FINAL SUBMISSION ON BEHALF OF

THE CLEAN ENERGY ASSOCIATION OF BRITISH COLUMBIA ("CEABC")

BRITISH COLUMBIA UTILITIES COMMISSION

INQUIRY INTO THE REGULATION OF ELECTRIC VEHICLE CHARGING SERVICE

Project No. 1598941

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Introduction

In its final submission, the CEABC is confining its comments to the straw man regulatory framework and questions posed by the B.C. Utilities Commission ("*BCUC*") Panel all as set out in Order G-119-18.

Straw Man Regulatory Framework

"Entities not otherwise public utilities will, with respect to the provision of electric vehicle charging services, be exempt from Part 3 of the UCA except for sections 25, 26, 38, 42, 43 [Footnote omitted] 44 and 49. Entities that are otherwise public utilities may apply for BCUC approval to provide regulated EV charging services."

There is no need for the BCUC to have regulatory oversight under sections 25 (Commission may order improved service) 26 (Commission may set standards) 38 (Public utility must provide service) 42 (Duty to obey orders) 43 (Duty to provide information) 44 (Duty to keep records) and 49 (Accounts and reports) of the UCA. There is no such oversight with respect to the sale of gasoline in British Columbia and nor should there be. Electricity and gasoline are transportation fuel and their sale for this purpose should be pursuant to a competitive market model. If this model fails, government can intervene.

In addition, private capital and innovation in the rollout of electric vehicles is essential to meet greenhouse gas reduction targets. This will not occur rapidly enough unless those with the expertise and capital are involved in a competitive market.

As noted in the CEABC's response to Question 3, entities that are otherwise public utilities should not be providing regulated EV charging services except where the competitive market does not do so.

Question 1

"Do the words "for compensation" in the definition of public utility mean that a person who does not expressly require customer to pay for charging services but instead recovers the cost of charging from other services provided to the customers is a "public utility"?"

The answer to this question is most likely yes. As indicated in the attached legal research memorandum[1] ("Memorandum") there is no direct case law with respect to the definition of "compensation" in the Utilities Commission Act (British Columbia). This definition is almost identical to the definition of "compensation" in the Water Utilities Act (British Columbia) which has also not been subject to judicial review.

The case law that is referenced in the Memorandum covers a number of instances where the term "compensation" was considered by the Courts ranging from "free" bus service to the use of a lobby and main entrance hall in a building. The fact patterns that precipitated the reviews by the Courts are very diverse which is why the qualification of "most likely" is added to the answer "yes".

From a practical perspective, no investor should have to take the chance that supplying electricity to EV end users ("Charging Service(s)") falls outside the definition of "compensation" i.e. it is a free service and therefore not subject to regulation. Because the required legal clarity is not present, there is a very high risk that the party providing the Charging Service is a public utility and subject to regulation.

Clear proof that the Charging Service being provided by an entity is not subject to regulation may prevent this entity from interconnecting to the local electric utilities' distribution system. In some cases such as Level 1 or 2 vehicle charging stations, the existing electrical system may be adequate to support these stations and in other cases such as Direct Current Fast Charging stations ("DFCF") improvements to the existing electric distribution system may be required. The local electric utility may not proceed with these improvements or allow a private owner of a DFCF to interconnect to its system until this owner provides definitive proof as to whether it is or isn't a public utility.

The solution is to provide an exemption from regulation under the Utilities Commission Act or legislative amendment to parties that provide Charging Services at Levels 1 and 2 and DFCF or any of them and that are not otherwise public utilities.

[1] Appendix A

Question 2

"Should entities not otherwise public utilities supplying electricity to EV end users be regulated at all?"

No they should not be regulated even on a complaint basis. Except as described below in the CEABC's response to Question 3, the provision of Charging Service is not a natural monopoly. Competition can take the place of regulation. Other than laws of general application, the competitive market should be left to function on its own.

In its written evidence, the British Columbia Ministry of Energy, Mines and Petroleum Resources states[2]:

"MEMPR agrees with the key principles that the Commission intends to adopt for the Inquiry, namely that the Commissions should only regulate where necessary, and regulation should not impede competitive markets. Those principles align with, and support, current provincial policy and strategies relating to EVs and EV charging infrastructure, which are informed by British Columbia's energy objectives outlined in section 2 of the Clean Energy Act. [Footnote omitted.] Those objectives include:

- *reducing BC greenhouse gas emissions by at least 33% less than the level of those emissions in 2007 by 2020 and for each subsequent calendar year;*
- *reducing BC greenhouse gas emissions by at least 80% less than the level of those emissions in 2007 by 2050 and for each subsequent calendar year; and*
- *encouraging the switching from one kind of energy source or use to another that decreases greenhouse gas emissions in British Columbia."*

The CEABC agrees that the BCUC should only regulate Charging Services where necessary and should not impede competitive markets.

[2] Exhibit C19-2, pages 1-2.

Question 3

"Inasmuch as public utilities such as BC Hydro and FBC [sic] to participate in the EV market as owners or operators of EV charging stations, clarity is needed on whether BC Hydro and FBC are permitted to invest in EV charging stations as a prescribed undertaking under section 18 of the Clean Energy Act and section 4 of the GGRR."

There is nothing in the section 18 of the Clean Energy Act and section 4 of the GGRR that the CEABC can identify as specifically permitting BC Hydro and FBC to invest in EV charging stations as a prescribed undertaking under section 18 of the Clean Energy Act and section 4 of the GGRR. There is no specific language to this effect as compared to the specific language in subsection (2) of section 4 including the definition of "natural gas processing plant" in subsection (1) of section 4.

FBC should be allowed to participate in the Charging Services market as owners or operators of EV charging stations on a non-regulated basis provided the required electricity for the provision of the Charging Services by the non-regulated utility entity is acquired on an arms-length basis from the parent regulated utility. It should not be permitted to invest in the Charging Services market as a prescribed undertaking under section 18 of the Clean Energy Act and section 4 of the GGRR except as described below. There is no need to provide a guaranteed rate of return for Charging Services to FBC. If it chooses to enter this market it should receive the market rate of return for the risk it takes.

BC Hydro's participation in a non-regulated Charging Services market is a problem. BC Hydro claims[3] that for the purposes of its capital investments, no return on equity is required. While CEABC disagrees with this claim, a competitive, Charging Services market will be distorted if BC Hydro participates in it on a no return on equity basis. BC Hydro will be participating on this basis whereas all other participants will be expecting a return on equity for the risk they take. There will be no competitive Charging Services market as the playing field will be tilted in BC Hydro's favour. BC Hydro's existing investment in Charging Services should be grandfathered and no new investment allowed except as provided immediately below.

[3] Exhibit C1-2, page 14.

In areas of the Province that cannot support Charging Services on a commercial basis, regulated utilities including BC Hydro and third parties could make application to the BCUC to provide these services on a regulated basis. The onus would be on these parties to prove the competitive market is not, or will not work as opposed to assuming that it will not work and a guaranteed rate of return provided for whatever capital investment is made. The no return on equity problem could be dealt with by the BCUC on a case by case basis.

All of which is respectfully submitted.

Appendix A

The subject of the research is whether there are any judicial discussions of the proper meaning or interpretation of "compensation" as it is defined within the *Utilities Commission Act,* R.S.B.C. 1996, c. 473 ("UCA"), or any similar utilities legislation in B.C. In the UCA:

> **"compensation"** means a rate, remuneration, gain or reward of any kind paid, payable, promised, demanded, received or expected, directly or indirectly, and includes a promise or undertaking by a public utility to provide service as consideration for, or as part of, a proposal or contract to dispose of land or any interest in it; …

There is no B.C. case law that includes any express discussion as to the meaning of "compensation" within the *UCA*. The "definitions" sections of other B.C. statutes, including the *Gas Utility Act,* R.S.B.C. 1996, c. 170 and the *Water Utility Act,* R.S.B.C. 1996, c. 485 (the latter of which includes a substantially identical definition of "compensation") have been reviewed but likewise there is no relevant case law. The search was expanded to encompass case law across Canada, employing various search terms along the lines of "public utility" and "compensation", "meaning of", "defined as", "definition of", "interpreted as", "interpretation", etc., but the case law is very sparse.

The research was narrowed to any case law that considered the scenario whereby the provision of a "free service" may be said to give rise to a profit or benefit (whether indirect or not) to the offeror.

The most thorough and relevant discussion of this issue occurred in *Greyhound Canada Transportation Corp. v. Trentway-Wagar Inc* (1997), 35 O.R. (3d) 145. The issue before the Court was whether a particular bus service company, that had previously been ordered by the Ontario Highway Transport Board ("Board") to cease providing a particular bus route service between Peterborough and Toronto, was in contempt of the order by continuing to provide the same service, but for free.

The Court said:

> *"The Board's jurisdiction to hold a hearing is derived from s. 11(1) of the recently-amended Public Vehicles Act, R.S.O. 1990, c. P.54 (the "Act"): see s. 18 of the Ontario Highway Transport Board and Public Vehicles Amendment Act, 1996 (Bill 39), S.O. 1996, c. 9. It authorizes the Board to hold a hearing into the operation of any transportation service conducted by means of a "public vehicle". Section 1 of the Act defines "public vehicle", in part, as follows:*
>
> > *"public vehicle" means a motor vehicle operated on a highway by, for or on behalf of any person for the transportation for compensation of passengers, or passengers and express freight that might be carried in a passenger vehicle . . .*
>
> *"Compensation" is defined in s. 1:*
>
> > *"compensation" includes any rate, remuneration, reimbursement or reward of any kind paid, payable or promised, or received or demanded, directly or indirectly.*
>
> *Counsel for the applicant submitted that even though Trentway does not charge its passengers any fares, nevertheless it still operates a transportation service conducted by a "public vehicle". Ms. Kussner argued that the "compensation" which Trentway "receives" is the "reward" of maintaining and/or enhancing its goodwill."*

The Court proceeded to a lengthy discussion as to the meaning of “reward” as well as “compensation”:

> “On the basis of the materials before me, I am not satisfied that there has been an increase in goodwill as a result of Trentway's actions. There was no expert evidence adduced in this regard. Trentway might hope to receive such a benefit from its free ride policy, but the evidence does not satisfactorily establish that this has in fact occurred, or will occur in future. Even if Trentway's goodwill has been enhanced, it would seem that this purported benefit should be set off by the costs incurred in offering the free service. Again, no expert evidence in this respect was before the court. In any event, I am not satisfied that the definition of "compensation" in the Act is broad enough to include the maintaining of or an increase in a company's goodwill.
>
> Counsel for the applicant relied on the definition of "reward" in Words and Phrases Judicially Defined in Canadian Courts and Tribunals, vol. 7 (Toronto: Carswell, 1993) where reference is made to "hire or reward". She then noted that "hire or reward" is defined in s. 3 of the Aeronautics Act, R.S.C. 1985, c. A-2 as follows:
>
> > "hire or reward" means any payment, consideration, gratuity or benefit, directly or indirectly charged, demanded, received or collected by any person for the use of an aircraft;
>
> This definition was considered in R. v. Race (1973), 14 C.C.C. (2d) 165 (Ont. Dist. Ct.), by McLennan D.C.J., who noted that it was extremely broad. However, in terms of its application, the facts in that case are distinctly different from the facts in the case before this court. The accused, who operated a hunting lodge, used aircraft to fly their customers between the main lodge and their outpost lodges. It was held that they were using the aircraft for "hire or reward", notwithstanding the absence of a specific payment for the aircraft rides. Customers were still required to pay for their stay and they would not have come to the lodge in the first place if they were not transported to the outpost camp. The accused used the airplane to obtain customers, and consequently received payment from them for their accommodation. This was clearly a "benefit" within the definition of

"hire and reward". The court in Race accepted the Crown's argument that embodied in the all-inclusive rate charged by the accused was an amount for the use of the aircraft.

In the present case, there is no payment of any kind by Trentway's passengers. Trentway does not receive or demand any benefit or payment, either directly or indirectly from an individual who chooses to ride one of its buses between Peterborough and Toronto.

No case law was provided to the court which held that the interpretation of either "compensation" or "reward" encompassed the notion of "goodwill". In support of her argument that "reward" does include goodwill, counsel for the applicant relied on William C. Burton's The Legal Thesaurus (New York, N.Y.: MacMillan, 1980), where a number of synonyms, including "benefit" and "recognition" are included under the word "reward". The entire list reads as follows:

REWARD, noun

> acknowledgment, award, benefit, bonus, booty, bounty, compensation, consideration, donation, emolument, fee, gift, grant, gratuity, guerdon, honorarium, incentive, indemnification, need, pay, payment, perquisite, praemium proponere, premium, presentation, prize, purse, quittance, recognition, recompense, remembrance, remuneration, requital, requitement, return, solatium, tip, tribute

It is to be noted that the vast majority of the above synonyms imply the payment of money or other tangible gifts or items. This, it would seem, is the most common meaning or usage of the word "reward". Although "recognition" is also included, it must be remembered that a thesaurus, unlike a dictionary, does not provide definitions, but rather alternatives or synonyms. There is no rule against using a thesaurus per se in interpreting a statutory provision, and it may, in fact, provide some helpful guidance. However, its use is limited and is certainly not determinative.

On the other hand, the use of dictionaries and jurisprudence to assist in statutory interpretation is well recognized and sanctioned. The following passages are from R. Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Toronto:

Butterworths Canada Ltd., 1994) at pp. 8-9, 12 and 26, where the author discusses the usefulness of dictionaries in applying the basic principle of statutory construction, that is, the "ordinary meaning" rule:

> The "ordinary meaning" of a text is the meaning that is understood by a competent user of language upon reading the words in their immediate context [footnote omitted]. The immediate context of words in a statute generally consists of the section or subsection in which the words appear. In some cases it might include more -- a series of related provisions perhaps. However, it does not include the statute as a whole, but only as much as is needed for the reader to form a sensible impression of what is being said.
>
> As defined here, the ordinary meaning is not the post- interpretative meaning, the meaning that is accepted after adjusting for all relevant considerations. It is the first impression meaning gleaned by a competent reader based on the information that is immediately to hand. This understanding reflects the actual experience of readers, who normally do not read the whole of a text before forming an impression of the meaning of the individual sentences that comprise it.
>
> . . . . .
>
> The chief virtue of a dictionary definition is that it fixes the outer limits of ordinary meaning. It offers a more or less complete characterization of the conventional ways in which a word or expression is used by literate and informed persons within a linguistic community. It thus indicates the possible range of meanings that the word or expression is capable of bearing. This is valuable information because, generally speaking, the courts prefer meanings that are plausible, that is, meanings that the words are reasonably capable of bearing.
>
> . . . . .
>
> Dictionaries are normally consulted to determine the meaning of words used in legislation. However, courts sometimes look up the definition of things forming parts of the facts to which the legislation is applied.
>
> . . . . .

> It is presumed that the ordinary meaning of legislation is the most appropriate or "intended" meaning. In the absence of a reason to reject it, this meaning is binding on the courts.

The Concise Oxford Dictionary, 8th ed. (1990), defines "reward" as follows:

> a return or recompense for service or merit. b requital for good or evil; retribution. 2 a sum offered for the detection of a criminal, the restoration of lost property, etc.

"Return" is defined in the same dictionary as follows:

> verb- . . . 3 pay back or reciprocate; give in response (decided not to return the compliment). 4 yield (a profit).
>
> noun- . . . 4 a the proceeds or profit of an undertaking. b the acquisition of these.

"Recompense" is defined as a reward or requital.

It is clear from the above definitions that "reward" is commonly intended to mean something tangible and pecuniary, such as payment or profit, as opposed to something of an intangible nature such as goodwill. Black's Law Dictionary, 6th ed. (1990), includes the following definitions of goodwill:

> The favour which the management of a business wins from the public. The favourable consideration shown by the purchasing public to goods or services known to emanate from a particular source. . . . Property of an intangible nature, commonly defined as the expectation of continued public patronage.

I conclude that although synonyms for reward may include words such as "benefit" and "recognition", its meaning within the Public Vehicles Act is narrower and is limited to its "ordinary meaning".

Another principle of statutory interpretation, ejusdem generis, also leads me to this conclusion. This principle was explained by the Supreme Court of Canada in National Bank of Greece (Canada) v. Katsikonouris, 1990 CanLII

92 (SCC), [1990] 2 S.C.R. 1029 at p. 1040, 74 D.L.R. (4th) 197 at p. 203 by La Forest J.:

> Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it.

The specific words preceding the general word "reward" in the definition of "compensation" are "rate", "remuneration", and "reimbursement". The Concise Oxford Dictionary defines these words as follows:

> rate -- 2 a fixed or appropriate charge or cost or value; a measure of this
>
> remuneration -- 1 reward; pay for services rendered. 2 serve as or provide recompense for (toil etc.) or to (a person).
>
> reimburse[ment] -- 1 repay (a person who has expended money) 2 repay (a person's expenses)

The common feature connecting the above words is the notion of pecuniary payment or repayment. It follows that the word "reward", which comes after these more specific words, should also be construed as containing a tangible pecuniary element. Its meaning should be limited to the "genus of the narrow enumeration that precedes it", and not extended to include the notion of a company's goodwill.

The meaning of the word "compensation" was considered in Shaw v. McNay, 1939 CanLII 77 (ON SC), [1939] O.R. 368, [1939] 3 D.L.R. 656 (S.C.). The question before the court was whether the defendant, at the time of a motor vehicle accident, was operating a vehicle "in the business of carrying passengers for compensation", pursuant to s. 47(2) of the Highway Traffic Act, R.S.O. 1937, c. 288. That Act, unlike the Public Vehicles Act, did not define "compensation". Nevertheless, Mr. Justice Godfrey's analysis of the meaning of the word is instructive. At pp. 370-71 O.R., pp. 658-59 D.L.R., His Lordship states:

> What is the natural meaning of the words "compensation" and "business"? Funk & Wagnalls defines "compensate", "To make suitable return to or for, as for services, loss, etc. -- To give an equivalent or recompense to or for; requite, remunerate as to compensate one for his services."
>
> The word "compensation" is used in other sections of the Act, and its meaning in those sections throws some light as to its meaning in this section.

. . . . .

Subsection (m):

> "'Public vehicle' shall mean any motor vehicle operated on a highway by, for or on behalf of any person who receives compensation either directly or indirectly for the transportation of passengers, or passengers and express freight which might be carried in a passenger vehicle."

The above definition is very similar to the current definition of "public vehicle" in the Public Vehicles Act.

Godfrey J. concluded that "compensation" means payment by way of profit or gain. At p. 371 O.R., p. 659 D.L.R., he stated:

> It seems clear that when the words [referring to the words "business" and "compensation"] were used together the legislature intended to impose liability only on persons who were operating motor vehicles for the carrying of passengers in a commercial way for gain and profit. This would include taxi drivers and those who operate motor buses on which passengers pay fares.

He concluded that payment or the promise of payment by the plaintiffs to the defendant for half the cost of gasoline used on a trip was not "compensation" because it did not constitute payment by way of profit or gain. Nor, in my view, can an increase in a company's goodwill be considered as payment for profit or gain, or "compensation" as that word is defined in the Act.

I conclude that even if Trentway's free fare policy has resulted in the maintaining of and/or increase in its goodwill, this does not constitute a "reward", and hence is not "compensation" within the meaning of s. 1 of the Act. It can therefore not be said that Trentway operates a transportation service by means of a "public vehicle". In my view, the Legislature did not intend to regulate a free transportation service.

There is evidence before the court that, on occasion, Trentway inadvertently charged for the carriage of freight. These incidents arose when agents, who are not employees of Trentway, charged compensation for parcels between Peterborough and Toronto. Upon learning of this situation, Trentway immediately contacted the agents involved, advised them that no money was to be charged, and instructed them to make the appropriate refunds. In any event, it seems that the Board does not have jurisdiction to regulate the carriage of parcels by commercial vehicles unless passengers are also charged compensation. I refer again to the Act's definition of "public vehicle" -- ". . . a motor vehicle operated on a highway by, for or on behalf of any person for the transportation for compensation of passengers, or passengers and express freight that might be carried in a passenger vehicle . . ." (emphasis added).

In conclusion, I am not satisfied beyond a reasonable doubt that Trentway, by offering free transportation to passengers, is in contempt of the Board's order. The motion is therefore dismissed."

In *Demers c. Yahoo! Inc.,* 2017 QCCS 4154; the Court considered, among other things, whether a "consumer contract" existed between an internet user and the internet service provider given that the latter's services are provided "free of charge". On this point, the Court held as follows:

> *"[25] The Defendants reply that the internet-based services offered to users are free of charge. Hence, there is no consumer contract because a consumer contract requires payment or the exchange of valuable*

consideration, and article 3149 CCQ and section 22.1 of the CPA cannot override the choice of forum clause in favour of Ontario.

*[26] The Defendants refer to the case of St-Arnaud v Facebook inc.**[4]** where the Superior Court faced with a declinatory motion in the context of a class action brought against Facebook for similar internet-based services, held that article 3149 CCQ was not applicable since its users did not pay for the use of the services provided, thereby precluding the possible existence of a consumer relationship.*

[27] Me Luc Thibaudeau in an article entitled "Le I-consommateur à la recherche de la protection adéquate"[5] commented on the nature of the contract in similar circumstances:

> *" On pourrait croire que le contrat d'adhésion à un réseau social sur Internet serait aussi un contrat conclu à distance au sens de la Lpc. Mais il faudrait en premier lieu qu'il s'agisse d'un contrat de consommation. Or, dans une décision de 2011, la Cour supérieure, rejetant une demande d'autorisation d'exercer un recours collectif, a statué que le contrat conclu avec Facebook n'est pas un contrat de consommation parce que l'utilisation de Facebook est gratuite[6]. Pourtant, dans Albilia c. Apple inc., la gratuité du service fourni n'a pas semblé empêcher le tribunal de permettre l'autorisation d'exercer un recours collectif basé sur de fausses représentations contraires à la Lpc. Dans une autre décision plus récente, le tribunal a autorisé un recours collectif dont le fondement contractuel semblait à première vue à titre gratuit. La décision dans le dossier Facebook a été portée en appel, mais le dossier a fait l'objet d'une transaction. Dans un autre dossier où l'on attaquait les termes et conditions d'un programme de loyauté, le caractère gratuit de l'adhésion à ce programme n'a pas empêché la demande d'autorisation de recours collectif d'être autorisée.*

La question de la gratuité d'un I-service comme constituant un obstacle à l'exercice d'un recours collectif resterait donc non résolue. Il pourrait être débattu que le contrat à titre gratuit conclu sur le Web, si le contrat de Facebook en est un, demeure un contrat de consommation, surtout si l'on se fie au libellé des articles 1381 et 1384 du Ccq :

> ***1381.*** *Le contrat à titre onéreux est celui par lequel chaque partie retire un avantage en échange de son obligation.*
>
> *Le contrat à titre gratuit est celui par lequel une des parties s'oblige envers l'autre pour le bénéfice de celle-ci, sans retirer d'avantage en retour.*
>
> ***1384.*** *Le contrat de consommation est le contrat dont le champ d'application est délimité par les lois relatives à la protection du consommateur, par lequel l'une des parties, étant une personne physique, le consommateur, acquiert, loue, emprunte ou se procure de toute autre manière, à des fins personnelles, familiales ou domestiques, des biens ou de services auprès de l'autre partie, laquelle offre de tels biens ou services dans le cadre d'une entreprise qu'elle exploite. (The emphasis was in the article)*

*[28] There is no definition of a "consumer contract" or of a "merchant" in the CPA. In the case of Caza c. Derisca**[7]**, the Court of Appeal, referring to a previous decision[8], proposed the following in order to identify a merchant :*

> *[17] «Commerçant» n'est pas défini dans la L.p.c. Par contre, notre Cour a identifié deux éléments essentiels à la qualité de commerçant soit : 1) l'exercice d'une activité en*

> *vue de faire un profit et 2) le caractère de permanence de l'activité, sans que cette activité constitue nécessairement l'activité principale ou exclusive de la personne en autant que la personne exerce cette activité de façon «habituelle plutôt qu'occasionnelle».*

[29] The fact that the internet-based services rendered by the Defendants, i.e. internet search and communication through email, constitute their primary activity is not disputed. Also, the sheer number of these free applications that bring fortunes to their inventors leads us to believe that the latter have exercised their activities with a view to making a profit.

[30] The counsel for the Applicant does not dispute the fact that there is no charge to the user for the services rendered by the Defendants. He adds however, that the latter receive an advantage from the "affluence" on their website. In other words, the more users Yahoo has the more income it is likely to receive from advertisers, etc. Therefore, each party draws an advantage from the contract they have entered into. The Defendants earn more advertising revenue the more users they have, while the users get an email address free of charge.

*[31] Finally, Applicant also argues that the Supreme Court of Canada, in the recent case of Douez v. Facebook,Inc.**[9]** rendered in the context of a class action (the "**Facebook Decision**"), found that the contract between Facebook users and Facebook, Inc. was a consumer contract and that the choice of forum clause was not enforceable against Facebook users despite the fact that Facebook was free to join and use:*

> *[33] But commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. For example, the unequal bargaining power of the parties and the rights that a consumer relinquishes under the contract, without any opportunity to negotiate, may provide compelling reasons for a court to exercise its discretion to deny a stay of*

> *proceedings, depending on the other circumstances of the case (see e.g. Straus v. Decaire, 2007 ONCA 854, at para. 5 (CanLII)). (…)*
>
> *(…)*
>
> *[50] (…) More importantly, the claim involves a consumer contract of adhesion and a statutory cause of action implicating the quasi-constitutional privacy rights of British Columbians. (…) (Emphasis added)*

[32] In the Facebook Decision, the Supreme Court listed the elements to be considered when determining whether there exists a strong cause not to enforce a forum selection clause within a consumer context, namely, the inequality of bargaining power of the parties in a consumer contract of adhesion and the local court's interest in adjudicating claims involving constitutional or quasi-constitutional rights.

[33] The counsel for the Defendants submits that the Court should not rely on the Facebook Decision given the distinct legislative framework that exists in Québec, which already responds to many of the policy concerns raised in the Facebook Decision.

*[34] The Court is aware that many distinctions can be made between the present case and the Facebook Decision, namely, that in the Facebook decision, the Supreme Court applied the common law test for forum selection clauses set out in Z.I. Pompey Industrie v. ECU-Line N.V.**[10]**, which does not apply in this case.*

[35] However, the Supreme Court nevertheless stated that the contract between Facebook, Inc. and its users was a consumer contract of adhesion. In conducting its analysis, the Court found this statement to be persuasive.

[36] As appears from the foregoing, it would seem that we are dealing with a merchant who has concluded contracts with consumers, be it under the CPA or the CCQ.

[37] As seen above, the Québec legislature has chosen to except consumer contracts from its standard jurisdictional rules. In conclusion, the Court finds that the contract between Yahoo! Canada and the Applicant is a

consumer contract and thus the waiver of the Québec jurisdiction does not apply in the present case.

As a further example of the Court's taking into account a service's being "free", in Culhane v. ATP Aero Training Products Inc., 2004 FC 535 (aff'd 2005 FCA 129; appeal to SCC dismissed [2005] SCCA No. 279), the Court considered whether a company's provision of "free" practice aviation exams constituted "predatory pricing" as alleged by a competitor; while the Court found that no predatory pricing had occurred, it did find that, in the context, the provision of "free" exams was held to constitute "selling" them at an unreasonably low price:

[22] (a) That the defendants are engaged in a business

There is no dispute in this case that the corporate defendant is engaged in the business of selling aviation products. The defendant Reilly James Burke is the "sole principal, director, president/secretary and controlling mind of the defendant ATP" (statement of claim, paragraph 7, which was admitted by the defendants).

[23] (b) That the defendants are engaged in a policy of selling products

The defendants submitted that they were not engaged in a policy of selling on-line practice exams. The defendants, up until approximately 1998, were one of the largest sellers of practice aviation exam guides. In or about 1997, ATP began to make its practice exams available free on the internet. ATP also offers a free on-line correcting service for the exams. The defendant states that it is not selling the exam guides but are giving them away free. They compare the free exams to the free newspapers that are available on the internet. The defendants also state that the provision of the free exam guides is a marketing tool to sell its other products. Also, the defendants noted that Mr. Burke testified that there was no intention or plan to sell the exam guides for a fee in the future. Consequently, the defendants submitted

that this case is distinguishable from Hoffman-LaRoche, supra where the defendant gave away valium for only a one year period.

[24] Since ATP traditionally sold the exam guides for a price and continue to update the exam guides on-line to make them current, I am of the opinion that by giving the practice exams away for free, the defendants are engaged in a policy of selling products.

[25] (c) That pursuant to the policy, the products are being sold at prices which are unreasonably low

ATP originally sold the exam guides for a profit. For example, in 1988, ATP sold the private pilot exam guide, the commercial pilot exam guide and the exam guide for IFRS ratings for $7.95 each. The defendant, Mr. Burke, indicated that it takes some time for him to keep the on-line practice exams up-to-date. The plaintiff sells his practice exams for approximately the same price as did ATP, and the plaintiff also has a web site where his practice exams are offered for sale.

[26] In Hoffman-LaRoche, supra, Linden J. stated at page 194 as follows:

The reasonableness or unreasonableness of a price is an objective matter, not a subjective one. What is in the seller's mind is not important in deciding whether the price is unreasonable. In other words, it need not be proved that the accused actually meant to sell at an unreasonably low price as long as he did so in fact. A price may be found to be unreasonably low even though the seller honestly believed it was not. The subjective state of mind of the seller is vital, however, in determining the mens rea issue, which I shall discuss later.

And at page 200:

In assessing whether a seller has sold for unreasonably low prices, the Courts must examine all of the circumstances involved in the case. Reasonableness has a flexible meaning, depending on all of the facts. Parliament chose to enact that word in order to give the Courts some latitude in making their decisions about the legality or illegality of the prices

charged. There is nothing rigid about the concept of reasonableness. Business decisions should not be condemned, unless the Courts find that the price charged is unreasonable in all the circumstances.

[27] Linden J. then proceeded to list a number of factors to be considered by the Court in deciding whether a price is unreasonable. The factors and an explanation of them is stated at pages 200 to 201:

The factors to be considered by the Courts in deciding whether a price is unreasonable are several. First, the actual difference between the production cost or accounting cost and the sale price is important. If an article is sold for more than cost, it can never be held to be unreasonable. If an object, however, is sold for less than cost, this may or may not be held to be unreasonable. If it sold for 95% of its cost, for example, this is less likely to be held unreasonable than if it is sold for 50% or 5% of its cost. In other words, the greater the reduction below cost price, the more likely it is that the price is an unreasonable one.

Second, the length of time during which sales at the questionable prices take place is significant. If articles are sold below cost for a day or a week, this is less likely to be unreasonable than if it is done for a month, six months or a year. For example, an introductory, promotional sale of goods for a few days or even weeks is not prevented, for that is eminently reasonable to get potential customers to try one's product. The longer the deal lasts, however, the more suspect it would become. At some point, a Court would hold that what had been a reasonable price at first had become an unreasonable one.

Third, the circumstances of the sales must be taken into account. If a seller lowers his price to counteract a decrease in the price of his competitor, this is different than reducing the price initially. In other words, defensive price-cutting is viewed differently than offensive price-cutting. A level of prices may be reasonable in the former situation that may not be reasonable in the latter. Moreover, one need not wait for the competitor to attack first -- if one has information that an assault from a competitor is being planned, one may strike pre-emptively. In R. v. Allied Chemical Canada Ltd. et al. (1975), 1975 CanLII 959 (BC SC), 29 C.C.C. (2d) 460 at p. 490, 69 D.L.R. (3d) 506 at p. 536, 24 C.P.R. (2d) 221 at p. 251, Mr. Justice Ruttan stated:

"One is not required to wait until competitors get well established and then seek to meet them and their demands." Consequently, whereas a price reduction of 50% by itself might appear unreasonable in certain circumstances, it might not be if a competitor had reduced its price by 40% just prior to that time or if he had indicated that he would do so in the near future. Competition is a battle after all, and competitors must be allowed to engage in that battle, as long as they do so within reason.

A fourth factor to consider is whether any external or long-term economic benefits will accrue to the seller by reducing its prices below cost. An example is, a manufacturer may wish to keep its business alive, its customers supplied and its employees working during a difficult economic period, even though it cannot do so profitably. It may consider selling its products at less than cost for a time in the hope that they will recoup those losses when conditions improve. Another example may be that, for prestige reasons, a supplier may wish to be represented in a particular market, such as well-regarded retail outlets. Or, as here, it may be thought to be economically advantageous in the long run to have one's drugs used in the hospital market.

[28] The application of the facts of this case to the factors set out by Linden J. in Hoffman-LaRoche, supra, are as follows.

[29] <u>The actual difference between the production cost or accounting cost and the sale price</u>

There is no doubt that there are some costs associated with preparing and placing the exams at an on-line site even if Mr. Burke does the work himself. There is also the cost, albeit a declining cost, of maintaining the exams on-line. As well, there are costs incurred by way of Mr. Burke's work to up-date the exams in order to keep them current. As well, the fact that Mr. Burke sold the exams for $7.95 each in 1988 indicates that they are of some value. As Linden J. stated in Hoffman-LaRoche, supra:

. . . the greater the reduction below cost price the more likely it is that the price is an unreasonable one.

In the present case, the exam guides are given away for free. This factor therefore, suggests an unreasonably low price.

[30] The length of time during which sales at the questionable prices take place is significant

The defendants intend to offer the exam guides free for an indefinite period of time and do not intend to begin charging for them in the future. The Courts have stated that the longer the price decrease lasts, the more suspect it would become.

[31] The circumstances of the sale must be taken into account

By way of example, for a seller to lower its price to counteract a price decrease by its competitor is viewed differently than reducing the price initially, i.e. defensive versus offensive price-cutting. A drop in selling price in a defensive price cutting situation may be reasonable, but the same price cut in an offensive price cutting situation may be unreasonable. In this case, ATP's price cutting was an offensive price cutting situation, since it was not in reaction to any price decrease implemented by the plaintiff or anyone else in the marketplace.

[32] Whether any external or long-term economic benefits will accrue to the seller by reducing its prices below costs

The defendants submit that since an objective standard of reasonableness is used to assess a seller's activities, ATP need only demonstrate that it can reasonably expect long term economic benefits from providing on-line examinations for free, it need not provide proof that it has already benefited economically. The economic benefit that the defendants claim is that the free on-line exams will aid them in selling more of their other products. The evidence of Mr. Burke is to the effect that he does not know what portion of his sales result from the provision of his free on-line exam guides to customers. It seems to me that in order to assess whether long term economic benefits would accrue to the defendants as a result of the free exam guides, it would be very useful to the Court to know what economic benefits have already accrued since 1997 or 1998. There is no

evidence that the free give-aways have increased the sales of the defendants' other products now or that it will likely occur in the future.

[33] Based on the above considerations, I have come to the conclusion that the defendants selling their free on-line exam guides is selling at an unreasonably low price for the purpose of the test set out in Hoffman-LaRoche, supra.

As a comparatively simplistic final example, in *Paterson v. Guardian Realty Co. of Canada,* [1952] O.J. No. 260, the Ontario High Court of Justice held with regard to a building occupant's "provision" of a lobby and main entrance hall:

5 … The entrance and main entrance hall of a twenty story office building is practically a public thoroughfare where the young and the old and the strong and the feeble are constantly coming and going by the hundreds. The occupier of such a building is practically in the position of operating privately and for at least an indirect profit something in the nature of a public street. It seems to me, therefore, that a person in the position of this defendant must afford the many persons coming and going from its building every reasonable protection.