it must be, with the words "adverse effect". That is the language of s. 6 of the statute and I think it is in that context that one must consider this second ground of appeal.
>
> Returning for a moment to the reasons of the board, it is apparent to me from the first paragraph which I have quoted that the board considered that while there were adverse effects on wildlife and hence, in my view, on the environment, it did not consider those adverse effects to be unreasonable.
>
> Applying the analysis made by the Chambers Judge, which I have approved of, it seems to me it was error on the part of the board to eliminate from its consideration a viable alternative of control, including silvicultural methods. The result is that, in my view, the trial Judge erred in concluding that there was no evidence of any adverse effect. It seems to me inherent in the reasons of the board that they found adverse effects. They went on however to say, as the language of the Act, in my view, requires them to do, that such adverse effect as there was was not unreasonable. However, they eliminated from their consideration in reaching that conclusion the possible viable alternatives to the use of the pesticide Roundup.
>
> The result is that on this ground I think the appeal must be allowed and the matter remitted to the Appeal Board in order that it may approach the question of unreasonable adverse effect taking into consideration the viable alternatives as disclosed by the evidence.

45 In the case at bar, the petitioner submits that the Board fell into the same error as the Board in Earthcare; namely, it found some adverse effect in that, to use the language of Lander J. it found some risk, but concluded that that adverse effect was not unreasonable without considering the evidence of Dr. Partridge and Dr. Safranyik. In so doing it failed to follow the second step of the two-step test articulated in Earthcare. That is to say, the Board reached a conclusion with respect to the anticipated risk without a proper consideration of the anticipated benefits including consideration of silviculture practices and alternative methods.

46 The respondent submits that, when the decision of the Board is read as a whole, it is evident that notwithstanding the language of the finding, the Board did consider all the evidence and both aspects of the test articulated in the Earthcare decisions.

47 The Board's reasons state the following at p. 20-22:

> The Panel accepts the uncontroverted evidence of Dr. Cullen that the arsenic compounds found in MSMA will have acute and chronic affects on the human body if they are ingested or otherwise introduced into the human body. However, the Panel is not satisfied that any evidence has been put forward that would lead to the conclusion that the application of MSMA under the Permit poses such a risk to workers who apply this pesticide.
>
> The Panel accepts the evidence of Mr. Nakashoji that contractors that apply MSMA are required to follow the label and the terms of the Permit when applying MSMA. In particular, the Panel notes that the safety equipment required by the Ministry when applying MSMA includes unlined rubber gloves, face shields (avoid splashing and skin exposure), and rain gear. It also requires water and soap to be on site in case of exposure. Further, the Panel notes Dr. Cullen's evidence that MSMA does not pose a risk of dermal exposure as it will not be absorbed through the skin. Additionally, the Panel notes that any person applying MSMA must be under the direct supervision of a person who is a Certificated Pesticide applicator in British Columbia and must be inn visual or auditory contact at all times. The Panel finds that the safeguards that have been placed around the application of MSMA under the Permit and by the Ministry preclude any unreasonable adverse risk to workers from the application of MSMA.
>
> Ms. Wier expressed concern that the application of MSMA would move through the environment and cause a risk to wild animals such as mountain goats or woodpeckers. However, she provided no direct evidence of how such a risk could occur. No evidence was provided that MSMA, when properly applied would cause an external risk to any animals.
>
> Further, the Panel notes that the terms of the Permit provide generous setbacks to waterbodies and sources of domestic water. In addition, the Technical Report prepared by the Respondent states that, "No studies have shown that water courses are contaminated following standard hack and squirt application." The Report goes on to say that, "Animals that lick numerous tree trunks or the ground, with drips of MSMA, could possibly consume harmful quantities of the pesticide. However, such exposure can be prevented y proper and careful application by trained, certified applicators." The Panel finds that there is no evidence that when MSMA is properly applied that it will cause any unreasonable risk to wild animals. Indeed, as with all pesticides, care must be taken to ensure that exposure is directed at the target only. The application of MSMA is no different.
>
> Ms. Wier further expressed concern about the exposure of MSMA to children. However, no evidence was led in this regard, except that children exposed to contaminants may be susceptible to greater risk of harm. In this instance, there is no indication that children will be exposed to MSMA under the terms of this Permit.
>
> Ms. Wier also stated her concern that the volumes of MSMA allowed under the Permit were excessive. The Panel notes that the Permit Holder applied for and received authorization to apply MSMA to 150,000 trees in the District and Tweedsmuir Park. The Panel further notes that Mr. White's evidence was that only 20,000 trees received MSMA treatment in 2001. The Panel also notes Mr. Nakashoji's evidence that, due to budgetary restrictions, less trees will receive treatment in 2002 then did so in 2001. The Panel also notes that no treatment will now be made to trees in Tweedsmuir Park in spite of the fact that treatment of trees in the northern vicinity of the park were clearly contemplated in the permit application which was later reflected in the Permit.
>
> The Panel finds that the Permit, as drafted, will allow the application of MSMA on approximately 130,000 trees during 2002 and 2003, as only 20,000 trees have been treated to date in addition to any trees that were treated for spruce bark beetles this past spring. Additionally, if less than 20,000 trees were treated in 2002, as is contemplated, this would allow the Permit Holder to treat 110,000 trees in 2003 over an area

> that is smaller than the one that is permitted. The Panel finds that this is excessive and could lead to harmful results. In particular, there is a limited time frame for the application of MSMA. Care must be taken when applying this pesticide. If a treatment program were undertaken that is more than double the size of the one that was considered by the Respondent when he issued the three-year Permit, there is a greater chance of mistakes and risk to the environment and workers who apply the MSMA. The Panel finds this risk to be unreasonable. Even if it is not a risk, it is unnecessary in the circumstances.
>
> With these amendments, the Panel is satisfied that the application of MSMA under the Permit will not cause an unreasonable adverse affect. Under these circumstances it is unnecessary to review the second part of the test to determine if the same benefits could be achieved through alternate risk free methods. That being the case, it is unnecessary to further consider the very helpful evidence that was given by Dr. Partridge and Dr. Safranyik.

48 In my view, the Board, as evident from the passages set out above, did find that there was an adverse effect in the sense of the term as used by Lander J. in Earthcare, "some risk" (supra at para. 15). The Board then took steps to make this risk of adverse effects reasonable through modification of the terms of the Permit. It then reached the ultimate conclusion that with these modifications there is no unreasonable adverse effect. However, the Board in undertaking this analysis did not consider the evidence of Dr. Partridge and Dr. Safranyik.

49 I agree with the petitioner in so doing the Board fell into the same error as the Board in Earthcare. It failed to apply the second step of the two-step test articulated in Earthcare. The Board excluded from its consideration evidence relevant to the question of whether the risk it had identified was reasonable or unreasonable.

50 Accordingly, the matter must be remitted to the Board so that it may approach the question of unreasonable adverse effects taking into consideration viable alternatives disclosed by the evidence.

ARGUMENT WITH RESPECT TO THE CHARTER

51 In the application for judicial review the petitioner made an argument, not made before the Board, based upon section 7 of the Charter. With respect to the application for judicial review, notice was given and no objection taken by the respondent to proceeding on that issue. However, the answers to constitutional questions are of significance to the community at large. Because the matter was not raised before the Board, the record is sparse with respect to questions relevant to the constitutional issue. Particularly in light of the disposition of this application for review on other grounds, I have concluded that a decision with respect to the constitutional question raised should await another case where there is a proper evidentiary foundation.

ROSS J.

CHASTAIN et al. v. BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

British Columbia Supreme Court, McIntyre, J. December 28, 1972.

I. G. Waddell and *D. W. Mossop*, for plaintiffs.
R. D. Strilive, for defendant.

McINTYRE, J.:—The plaintiffs sue on behalf of themselves and all others in residential premises being required to pay security deposits or who have already paid such deposits to the defendant for the supply of gas and electric power. The plaintiff Karen Chastain is a student, the plaintiff Rankin is a student and the plaintiff Waddell was, at the commencement of these proceedings, unemployed, but is now employed as a detention home supervisor. All of the named plaintiffs are young, though precise evidence of age was not given, and although Karen Chastain and her husband jointly own some real property in Mission, British Columbia, all are in modest, if not impecunious, circumstances. The defendant is a Crown corporation incorporated under the provisions of the *British Columbia Hydro and Power Authority Act*, 1964 (B.C.), c. 7. By section 14(1) (*a*) of the Act the defendant is empowered to generate, manufacture, distribute and supply power. The word "power" as defined in s. 2 of the Act includes electricity and gas. It was alleged that the defendant has an absolute monopoly in British Columbia for the supply of gas and electricity. This was denied and it was asserted that other agencies in British Columbia could also supply gas and electricity. It was conceded, however, and I find as a fact that in the area in which the plaintiffs sought the delivery of services from the defendant and, indeed, for the majority of power users in British Columbia the defendant does have an absolute monopoly and there was no other source to which the plaintiffs could turn for the supply of gas and electricity.

Karen Chastain, one of the plaintiffs, is a student at Simon Fraser University and a part-time waitress. She and her husband lived at Mission, British Columbia, in 1968. They had a power account with the defendant there in the husband's name. The husband was also a student in receipt of some form of military pension from the United States Government. They were not asked for a security deposit in Mission and there is no suggestion that when that account was closed there were unpaid bills for service. They moved to 4429 James St. in Vancouver about October 1, 1971. Power and gas were already connected, presumably in the name of an earlier occupant, and

she, her husband and three others (two of whom left when there was a threat of a power cut-off) had the use of a power supply from October 1, 1971. She applied in her own name for the power connection and signed the defendant's application form in early November, 1971. The exact date is not clear but the application which was mailed to the defendant bears a postmark of November 9th. This application and others signed by the other plaintiffs bear above the signature of the applicant the following words:

> AGREEMENT: The undersigned agrees to take and pay for electricity and/or gas from the British Columbia Hydro and Power Authority in accordance with this application and the rates, terms, and conditions contained in the Authority's electric and/or gas tariff(s) as amended from time to time and available for inspection at any general office of the Authority.

By letter dated November 30, 1971, the defendant wrote to the plaintiff in the following terms:

> As provided in the tariffs of the British Columbia Hydro and Power Authority, a Security Deposit in the amount of $75.00 is required on the above account.
>
> We would appreciate receiving payment in this office on or before 7 December 1971.
>
> Please mark your cheque or money order "For Security Deposit Only".

This letter was duly received but Mrs. Chastain did not pay the $75. On December 8, 1971, the defendant wrote a second letter in which it stated that if the $75 was not paid by December 20, 1971, service would be discontinued without further notice. The plaintiff telephoned the defendant's office and arranged for an extension of time until the end of December, 1971, and on or about December 20th or 21st wrote to the defendant in the following terms:

> In reference to your letters of November 30th and December 8th 1971, I would like to know why I have to pay this deposit. I would also like to know what are "the tariffs of the British Columbia Hydro and Power Authority" as they affect me in your demand for a security deposit.
>
> I would appreciate an early reply to my letter since my hydro will be cut off on December 28th.

This letter drew a reply dated December 29, 1971:

> In reply to your enquiry regarding the necessity for a Security Deposit for a utility account, we trust the following information will clarify the matter.
>
> Obtaining a Security Deposit to guaratee payment of a utilities account is a common business practice exercised by most utility companies on the North American continent. The Electric and Gas Tariff available for public inspection at the Hydro Authority's head

office at 970 Burrard Street, Vancouver, states: "Any customer may at any time be required by the Authority to deposit and to maintain with the Authority a Security Deposit in cash or its equivalent".

You may establish a good payment record with the British Columbia Hydro and Power Authority by paying your bills promptly for two years. At the expiry date of such time, and upon request, a review of your account will be undertaken with the view to refunding your Deposit if terms of payment have been met.

We would appreciate receiving payment of the $75.00 Security Deposit in our office by the 17 January 1972, after which time the service would be subject to disconnection without further notice.

The deadline of January 17, 1972, passed with no interruption in service and these proceedings were commenced on January 26, 1972. Mrs. Chastain then stood in peril of having her power cut off at the date of the commencement of these proceedings.

The plaintiff Rankin was at all relevant times a student at Simon Fraser University. He and three or four other students occupied the residential premises at 1139 E. 13th Ave. in Vancouver from September 14, 1971, to about the end of May, 1972. On occupation, there was an existing power connection which he and his companions used. He paid at least one bill rendered for service while the account remained in the former name and there is no suggestion that any bills for service during his period of occupancy went unpaid. He applied for service in his own name by filling out the company's form of application on or about November 6, 1971, and at or about that time received a demand from the defendant for a security deposit in the amount of $60. He could not pay because he did not have the money. When the defendant insisted on payment or termination of power service, he procured the money from his father and paid the deposit on December 7, 1971. On his departure from that address in May or June, 1972, he received the deposit back less the amount of a bill covering services up to the date of his departure from the premises.

The plaintiff Waddell occupied residential premises at 2187 York Ave., Vancouver, in December, 1971. He took over from an earlier tenant who had an account with the defendant and he made use of the service. He applied for service from the defendant in late December, 1971 after using the power for some time. He found there was an unpaid account in the sum of $43 for service rendered to his predecessor. He did not want to have trouble with the defendant and, having the money at that time, he paid this old account of $43. He did not say that he had been required to pay it by the defendant but he feared power interruption if it was not paid. He also paid $27 for

power supplied to him and was then faced with a demand for a security deposit of $50. On December 30, 1971, he paid $25 towards the $50 security deposit. Later he was informed that if he did not pay the remainder of the security deposit his power would be cut off. Again there is no suggestion that any account rendered to him was unpaid.

Witnesses were called for the defendant who gave evidence of the system used by the defendant in requiring residential security deposits including the basis upon which the persons from whom deposits are demanded are selected. The policy of the defendant is set forth in the Gas and Electrical Tariffs made, purportedly, under the powers contained in s. 57 of the *British Columbia Hydro and Power Authority Act, 1964*, which gives a general power to make Regulations. These tariffs provide that any customer may be required at any time to deposit and maintain a security deposit in cash or its equivalent in an amount not less than the estimated billing for two months or $10, whichever sum is greater. They also provide that if the customer's bill is in arrears the defendant may apply the security deposit in whole or in part in payment of the bill, but the right of the defendant to cut off power in the event of non-payment is specifically reserved, notwithstanding the furnishing of the deposit. The Regulations also provide for the return of the deposit after the final bill is paid.

According to the evidence, on January 31, 1972, the defendant had some 620,000 residential electrical customers and some 180,000 residential gas customers. In the year 1971, 19,982 customers out of an estimated 265,000 new accounts were required to furnish security deposits. Some 23,624 deposits were held by the defendant on December 31, 1971, and on that date they totalled in value $1,041,443. These figures covered all types of accounts, commercial, industrial and residential. It was said that it was not possible to segregate the residential accounts but some of these funds would involve residential security deposits and one of the defendant's officers estimated that 25 to 40 residential applicants per day would be required to furnish deposits. These funds form part of the cash resources of the defendant and are used by the defendant. A record, of course, is kept and the books of the defendant show the deposits as a liability to individual depositors but no interest is paid upon them.

It was said that security deposits were necessary in order to reduce losses attributable to unpaid accounts. Evidence was given in an effort to show that where the practice of requiring deposits was suspended in one city for a period of time, the

rate of loss due to unpaid bills increased. This evidence was attacked by the plaintiffs as being valueless and I find it impossible to base any finding upon this evidence because of its equivocal nature. In any event, the rate of loss on residential accounts was given as .20% of the total billed for 1972 and whether this rate is increasing or decreasing and whether it has increased or decreased because of the presence or absence of security deposits, there can be no doubt that it is a very small rate of loss indeed. I refer to this evidence because it affords some background for this case. It does not seem to me, however, to be of great significance since the issue before me concerns the legality of the imposition of security deposits and must be decided without reference to the wisdom of their use from an economic point of view.

Security deposits are required of poor credit risks, that is, people who the defendant considers might not pay. No deposit is required of a person who is a home owner or who has a previously established payment record with the defendant or who can show steady employment. If a person does not fit any one or more of these categories, he or she may be faced with a demand to furnish a security deposit. The persons from whom a deposit is demanded are chosen at the discretion of the officers of the defendant and failure to pay deposits can lead to termination of service.

Deposits can be reclaimed after the account is closed and the final bill paid or after one year with a good payment record or where a credit record has been established with the defendant by other means. It is clear that the defendant has carried out a policy of requiring security deposits as a condition of service or of continued service from a section of the community selected by the defendant on a consideration of financial reliability. Evidence was given of demands for deposits from other persons not named plaintiffs and of the actual cutting off of power in at least one case when a deposit was not paid.

The plaintiffs seek certain declarations to the effect that the defendant has no valid authority to require the posting of security deposits and for a return of the money so deposited and for an injunction against the requiring of further deposits.

In the pleadings the defendant raised the question of the status of the plaintiffs and claimed that the named plaintiffs had no status to sue personally or as representatives of the class referred to in the pleadings. At the trial the defendant moved to strike out the plaintiffs' proceedings in a prelimi-

nary motion upon this basis. Argument was heard on the motion and judgment reserved and the case was heard on its merits.

The defendant argued that the policy of requiring security deposits is one which applies to the whole population and affects the whole population because any member of the public could be required to furnish a deposit by falling into any of the categories referred to above. No individual, then, it was said, has any right to bring a suit because in its nature the matter is a public one. To bring such proceedings the plaintiff must have a special direct interest in the matter going beyond that of the public generally and this, it was contended, the plaintiffs do not have. Furthermore, the plaintiffs do not have any right to act or purport to act for a class since the members of the class, even if ascertained or ascertainable, have no such special interest which would enable them to sue individually on their own. To this the plaintiffs reply that the three named plaintiffs and all in like case clearly have a special and direct interest which gives them the right to sue. They have been selected from the public at the discretion of the defendant and have been required to pay, or have been threatened with a loss of power service in the event of non-payment, a sum of money not required of others and thus they have a direct interest separate and distinct from any interest in the matter held by the public at large.

The defendant's contention was based on such authorities as *Smith v. A.-G. Ont.*, [1924] 3 D.L.R. 189, 42 C.C.C. 215, [1924] S.C.R. 331; *Jamieson et al. v. A.-G. B.C.* (1971), 21 D.L.R. (3d) 313, [1971] 5 W.W.R. 600; *Cowan v. Canadian Broadcasting Corp.* (1966), 56 D.L.R. (2d) 578, [1966] 2 O.R. 309, and *Burnham v. A.-G. Can.* (1970), 15 D.L.R. (3d) 6, 74 W.W.R. 427. From these authorities the law applicable to this objection emerges and is clearly stated in the *Cowan* case, *supra*, by Schroeder, J.A., at p. 580, in the following terms:

> A plaintiff, in attempting to restrain, control, or confine within proper limits, the act of a public or *quasi*-public body which affects the public generally, is an outsider unless he has sustained special damage or can show that he has some "special interest, private interest, or sufficient interest". These are terms which are found in the law of nuisance but they have been introduced into cases which also involve an alleged lack of authority. Therefore, in an action where it is alleged that a public or *quasi*-public body has exceeded or abused its authority in such a manner as to affect the public, whether a nuisance be involved or not, the right of the individual to bring the action will accrue as it accrues in cases of nuisance on proof that he is more particularly affected than other people.

Leave to appeal from this judgment to the Supreme Court of Canada was refused. This statement is entirely consistent with what I take to be the leading case on the point in Canada, *Smith v. A.-G. Ont.*, *supra*.

The plaintiffs contend that they do have such a special interest shared in their submission by members of the class they represent. They say there is nothing hypothetical about their situation. They have been subjected to demands for money and faced with a harsh penalty, that of the loss of power service if they do not comply and pay. Two of the named plaintiffs and certain members of the class they seek to represent have been compelled to pay money and some members of the class have had their power discontinued as a result of non-payment. If it can be said in respect of the plaintiffs Rankin and Waddell that the case is now academic since they have terminated their power connections and received a return of their deposits, it cannot be so said of the plaintiff Chastain who still faced, at the date of the commencement of these proceedings, the possibility of a power cut-off because of her refusal to pay the security deposit. This is not a situation faced by the public at large. This is a problem faced by some members of the public only and those who are compelled to pay these deposits or suffer the consequence of non-payment have suffered a special injury and damage beyond that suffered by the community at large and they have thus acquired a status to sue.

With this argument I agree. The words used by Duff, J., in the *Smith* case, *supra*, at pp. 191-2, in distinguishing the case of *Dyson v. Attorney-General*, [1911] 1 K.B. 410, and *Burghes v. Attorney-General*, [1911] 2 Ch. 139, from the case then before him may also be applied to distinguish the facts in the case at bar from the *Smith* case. He said:

> The Finance Commissioners, having certain strictly defined powers by statute, delivered to the plaintiffs a list of questions with a peremptory demand that they should be answered within a nominated time, and the notice contained an intimation, which amounted to a threat, that, unless the demand was complied with, proceedings would be taken to recover the penalties authorized by the statute under which they professed to act. The time nominated was less than the time permitted by the Act; the answers demanded were not answers which the Act authorized the Commissioners to require; and the demands therefore were illegal demands. These notices had been sent broadcast over the country under the authority of the Commissioners, and it may be added that the penalties to which the threat referred were penalties recoverable in the Supreme Court of Judicature, at the instance of the Attorney-General. There was in each case a demand actually made by the Finance Commis-

sioners, professing to act under the authority of statute, a demand which they were not entitled to make, accompanied by a threat that if the illegal demand were not complied with the person to whom the notice was addressed would be subjected to proceedings at the suit of the Attorney-General for penalties.

Two points should be noted in relation to these authorities: first, there was no decision upon a hypothetical state of facts, and second, the demand in each case was a personal demand and an illegal attempt to constrain the plaintiff personally by an illegal threat addressed to him as an individual. These points appear, superficially at all events, to mark rather important distinctions between the circumstances of the decisions cited and those of the case now under appeal. As to the penalties, the appellant was subjected to no actual threat and no actual risk; only if the liquor ordered were actually shipped, that is to say, only in a contingency which has not happened, could the appellant be put in jeopardy.

In the case at bar there is no hypothetical state of facts and the demand made for a deposit is actual and personal. In my view, the case at bar falls into the same category as the *Dyson* case, *supra*, and the plaintiffs have the status to approach the Court for a determination of the legality of the demands made upon them and of which they complain.

It was objected by the defendant but not strenuously that this was not a case which the plaintiffs could bring as a class or representative action. Little authority was referred to, but in my view this case does not differ in this respect from *Alden v. Gaglardi et al.* (1970), 15 D.L.R. (3d) 380, where Dohm, J., in this Court allowed the bringing of a class action. This case went on appeal to the British Columbia Court of Appeal [16 D.L.R. (3d) 355, [1971] 2 W.W.R. 148] and to the Supreme Court of Canada [30 D.L.R. (3d) 760, [1973] 2 W.W.R. 92] and in neither appellate Court was any adverse comment made upon the class aspect of the action. In my view, the plaintiffs and the people they seek to represent form a group having the same interest in the cause and the action is well founded in accordance with O. 16, r. 9 of the Rules of the Supreme Court.

The plaintiffs argue that the defendant, as a public utility, is bound to provide its service to all who seek it as a matter of law and not of contract, charging only a reasonable price for such services and treating all consumers equally. To require some consumers to provide security deposits and not others is to make an unlawful distinction between consumers. It is also contended that if power is supplied by the defendant on a contractual basis, then such contract requiring, as it does, a security deposit, is harsh, unconscionable and inequitable and con-

trary to the provisions of the *Consumer Protection Act*, 1967 (B.C.), c. 14.

The defendant contends that it is not a public utility but a super power authority created by statute for a special purpose and not bound by the Statutes of British Columbia and the general law relating to public utilities. Counsel for the defendant at trial conceded that if the defendant was a public utility its defence would fail but insisted that the defendant, because of the general terms of its statute and particularly the provisions of s. 53 [am. 1968, c. 26, s. 81(*a*)] and s. 53A [enacted 1966, c. 38, s. 8] was exempt from the provisions of the *Public Utilities Act*, R.S.B.C. 1960, c. 323, and the general law governing utilities.

To the claim under the *Consumer Protection Act, 1967* there is a short answer. Sections 53 and 53A of the *British Columbia Hydro and Power Authority Act, 1964*, effectively put the defendant beyond the reach of that statute and no effect may be given to that argument.

Turning to the question of the nature of the defendant, I cannot give effect to the argument that it is not a public utility. The mere fact that the defendant is not subject to the provisions of the *Public Utilities Act* does not alter its essential character. It partakes so much of the nature of a public utility that it must be amenable to the law governing public utilities. For the great majority of the people of British Columbia and for all of the plaintiffs joined or represented in this action, the defendant has a monopoly on the supply of gas and electricity. It is clear from the statute that it was intended to have such a monopoly and it is also clear that in relation to the public it is a public utility. To accede to the defendant's argument and find otherwise would be to hold that the Legislature, in passing the *British Columbia Hydro and Power Authority Act, 1964*, intended to create a body with a monopoly on the generation and distribution of power for the greater part of the Province of British Columbia with an unfettered discretion to deliver service on differing terms and conditions to different members of the public and even to withhold service at its own discretion from parts of the public. I cannot find, in the language of the statute, any such intention. While the defendant is not subject to the provisions of the *Public Utilities Act*, it is to be noted that s. 53A of the defendant's own statute provides that it shall be deemed to have been granted a certificate of public convenience and necessity under the *Public Utilities Act*. Reference to s. 12 [am. 1971, c. 58, s. 14(2)] of the *Public Utilities Act* dealing

with such certificates, makes it clear that one of the purposes of the certificate is to provide for the protection of the public interest and the certificate is given to the recipient in its character as a public utility with the interest of the public in mind. The fact that the defendant's statute deems such a certificate to have been given strengthens my view that it was intended to create a public utility for the public service. I find that the defendant is a public utility and amenable to the general law relating to public utilities, notwithstanding the fact that the particular provisions of the *Public Utilities Act* do not apply to it.

The obligation of a public utility or other body having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public has long been clear. It is to supply its product to all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers. The great utility systems supplying power, telephone and transportation services now so familiar may be of relatively recent origin, but special obligations to supply service have been imposed from the very earliest days of the common law upon bodies in like case, such as carriers, innkeepers, wharfingers and ferry operators. This has been true in England and in the common law jurisdictions throughout the world. In *Munn v. Illinois* (1876), 94 U.S. 113, in the Supreme Court of the United States, the historical roots of this principle were examined and they have been applied in the United States. In Canada the law has followed the same path. In *St. Lawrence Rendering Co. Ltd. v. Cornwall*, [1951] 4 D.L.R. 790 at p. 804, [1951] O.R. 669, Spence, J., then of the Ontario High Court, said:

> That a public utility was at common law compelled to treat all consumers alike, to charge one no more than the others and to supply the utility as a matter of duty and not as a result of a contract, seems clear: *A.-G. Can. v. Toronto* (1893), 23 S.C.R. 514; *Scottish Ont. & Man. Land Co. v. Toronto* (1899), 26 O.A.R. 345; *Hamilton v. Hamilton Distillery Co.* (1907), 38 S.C.R. 329; 51 Corp. Jur., para. 16.

This statement is well rooted in authority. In *A.-G. Can. v. Toronto* (1893), 23 S.C.R. 514, the question arose whether a municipal by-law fixing a higher rate for the supply of water to non-taxpaying consumers than that charged taxpayers was valid. It was held invalid and Strong, C.J., said at pp. 519-20:

> A good deal has been said in argument, and some allusion was also made to it in the judgments below, about the reasonableness of charging differential rates against persons not paying taxes. I am

unable to recognize any force in this argument. The water-works were not constructed for the benefit of the ratepayers alone, but for the use and benefit of the inhabitants of the city generally, whether tax-payers or not. The provision embodied in section 480, subsection 3 of the Municipal Act (which is referred to above) has a most important bearing upon this. That provision makes it a duty obligatory upon the city to furnish water to all who may apply for it, thus treating the corporation not as a mere commercial vendor of a commodity but as a public body entrusted with the management of the water for the benefit of the whole body of inhabitants, and compelling them as such to supply this element, necessary not merely for the private purposes and uses of individuals but indispensable for the preservation of the public health and the general salubrity of the city. It must therefore have been intended by the legislature that the water was to be supplied upon some fixed and uniform scale of rates for otherwise the city might, by fixing high and exorbitant prices in particular cases, evade the duty imposed by this section. In other words, the city, like its predecessors in title the water-works commissioners, is in a sense a trustee of the waterworks, not for the body of rate-payers exclusively but for the benefit of the general public, or at least of that portion of it resident in the city; and they are to dispense the water for the benefit of all, charging only such rates as are uniform, fair and reasonable. This obligation is to be enforced by subjecting the by-laws indispensable for the legal enforcement and collection of rates, and which the city council have power to pass, to a judicial scrutiny in order to ascertain whether they comply with the conditions which, as before stated, it is a fair implication from the statute they were intended to be subjected to, and also whether they conform to the requisites essential to the validity of all municipal by-laws in being, so far as the power to enact them is left to implication, consistent with public policy and the general law uniform in operation, fair and reasonable.

In *City of Hamilton v. Hamilton Distillery Co.* (1907), 38 S.C.R. 239, discrimination between different kinds of manufacturers was held unlawful in the supply of water. Other authorities in New Zealand such as *McLean v. Municipal Council of Dubbo*, [1910] N.S.W.R. 911, and *Wairoa Electric-Power Board v. Wairoa Borough*, [1937] N.Z.L.R. 211, speak to the same effect and these principles are declared to be applicable in the United States in 73 *Corp. Jur. Sec.*, pp. 999-1001, para. 7. It is of interest as well to note here that in the American case of *Town of Wickenburg v. Sabin* (1948), 200 P. 2d 342, 68 Arizona Reports 75, security deposits of the kind imposed in the case at bar were held to be unlawful. There are American authorities to the contrary but the general trend of American authority appears to be consistent with the statement of Spence, J., quoted above. It follows that in the Province of British Columbia the defendant, as a public utility, must treat all residential consumers alike. To require some consumers to furnish a deposit for power to be supplied

in the future as a condition of service or continued service and not to require the same deposit from all constitutes unequal treatment of consumers and is unlawful in the Province of British Columbia. It should be noted that this question was dealt with in s. 36 of the *Public Utilities Act* where it was felt necessary to give specific power to utilities under that Act to require security, a power not granted to the defendant under this statute.

It was argued that the authorities referred to above depended on particular statutes and by-laws governing the supply of the commodity concerned. There being no statutory requirement here for the delivery of power, these cases, it was said, do not support the plaintiffs' position. This argument I consider to be without merit. While it is true that in the Canadian decisions cited above there were statutory provisions imposing an obligation to supply a commodity to the public, nevertheless the judgments make it clear that the statutes in this respect are merely declarative of common law principles and in cases even outside the statute the duty to supply remains upon the utility. See *Minister of Justice for Canada v. City of Levis* (1918), 45 D.L.R. 180 at pp. 185-6, [1919] A.C. 505, *per* Lord Parmoor:

> It must be recognized, however, that water is a matter of prime necessity, and that, where waterworks have been established to give a supply of water within a given area for domestic and sanitary purposes, it would be highly inconvenient to exclude from the advantages of such supply Government buildings, on the ground that these buildings are not liable to water taxation. The respondents are dealers in water on whom there has been conferred, by statute, a position of great and special advantage, and they may well be held in consequence to come under an obligation towards parties, who are none the less members of the public and counted among their contemplated customers, though they do not fall within that class, who are liable to taxation, and who being in the immense majority are expressly legislated for and made subject to taxation. Their Lordships are, therefore, of opinion that there is an implied obligation on the respondents to give a water supply to the government building provided that, and so long as, the Government of Canada is willing, in consideration of the supply, to make a fair and reasonable payment. The case stands outside of the express provisions of the statute, and the rights and obligations of the appellant are derived from the circumstances and from the relative positions of the parties.

The defendant also sought to justify the security deposits on the basis of s. 57 of the *British Columbia Hydro and Power Authority Act, 1964*, which is quoted hereunder:

> 57. In order to give full force and effect to the meaning and intent of this Act the Lieutenant-Governor in Council may make any

> orders and regulations deemed necessary or advisable for carrying out the spirit, intent, and meaning of this Act in relation to matters for which no express provision has been made or for or in respect of which only partial or imperfect provision has been made.

The deposits complained of were provided for in tariffs published by the defendant in the purported exercise of the power contained in s. 57. It is undoubtedly true that the Legislature could, if it wished, by the use of appropriate language, authorize discrimination among residential consumers and authorize virtually any other form of discrimination in any manner it wished and even give a power to withhold service at its discretion, I cannot, however, agree that the Legislature has done so in the *British Columbia Hydro and Power Authority Act, 1964*. The Legislature will not be presumed to have intended to grant such powers in the absence of specific words adequate to confer them. In *A.-G. Can. v. Toronto, supra*, Strong, C.J., said at p. 523:

> Had the Provincial legislature possessed plenary powers of legislation, unfettered by any provision in the British North America Act, I should have considered that the by-laws which it empowered first the water-works commissioners and then the city to make must have been fair, reasonable and uniform regulations as regards rates. Of course in the case just supposed the exact case presented here could not have arisen, but even so, and assuming that the Provincial legislature could confer unlimited authority to impose arbitrary and discriminating rates for the water, they would not be deemed to have intended to do so from a power to make by-laws expressed in general terms.

And in *City of Hamilton v. Hamilton Distillery Co., supra*, Davies, J., said at pp. 247-8:

> Alike, however, in that case as in these there is involved the validity of a city by-law claiming in one way or another to confer upon the city the power to differentiate or discriminate in the prices actually charged as between different members of the same class of customers for water supplied.
>
> As to the power of the legislature to confer such powers upon a civic corporation I do not entertain any doubt. It falls within those plenary powers vested in those bodies by the "British North America Act, 1867," and if any of them in attempting to confer such powers used apt and proper language I conceive it would be the duty of this court to give the language its full and proper effect. The question would be and ought to be simply whether such language has been used as confers the power claimed.

There is nothing in the statute creating the defendant which would authorize it in the exercise of its power to make Regulations to depart from the well-established principles governing utilities. A statutory power to make Regulations must be exercised within the framework of the statute and

must be consistent with the purposes of the statute. In *Padfield et al. v. Minister of Agriculture, Fisheries and Food,* [1968] 1 All E.R. 694 at p. 699, Lord Reid said:

> It is implicit in the argument for the Minister that there are only two possible interpretations of this provision—either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.

This principle has been applied in many other cases such as *McLean v. Municipal Council of Dubbo, supra,* at p. 927; *Re Kendrick and Milk Control Board of Ontario,* [1935] 3 D.L.R. 198, [1935] O.R. 308, 63 C.C.C. 385; *Brampton Jersey Enterprises Ltd. v. Milk Control Board of Ontario* (1956), 1 D.L.R. (2d) 130, [1956] O.R. 1; *British Oxygen Co., Ltd. v. Board of Trade,* [1968] 2 All E.R. 177.

The *British Columbia Hydro and Power Authority Act, 1964,* in my view, clearly created a public utility and to construe s. 57 as conferring a power on the defendant by Regulation to depart from well-settled principles of law, long held to be applicable to public utilities would be to frustrate the purpose of the Act and the tariffs of the defendant, in so far as they purport to authorize the requirement of security deposits on a selective basis, are invalid.

Furthermore, I find no merit in the defendant's contention that the plaintiffs, in signing the application form for the delivery of power, effectively bound themselves by contract to take power on the defendant's terms and thus deprived themselves of the benefit of any obligation imposed by law on a public utility. The utility, in the words of Spence, J., in *St. Lawrence Rendering Company Ltd. v. Cornwall, supra,* supplied power as a matter of law, not contract, and in any event the basis of the contract being tariffs unlawfully adopted, it cannot bind the plaintiffs.

I am asked to make several declarations and to order an injunction against the continuation of the practice complained of. An examination of the prayer for relief leads me to the conclusion that the real substance of the plaintiff's claim is set out in paras. (a) and (g). I therefore make the declaration

that the defendant has no valid authority under the *British Columbia Hydro and Power Authority Act, 1964*, or any other statute, to require the plaintiffs to pay a security deposit before gas and electrical services are provided or are continued to be provided by the defendant authority. I also order the injunction prayed for in para. (g) of the prayer for relief, being a permanent injunction restraining the defendant, its servants, agents, representatives and persons acting on its behalf from demanding, or collecting, or keeping security deposits as a condition precedent to the supply of gas or electrical power to residential consumers, or as a condition to the continuation of the supply of gas and electrical power to any of the plaintiffs or any member of the class represented in this action.

I make it clear that in this case I have not considered and I make no declaration in respect of commercial or industrial consumers of the defendant, and refer solely to residential accounts. In addition to the above relief, the plaintiffs will have their costs.

Judgment for plaintiffs.

British Columbia Utilities Commission

Sixth Floor, 900 Howe Street
Vancouver, BC Canada V6Z 2N3
TEL: (604) 660-4700
BC Toll Free: 1-800-663-1385
FAX: (604) 660-1102

ORDER NUMBER
G-175-16

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

Spirit Bay Utilities Ltd.
Application for Exemption pursuant to section 88(3) of the *Utilities Commission Act*

BEFORE:
D. M. Morton, Commissioner/Panel Chair
D. J. Enns, Commissioner
R. I. Mason, Commissioner

on December 1, 2016

ORDER

WHEREAS:

A. On June 1, 2016, Spirit Bay Utilities Ltd. (Spirit Bay Utilities) filed an application (Application) with the British Columbia Utilities Commission (Commission) for an exemption pursuant to section 88(3) of the *Utilities Commission Act* (UCA) from the application of Part 3, Regulation of Public Utilities, with respect to the proposed provision of a heated or cooled fluid produced by an ocean thermal energy system, gaseous propane and electricity, delivered through local distribution systems (Energy Services) to the Spirit Bay Community;

B. As an alternative request to the above noted exemption, Spirit Bay Utilities requests the Commission direct, pursuant to section 72 of the UCA, that the Beecher Bay First Nation (Scianew) (Beecher FN) is a municipality or regional district for the purposes of the UCA which would, by way of the exclusions to the definition of public utility there within, exempt it from the provisions of the UCA solely applicable to public utilities;

C. Spirit Bay Utilities is a new entity that proposes to provide the above noted Energy Services along with water and sewer services;

D. At present, all utility assets are owned by Spirit Bay Developments Limited Partnership (Spirit Bay Developments), an entity 51 percent owned by the Beecher FN and 49 percent owned by Omnibus. Spirit Bay Utilities states that the assets will be transferred to Spirit Bay Utilities, whose ownership mirrors that of Spirit Bay Developments, in exchange for a note, or similar debt instrument, payable by the utility company to Spirit Bay Developments;

E. The Spirit Bay Community is a staged new town development planned to have 400 to 600 homes, 50,000 square feet of commercial space, a spa resort, and a light industrial site. It is located approximately 20 kilometers southwest of Victoria, BC on Beecher FN reserve land;

F. Pursuant to the *Beecher Bay First Nation Land Code*, the Beecher FN allows 99-year leases to members of the general public within a 100-acre economic development zone within which the Spirit Bay Community is located. The Beecher FN maintains control and governance of the lands within the economic development zone;

G. On June 24, 2016 by Order G-95-16, the Commission established a written hearing to review the Application and required Spirit Bay Utilities to provide notification of the hearing to affected parties and potentially affected parties including existing and potential leaseholders. The hearing involved one round of written information requests and an opportunity for interested parties to submit letters of comment followed by a written argument phase;

H. All participating parties indicated that they found the evidentiary record adequate and they preferred a written hearing process. Accordingly, by Order G-125-16, the Commission cancelled the procedural conference scheduled for Tuesday, August 2, 2016;

I. FortisBC Energy Inc. and FortisBC Inc. (collectively FortisBC) and British Columbia Hydro and Power Authority (BC Hydro) participated as interveners and submitted final arguments. No leaseholders or other parties submitted letters of comment;

J. The UCA defines a "public utility", in part, as "a person, or the person's lessee…who owns or operates in British Columbia, equipment or facilities for the production, generation, storage, transmission, sale, delivery or provision of electricity… or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation";

K. Section 88(3) of the UCA provides that the Commission may, on conditions it considers advisable, with the advance approval of the Minister responsible for administration of the *Hydro and Power Authority Act*, exempt a person, equipment or facilities from the application of all or any of the provisions of the UCA or may limit or vary the application of the UCA;

L. On November 14, 2016, the Commission issued a letter to the parties in the proceeding requesting consent, pursuant to section 4(11) of the UCA, to form a new panel consisting of Commissioners David Morton, Richard Mason and Douglas Enns to proceed with making final determinations based on the existing evidentiary record and written arguments;

M. On November 21, 2016, letters were received by the Commission from Spirit Bay Utilities and all registered interveners providing written consent for this panel to proceed with making final determinations based on the existing evidentiary record already filed as part of the proceeding; and

N. On November 25, 2016, pursuant to section 4 of the UCA, David Morton, Richard Mason and Douglas Enns were appointed to the panel to complete the review of the Application.

NOW THEREFORE for the reasons attached as Appendix A, the British Columbia Utilities Commission orders as follows:

1. .If Spirit Bay Utilities Ltd. were to provide the proposed Energy Services to the Spirit Bay Community for compensation it would be a public utility as defined by the *Utilities Commission Act* (UCA).

2. Spirit Bay Utilities Ltd.'s application for an exemption pursuant to section 88(3) of the UCA is denied.

3. Spirit Bay Utilities Ltd.'s alternative request that it be declared a municipality or regional district for purposes of the UCA is denied.

4. Spirit Bay Utilities Ltd. is to produce a plan, including proposed filings and timing, which will ensure Spirit Bay Utilities Ltd.'s and Spirit Bay Developments Limited Partnership's compliance with the UCA on a prospective basis. This plan should be prepared in consultation with Commission staff and must be filed with the Commission, for approval, no later than Friday, March 31, 2017.

DATED at the City of Vancouver, in the Province of British Columbia, this 1st day of December 2016.

BY ORDER

Original signed by:

D. M. Morton
Commissioner

Attachment

Spirit Bay Utilities Ltd.
Application for Exemption pursuant to section 88(3) of the *Utilities Commission Act*

REASONS FOR DECISION

1.0 INTRODUCTION

1.1 Background

Spirit Bay Utilities Ltd. (Spirit Bay Utilities) proposes to provide utility services including a heated or cooled fluid produced by an ocean thermal energy system, gaseous propane and electricity, delivered through local distribution systems to the Spirit Bay Community. The Spirit Bay Community is a staged new town development comprising of 400 to 600 homes, 50,000 square feet of commercial space, a spa resort and a light industrial site. It is located approximately 20 kilometers southwest of Victoria, BC on Beecher Bay First Nation (Beecher FN) reserve land within a 100-acre Economic Development Zone.[1] Spirit Bay Utilities is currently majority owned by the Beecher FN. It plans to become wholly owned by the Beecher FN.

Currently, thermal energy system infrastructure is installed for 53 lots and the initial electrical system infrastructure (conduit, kiosks, meter boxes) for 16 lots. No propane utility assets have been placed in the ground at the time of the application.[2]

At present, all utility assets are owned by Spirit Bay Developments Limited Partnership (Spirit Bay Developments), an entity 51 percent owned by the Beecher FN and 49 percent owned by Omnibus. Spirit Bay Utilities states that the utility assets will be transferred to Spirit Bay Utilities, whose ownership mirrors that of Spirit Bay Developments, in exchange for a note, or similar debt instrument, payable by the utility company to Spirit Bay Developments. Spirit Bay Utilities also states that "[a]t the point of transfer there is no effective change in percentage ownership of the utility assets between Spirit Bay Developments and Beecher FN."[3]

Beecher FN manages Beecher FN reserve lands and resources pursuant to the *First Nations Land Management Act* and Framework Agreement on First Nation Land Management and has enacted the *Beecher Bay Land Code* May 25, 2003 (Beecher Land Code). Pursuant to the Beecher Land Code, the Beecher FN allows for 99-year leases to the general public within the Economic Development Zone and has created zoning laws, registry laws and property taxation laws.

1.2 Approvals sought

Spirit Bay Utilities is seeking an exemption pursuant to section 88(3) of the *Utilities Commission Act* (UCA) from the application of Part 3, Regulation of Public Utilities, with respect to the proposed provision of a heated or cooled fluid produced by an ocean thermal energy system, gaseous propane and electricity, delivered through local distribution systems to the Spirit Bay Community (the Application). The exemption request excludes

[1] As defined in the *Beecher Bay First Nation Land Code*, May 25, 2003 as amended June 15, 2003, Exhibit B-1, Annex 1.
[2] Exhibit B-3, BCUC IR 1.1.
[3] Exhibit B-1, p. 3; Exhibit B-3, BCUC IR 1.2, 1.4.

section 42: Duty to obey orders, of the UCA in relation to safety orders of the British Columbia Utilities Commission (Commission). Spirit Bay Utilities' request would reduce regulatory requirements, the most germane of which relate to the acquisition and disposition of property and corporate securities, resource planning, construction and operation approvals and rate setting. Though not formally requested in the Application, Spirit Bay Utilities makes it clear in its reply argument to British Columbia Hydro and Power Authority (BC Hydro) that it is seeking exemption from section 83 of the UCA that would otherwise allow complaints to be brought before the Commission.

In the event that the section 88(3) exemption is denied, Spirit Bay Utilities is requesting, pursuant to section 72 of the UCA, that the Commission find the Beecher FN to be a municipality or regional district for the purpose of the UCA.

1.3 Regulatory process

On June 24, 2016, by Order G-95-16, the Commission established a written hearing to review the Application and required Spirit Bay Utilities to provide notification of the hearing to affected parties and potentially affected parties including existing and potential leaseholders. The hearing involved one round of written information requests and an opportunity for interested parties to submit letters of comment followed by a written argument phase. FortisBC Energy Inc. and FortisBC Inc. (collectively FortisBC) and BC Hydro registered and participated as interveners, which included the submission of final arguments. No letters of comment were received from leaseholders or other potentially affected parties.

2.0 ISSUES

2.1 Jurisdiction

The Commission's jurisdiction over public utilities stems from the UCA and specifically the definition of public utility contained therein:

> "public utility" means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for
>
> (a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation
>
> ……..
>
> but does not include
>
> (c) a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries,
>
> (d) 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,
>
> (e) a person not otherwise a public utility who is engaged in the petroleum industry or in the wellhead production of oil, natural gas or other natural petroleum substances,

> (f) a person not otherwise a public utility who is engaged in the production of a geothermal resource, as defined in the Geothermal Resources Act, or
> (g) a person, other than [BC Hydro], who enters into or is created by, under or in furtherance of an agreement designated under section 12 (9) of the Hydro and Power Authority Act, in respect of anything done, owned or operated under or in relation to that agreement;

Despite the approvals sought by Spirit Bay Utilities outlined in section 1.2 above, it states it is very confident that the Beecher FN "has the power to provide Utility Services through Spirit Bay Utility Ltd. and to establish Laws in this respect."[4] It states it is seeking an exemption for legal certainty and that rather than engaging in a lengthy discussion over regulatory jurisdiction they are taking a practical approach to regulatory oversight by requesting a section 88(3) exemption.[5]

The Beecher FN enacted the Beecher Land Code pursuant to the *First Nations Land Management Act SC 1999*, *chapter 24* (FNLMA). The FNLMA allows a First Nation to opt out of 32 sections of the *Indian Act RSC 1985*, *chapter I-5* relating to land management upon the First Nation's enactment of a Land Code.

Spirit Bay Utilities submits that the Beecher Land Code is a duly enacted First Nation law which has the force of federal law but that the courts have ultimate jurisdiction over the utility.[6] It further submits that sections 20(1) and 20(2)(d) of the FNLMA provide Beecher FN the authority to regulate and provide utility services.[7]
Section 20(1) of the FNLMA states that:

> The council of a First Nation has, in accordance with its land code, the power to enact laws respecting
> a) interests or rights in and licences in relation to First Nation land;
> b) the development, conservation, protection, management, use and possession of First Nation land; and
> c) any matter arising out of or ancillary to the exercise of that power.

In addition, paragraph 20(2)(d) of the FNLMA states that "Without restricting the generality of subsection (1), First Nation laws may include laws respecting:… d) the provision of local services in relation to First Nation land and the imposition of equitable user charges for those services…"

Spirit Bay Utilities is of the view that "[r]egulating utilities and acting as a utility are at the very least 'a matter arising out of or ancillary to the exercise of that power' and considers s. 20(2)(d) to be 'an example of law-making powers to provide local services, including utilities.'"[8]

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[4] Exhibit B-1, p. 7.
[5] Ibid.; Spirit Bay Final Argument, p. 2.
[6] Exhibit B-4, BC Hydro IR 1; Spirit Bay Final Argument, p. 2.
[7] Ibid., BC Hydro IR 1.1.
[8] Ibid.

On the matter of the Commission's jurisdiction, FortisBC submits that Spirit Bay Utilities has not demonstrated that the UCA does not apply and has acknowledged that the UCA may apply.[9] BC Hydro submits that the Commission's jurisdiction over Spirit Bay Utilities has not been questioned by any party in this proceeding.[10]

BC Hydro "understands that the Commission's jurisdiction to consider this matter has not been questioned by any party; neither did Spirit Bay [Utilities] make an argument contradicting the Commission's jurisdiction. As such, BC Hydro confirms that it does not take a position on this issue."[11] However, in reply, Spirit Bay Utilities asserts that "BC Hydro has mischaracterized Spirit Bay [Utilities'] view of the jurisdiction that the [BCUC] has to regulate the Spirit Bay [Utilities]", stating that "the BCUC may have regulatory jurisdiction or it may not. Taking the pragmatic approach, Spirit Bay [Utilities] has not investigated the matter in any detail which does not equate with agreeing that the BCUC has jurisdiction."[12]

Spirit Bay Utilities also believes that "any matters of jurisdiction would be best be dealt with by the Province of British Columbia. Under Section 88(3) of the Utilities Commission Act advance approval of the minister responsible for the administration of the Hydro and Power Authority Act will be required before any exemption is granted. This will afford the Province of British Columbia an opportunity to consider any jurisdictional matters."[13]

Commission determination

The Panel finds that the UCA applies to the Energy Services proposed by Spirit Bay Utilities. **If Spirit Bay Utilities were to provide the proposed Energy Services to the Spirit Bay Community for compensation it would be a public utility as defined by the UCA.**

Spirit Bay Utilities is of the view that the Beecher Land Code, enacted pursuant to the *First Nations Land Management Act* provides Beecher FN with authority to regulate and provide utility services. The Panel disagrees.

Section 88 of the *Indian Act* states that "provincial laws of general application continue to apply in respect of Indians in the province unless those laws are inconsistent with the provisions of the *Indian Act."* The FNLMA is enacted pursuant to the *Indian Act* and it allows a First Nation to opt out of 32 sections of the *Indian Act* on the enactment of a First Nation Land Code, but section 88 is not one of those sections. Therefore, there is nothing inconsistent between the UCA and the *Indian Act*. The UCA is a provincial law of general application and, as such, applies to the proposed utility services.

The Energy Services Spirit Bay Utilities proposes to provide - a heated or cooled fluid produced by an ocean thermal energy system, gaseous propane and electricity, delivered through local distribution systems - meet the definition of public utility under the UCA. Therefore, the Panel finds that if Spirit Bay Utilities were to provide

[9] FortisBC Final Argument, p. 4.
[10] BC Hydro Final Argument, p. 2.
[11] Ibid., p. 2.
[12] Spirit Bay Utilities Reply Argument, p. 1.
[13] Spirit Bay Utilities Final Argument, p. 2.

the proposed Energy Services to the Spirit Bay Community for compensation it would be a public utility as defined by the UCA.

With regard to Spirit Bay Utilities' belief that the jurisdictional matter does not need to be considered by the Panel, we do not agree. An exemption is only required if the UCA applies and an exemption is granted pursuant to the UCA. Accordingly, we must determine that the jurisdiction to grant an exemption exists, before we can make any recommendation to grant an exemption. If the Commission has no jurisdiction under the UCA, no exemption would be warranted.

The Panel notes that currently the utility assets are owned by Spirit Bay Developments. Therefore, Spirit Bay Developments may already be a public utility as defined by the UCA for the reasons outlined above.

2.2 Declaration as a regional district or municipality

As an alternative request to the section 88(3) exemption, Spirit Bay Utilities requests the Commission direct, pursuant to section 72 of the UCA, that Beecher FN is a municipality or regional district for the purposes of the UCA.[14] This would, by way of the exclusions to the definition of public utility there within, exempt it from the provisions of the UCA solely applicable to public utilities.

Spirit Bay Utilities submits that Beecher FN "is not a municipality or regional district as those terms are used in the *Interpretation Act* (British Columbia) but the Federal Government has conferred powers to it which it has exercised in relation to Utility Services."[15]

However, Spirit Bay Utilities also states that "[i]t is the substance and not the form that determines whether an entity is a municipality or regional district. The Beecher Bay First Nation as majority owner of [Spirit Bay Utilities] easily qualifies with the authority it has been granted under federal legislation."[16] Spirit Bay Utilities stated that Spirit Bay Utilities customers who are not members of the Beecher FN cannot vote in Beecher Bay Council elections, because "[r]esidency does not create political rights."[17]

When asked what opportunity Spirit Bay lease holders have to participate in the process required for Beecher FN Council to approve terms, conditions and rates set by Spirit Bay Utilities, Spirit Bay Utilities replied:

> Currently, Beecher FN Council meetings where resolutions are passed are not automatically open to the public or to interest-holders. The usual practice is to invite delegations or representations from potentially affected individuals to raise any concerns they have regarding specific agenda items. If the approval of terms, conditions and rates is carried out by Council Resolution, Beecher FN Council has stated that they willing to invite interest-holders to the meeting to make comments and ask questions.[18]

[14] Ibid., p. 1.
[15] Exhibit B-1, p. 6.
[16] Spirit Bay Utilities Reply Argument, p. 2.
[17] Exhibit B-3, BCUC IR 1.4.4.
[18] Ibid., BCUC IR 1.4.1.1.

Commission determination

Spirit Bay Utilities' alternative request that it be declared a municipality or regional district for purposes of the UCA is denied.

Section 2(1) of the *Interpretation Act* states that "[the *Interpretation Act*] applies to every enactment, whether enacted before or after the commencement of [the *Interpretation Act*], unless a contrary intention appears in [the *Interpretation Act*] or in the enactment."

Municipality and regional district are defined in the *Interpretation Act* as follows:

> **'municipality'** means, as applicable,
> (a) the corporation into which the residents of an area are incorporated as a municipality under the Local Government Act, the Vancouver Charter or any other Act, or
> (b) the geographic area of the municipal corporation…
>
> **'regional district'** means a regional district as defined in the Local Government Act.

Thus the exclusion to the definition of public utility in the UCA that applies to "a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries" only applies to municipalities and regional districts that meet those definitions in the *Interpretation Act*. Beecher FN does not meet either of these definitions and thus the Panel cannot find it to be a municipality or regional district for the purposes of the UCA.

The evidence shows that Spirit Bay Utilities is a corporation[19] and is therefore not a municipality and is also not excluded from the definition of public utility in the UCA. The Panel also notes that Spirit Bay Developments is a limited partnership and is therefore not a municipality.

The Panel also notes that generally speaking, ratepayers of a municipal utility are entitled to vote in a municipal election. Thereby, municipal councils are accountable to ratepayers for the performance, including rates, of the municipal utility. However, for ratepayers of Spirit Bay Utilities who are not members of Beecher FN, participation in the ratemaking process of Spirit Bay Utilities appears to be limited to making comments and asking questions of Beecher FN Council.

2.3 The exemption request

Spirit Bay Utilities states that the basis for the exemption request "is that the Beecher Bay First Nation (Scianew) ("Beecher FN") will exercise its legal authority under the FNLMA, Framework Agreement on First Nations Land Management ("Act and Agreement") and the comprehensive Beecher FN land code enacted in 2003, as amended ("Land Code") and regulate the Utility Services provided by the Spirit Bay Utility."[20]

[19] Exhibit B-1, p. 1.
[20] Exhibit B-1, p. 1.

Spirit Bay Utilities argues that "[t]here are third party checks and balances on the Spirit Bay Utility and the Beecher FN's oversight of utilities. Voluntary arbitration will be an option to settle disputes. Ultimately, the Courts have jurisdiction over the Spirit Bay Utility and the Beecher Bay FN cannot exclude this jurisdiction."[21]

Spirit Bay Utilities cites the exemption granted by the Commission to Templeton LP.[22] It states that in that proceeding, "[a]lmost no technical or operating concerns were raised in the BCUC's review of Templeton LP's section 88(3) application to distribute electricity to tenants in the McArthurGlen Designer Outlet mall at the Vancouver Airport. The Templeton LP has responsibility for constructing and operating the electrical distribution system which is what the Spirit Bay [Utilities] would have in relation to its electrical system. This utility would have the same responsibilities in relation to the less technically complex propane and district heating systems."[23]

The applicant provides no other justification for being granted an exemption.

2.3.1 Setting of rates

Spirit Bay Utilities states it will be governed by the *Beecher Bay Spirit Bay Utilities Law*. The draft law was published for public comment on June 16, 2016.[24] Under section 6.4 of the draft law utility service terms, conditions and rates established by Spirit Bay Utilities shall be approved in writing by the Beecher FN Council. This approval could take the form of a Law, Regulation or Resolution.[25]

Spirit Bay Utilities states it does not intend to reference or index its rates to Commission approved rates. It notes that BC Hydro rates for electricity are currently set by the government and Spirit Bay Utilities' financial requirements are not necessarily symmetric with those of BC Hydro.[26]

Spirit Bay Utilities states that its rates will be determined by Beecher FN, and should not exceed market rates. It points out that Beecher FN is working on a long term new town development of which it is a majority owner and it would be counter-productive to have high, above-market rates for potential new home buyers and future tax paying residents.[27]

Spirit Bay Utilities states that there are no formal requirements for the Beecher FN Council to notify lease-holders of upcoming decisions on terms, conditions and rates. However, the Beecher FN Council is willing to consider incorporating a formal notice and comment requirement into the Beecher Utilities Law to require

[21] Spirit Bay Utilities Final Argument, p. 2
[22] Order G-131-15, Templeton Designer Outlet Centre Limited Partnership Exemption Pursuant to Section 88(3) of the Utilities Commission Act, for its Proposed Supply of Electricity at McArthurGlen Designer Outlet Vancouver Airport.
[23] Spirit Bay Utilities Final Argument, p. 1.
[24] Exhibit B-3, BCUC IR 3.2.
[25] Ibid., BCUC IR 4.1.
[26] Ibid., BCUC IR 4.2.1.
[27] Ibid., BCUC IR 4.2.

notice and comment opportunities for all potentially affected individuals prior to passing a resolution, regulation or law to approve terms, conditions and rates.[28]

2.3.2 Spirit Bay Utilities' ratepayers process for resolving complaints

Spirit Bay Utilities is seeking exemption from section 83 of the UCA that would otherwise allow complaints to be brought before the Commission. In the event of a complaint or dispute raised by a utility ratepayer, Spirit Bay Utilities has set out the following processes that would be available to deal with these matters:

1. Bring the complaint/dispute to Beecher FN administration or Beecher FN Council;[29]
2. If the complainant does not find the result satisfactory, and all parties to the complaint/dispute agree to the process, they can apply for dispute resolution under Part 8 of the Beecher Land Code; [30]
3. The complainant could appeal a decision rendered under the Beecher Land Code to the Federal Court of Canada;[31] and
4. The complainant, instead of applying for dispute resolution under the Beecher Land Code can seek civil remedies directly through the courts.[32]

In addition, there is a 30-day limitation period for referring a dispute to the resolution process pursuant to the Beecher Land Code.[33]

Commission determination

For the reasons outlined below, the Panel finds that an exemption is not warranted and Spirit Bay Utilities' application for an exemption pursuant to section 88(3) of the UCA is denied.

When considering whether an exemption is warranted, we consider the reasons for decision issued for the Canal Plant Agreement Exemption, where the Commission laid out an appropriate test for an exemption order: "a section 88(3) exemption order should be issued, with the advance approval of the LGIC, when such exemption serves the objects and purposes of the [UCA] and it is in the public interest to do so." [34]

In the AES Inquiry Report,[35] the Commission concluded that regulation is required when "natural monopoly characteristics are present and there is a need to regulate to protect the public interest…" We agree with this public interest consideration and find it to be an appropriate public interest test. Therefore, if monopoly

[28] Ibid., BCUC IR 4.1.2.
[29] Exhibit B-3-1, BCUC IR 5.2.
[30] Ibid., BCUC IR 5.3, 5.4.
[31] Ibid., BCUC IR 5.3.1.
[32] Ibid., BCUC IR 5.2.
[33] Exhibit B-1, Attachment *Beecher First Nation Land Code*, Part 8 – Dispute Resolution.
[34] *In the Matter of An Application by FortisBC Inc. for an Exemption from the Act regarding the Canal Plant Agreement Subagreement*, Order G-41-06, Appendix A, p. 6.
[35] *British Columbia Utilities Commission Report In the Matter of the FortisBC Energy Inc. Inquiry Into the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives* dated December 27, 2012.

characteristics are not present, or are somehow mitigated, for example by an alternative regulatory body, an exemption from regulation under the UCA may be warranted.

Under the proposed *Beecher Bay Spirit Bay Utilities Law* the Beecher FN grants Spirit Bay Utilities the exclusive right to provide utility services to all premises within the Economic Development Zone.[36] By their very nature, propane, electricity and thermal distribution systems have elements of a natural monopoly. Further, Spirit Bay Utilities is proposing mandatory connection to, and mandatory end-use of, Energy Services provided by Spirit Bay Utilities.[37] Mandatory connection and mandatory use extend that natural monopoly into a "legal" monopoly. In this Application, the onus is on the applicant to demonstrate that these monopolistic elements have been mitigated, and in this case they have failed to do so. In addition, the exemption scheme proposed by Beecher FN, which is the majority owner of Spirit Bay Utilities,[38] has the effect of making the regulator the owner of the utility. For these reasons, the Panel finds that there is a potential for abuse of monopoly power and therefore exemption from regulation does not serve the objects and purposes of the UCA and is not in the public interest.

The Panel disagrees with Spirit Bay Utilities' comparison of its own circumstances to those of Templeton LP. Recitals F and G to Order G-131-15 state:

F. Templeton LP proposes to resell electricity to its Lessees using a rate setting mechanism whereby the selling price will not exceed the price which BC Hydro would have charged, if the Lessee were a customer of BC Hydro (Rate Cap). This Rate Cap is in accordance with the provisions of BC Hydro Electric Tariff Section 9.2 – Resale of Electricity. The proposed rate setting mechanism and the Rate Cap are explained within the lease agreements to be signed by Lessees;

G. Templeton LP proposes that if it is exempted from certain provisions within Part 3 of the UCA such that it is able to supply electricity to the Lessees on a non-metered basis, the costs of installing meters will be avoided;

The rate cap mitigates concerns about monopoly abuse, thereby providing justification for granting an exemption to Templeton LP. In the Spirit Bay Utilities' application, there is insufficient evidence concerning the rate and how the utility intends to set it. These circumstances distinguish the Templeton LP exemption from the exemption applied for by Spirit Bay Utilities.

With regard to Spirit Bay Utilities' argument that complaints are subject to voluntary arbitration and ultimately to the courts,[39] the Panel notes that generally speaking regulated utilities are expected to manage their own complaint processes. In addition, complainants have access to the Commission's complaint resolution process. Ultimately, complainants have recourse to the courts in the event that they feel their complaint has not been dealt with fairly by the utility and the Commission. For Spirit Bay Utilities to state that a dispute resolution process is in place and that civil remedies are available through the courts does not distinguish Spirit Bay Utilities

[36] Exhibit B-1, Annex 2, *Beecher Bay Spirit Bay Utilities Law*, section 6.1.
[37] Exhibit B-3, BCUC IR 4.7.
[38] "The Spirt Bay Utility will be initially majority owned by the Beecher FN and ultimately wholly owned." Exhibit B-1, p. 3.
[39] Spirit Bay Utilities Final Argument, p. 1.

from any other regulated utility in the province, except that it underlines that there is no independent regulator to whom complainants can turn.

3.0 COMPLIANCE WITH THE UCA

Commission Determination

Section 45(1) of the UCA states:

> Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.

As the Panel has denied Spirit Bay Utilities' request for an exemption pursuant to section 88(3) of the UCA, it is required to comply with section 45 of Part 3 of the UCA. As such, Spirit Bay Utilities and Spirit Bay Developments must not begin the construction or operation of a public utility plant or system without first obtaining a certificate of public convenience and necessity (CPCN) from the Commission. At the time of this application, the Panel notes that infrastructure of the thermal energy system and the initial electrical system is in place; however, no propane utility assets have been placed in the ground.[40] Each of these systems may require a CPCN from the Commission. As well, before services can be provided and charged to customers, Spirit Bay Developments and/or Spirit Bay Utilities will require approval of tariffs under sections 59-61 of the UCA. Therefore, **the Panel directs Spirit Bay Utilities to produce a plan, including proposed filings and timing, that will ensure Spirit Bay Utilities' and Spirit Bay Developments' compliance with the UCA on a prospective basis. This plan should be prepared in consultation with Commission staff and must be filed with the Commission, for approval, no later than Friday, March 31, 2017.**

[40] Exhibit B-3, BCUC IR 1.1.