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Our File No.: 05497-0255

May 1, 2017

BY ELECTRONIC FILING

British Columbia Utilities Commission
6th Floor, 900 Howe Street
Vancouver, BC V6Z 2N3

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

Dear Sirs/Mesdames:

Re: Application for Reconsideration and Variance of Order G-199-16, dated December 29, 2016 (Reconsideration Application), on FortisBC Inc.'s Net Metering Program Tariff Update Application

Please find enclosed the Reply Submission of FortisBC Inc., dated May 1, 2017, with respect to the above-noted matter.

Yours truly,

FARRIS, VAUGHAN, WILLS & MURPHY LLP

Per:

Nicholas T. Hooge

NTH/bd
Enclosure
c.c.: Registered Interveners
Client

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF
the *Utilities Commission Act*, R.S.B.C. 1996, chapter 473

and

FortisBC Inc. Application for Reconsideration and Variance of
Commission Order G-199-16
on the FortisBC Inc. Net Metering Tariff Update Application

PHASE 1 REPY SUBMISSION OF FORTISBC INC.

May 1, 2017

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Nicholas T. Hooge

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A. INTRODUCTION

1. FBC sets out below its reply to the interveners' Phase One Submissions filed pursuant to the Commission's letter, dated April 3, 2017, establishing phase one of the review process for FBC's Reconsideration Application in respect of Order G-199-16.[1] Capitalized terms used in this Reply Submission are as defined in FBC's Reconsideration Application.[2]

2. FBC continues to rely on the Reconsideration Application and will endeavour to avoid repeating here submissions it has previously made. To the extent any points made by interveners in their Phase One Submissions are not specifically addressed in this Reply Submission, they should not be taken as agreed to by FBC.

3. The following is a summary of what FBC understands the interveners' respective positions to be in respect of the Reconsideration Application:

(a) B.C. Sustainable Energy Association and Sierra Club B.C. (collectively, **BCSEA**) submits that the Commission should reconsider Order G-199-16.[3] BCSEA submits that the Commission panel majority's primary error concerns the proposed kWh bank and agrees with FBC that it was an error to treat the kWh bank solely as "a mechanism to implement FBC's proposed pricing".[4] BCSEA submits that reconsideration of the kWh bank proposal will necessarily require a fresh analysis of the other issues FBC has proposed for reconsideration.[5] BCSEA does not see a need for new evidence nor for new parties to be given an opportunity to participate.[6]

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[1] Ex. A-2
[2] Ex. B-1
[3] Ex. C1-1, p. 1
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*

(b) BC Old Age Pensioners' Organization, et al.[7] (collectively, **BCOAPO**) submits that there should be reconsideration by the Commission.[8] BCOAPO submits that the reconsideration should focus on the first and third issues raised by FBC, namely the treatment of consistent annual NEG by customers in RS 95 and the appropriate price for payment of NEG.[9] BCOAPO opposes the creation of a kWh bank. BCOAPO supports the ability of FBC, as well as new participants (if permitted) to file new evidence they believe necessary to address the issues.[10]

(c) The Commercial Energy Consumers Association of British Columbia (**CEC**) submits that FBC's Reconsideration Application does establish a *prima facie* case in the areas identified for reconsideration.[11] CEC does not see the need for new evidence; however, it does not oppose FBC filing new evidence that may assist in clarifying any misunderstanding that may have resulted in any error of fact in the Majority Decision.[12] CEC submits that the reconsideration should focuse on the issues identified by FBC in the Reconsideration Application.[13]

(d) Mr. Andy Shadrack (**Mr. Shadrack**) strongly objects to the Reconsideration Application.[14] Mr. Shadrack submits that FBC has not proven a case of any significant material implications arising from the Majority Decision.[15] Mr. Shadrack submits that the kWh bank proposal would cause considerable financial hardship to him as a low income senior and to other low income seniors on tight monthly budgets.[16] Mr. Shadrack submits that the Commission has the legal power pursuant to s. 75 of the *UCA* to vary any right FBC may have to remove customers from RS 95 for

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[7] BC Old Age Pensioners Organization, Council of Senior Citizens' Organizations, Tenants Resource and Advisory Centre and Disability Alliance BC.
[8] Ex. C2-1, p. 1
[9] Ex. C2-1, p. 2
[10] *Ibid.*
[11] Ex. C3-1, p. 1
[12] Ex. C3-1, p. 2
[13] *Ibid.*
[14] Ex. C4-1, p. 7 of 7 (pdf)
[15] Ex. C4-1, p. 3 of 7 (pdf)
[16] Ex. C4-1, p. 4 of 7 (pdf)

production of consistent NEG.[17] Mr. Shadrack submits that he would not have enrolled in the NM program had he known that "FBC had the right to expel me from the program for producing NEG above my annual energy consumption, before paying off the Basic Charges and GST, and that they could also lower the dollar value of the tariff having previously made representations to me that I would be credited at the retail rate that I paid for electrical power".[18] He submits that the kWh bank and the issue of a different price for NEG should not be reconsidered again until after the Long Term Electric Resource Plan (**LTERP**) and the Long Term Demand Side Management Plan (**LT DSM Plan**) have been considered by the Commission.[19] Mr. Shadrack does not comment in his submissions on the need for new evidence if a second phase of the Reconsideration Application is ordered, stating that he will decline to participate.[20]

(e) Mr. Donald Scarlett (**Mr. Scarlett**) submits that the Reconsideration Application has not established a *prima facie* case that the Commission made an error in fact or law and that the Reconsideration Application is disproportionate in cost and intervener effort to the magnitude of the issues identified.[21] Regarding the removal of NM customers from RS 95, Mr. Scarlett disagrees with FBC's contractual interpretation analysis and submits that FBC is estopped from asserting the right in issue because it has not previously enforced it.[22] Regarding the kWh bank proposal, Mr. Scarlett submits that the public interest may differ from the preferences of the majority of interveners and that the Commission should not necessarily be expected to promote the financial interests of the majority of a subgroup of customers.[23] On NEG pricing, he submits that the matter of crediting NEG producers at Tier 2 rates while they consume electricity at Tier 1 rates was not canvassed during the Commission

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[17] Ex. C4-1, p. 4-5 (pdf)
[18] Ex. C4-1, p. 6 (pdf)
[19] Ex. C4-1, p. 7 of 7 (pdf)
[20] *Ibid.*
[21] Ex. C5-1, p. 1
[22] Ex. C5-1, p. 2
[23] *Ibid.*

proceeding to address the NM Tariff Update Applciation, although FBC could have introduced the issue at the time.[24]

B. FBC REPLY RE: LEGAL RIGHTS UNDER RS 95

4. Regarding Mr. Shadrack's submission that the Commission could vary any rights FBC has under RS 95 pursuant to s. 75 of the *UCA*, this argument misses the point. The position set out in FBC's Reconsideration Application is that the majority of the Commission panel erred in assuming FBC was asserting a new form of legal right and therefore had the burden to justify adding it to the NM tariff.[25] Had the Commission considered the issue in the correct legal context – in other words, whether an existing right under RS 95 should be taken away from FBC – the Commission could have and, in FBC's submission, would have reached a different conclusion.

5. On this issue, Mr. Scarlett submits that FBC does not have the asserted right because it "cannot read into RS 95 conditions that simply are not there". To the contrary, the panel majority held that the proposed "adjustments" to RS 95 to "remove existing ambiguities", did in fact "impose a limit on customers' use of the program".[26] In FBC's submission, the tariff "adjustments" the Commission approved did not reflect a substantive change to the legal meaning and interpretation of RS 95. Thus, the limits imposed on customers's use of the NM program through the eligibility critiera have always been a part of RS 95 (properly interpreted). The Commission's determination also reflects that what is in issue is not so much an expressly delineated "right" as it is that FBC has no on-going obligation to provide service under RS 95 to customers that no longer meet the eligibility criteria.

6. Further, and in any event, terms are regularly implied into legal agreements and other instruments when necessary to give them commercial efficacy. FBC has pointed to other examples in its Electric Tariff and Rate Schedules where no "right" to remove customers from

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[24] Ex. C5-1, p. 3
[25] Reconsideration Application, para. 36
[26] Majortity Decision, pp. 9, 11

particular rate schedules is explicitly set out, but such legal entitlement must necessarily follow by virtue of the eligibility criteria to receive service under the rate schedule.[27]

7. The doctrine of estoppel, which Mr. Scarlett invokes on this issue, is not applicable because there is no form of detrimental reliance by NM customers on FBC's alleged non-enforcement of its rights under RS 95.[28] What is in effect being argued by Mr. Scarlett is that FBC waived the asserted rights under RS 95 by failing to enforce them against NM customers. However, a true waiver requires an unequivocal and conscious intention to abandon known legal rights and there is no basis whatsoever for concluding that FBC did so in these circumstances and therefore no basis for Mr. Scarlett's argument.[29]

C. FBC REPLY RE: KWH BANK ISSUES

8. BCOAPO's submissions in response to the Reconsideration Application reiterate its opposition to the kWh bank proposal as stated in the Commission proceeding in respect of the NM Tariff Update Application. FBC addressed those submissions substantively in its Reply Submissions, dated September 30, 2016, at paragraphs 9-10, and will not repeat those points again here. FBC notes that the Majority Decision did not resolve or otherwise comment on the positions being advanced and a full reconsideration would provide an opportunity for the Commission to do so.

9. Mr. Shadrack cites financial hardship, both personally and for low-income customers and fixed income seniors generally, as a basis to oppose the kWh bank proposal. However, the Commission has recently determined that income level or ability to pay are not criteria that are within its jurisdiction to consider in making rate setting determinations under the *UCA* in the absence of a cost of service rationale.[30] Accordingly, Mr. Shadrack's reliance on financial hardship, even if proven, would not be a valid basis for the Commission to reject FBC's proposals in respect of the NM program. Preserving the financial position of a limited number of

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[27] Reconsideration Application, para. 34 (referencing the eligibility criteria for RS 31); see also Response to BCUC IR 2.12.4 (Ex. B-10, p. 3)
[28] See *Ecobase Enterprises Inc. v. Mass Enterprise Inc.*, 2017 BCCA 29 at para. 10
[29] See *Saskatchewan River Bungalows Ltd. v. Maritime Life Insurance Co.*, [1994] 2 S.C.R. 490 at p. 500
[30] BCUC Decision and Order G-5-17, dated January 20 2017, p. 80

NM customers like Mr. Shadrack or Mr. Scarlett cannot be a justification for rejecting a proposal that provides the opportunity to customers to offset consumption that would otherwise be billed at Tier 2 rates.

10. It is also notable that, although opposed to the kWh bank for other reasons, BCOAPO has not made any similar argument. Self-generation facilities are not generally installed by low income customers due to the significant up front investment.

11. In addition, we note that the evidence Mr. Shadrack submitted with his Final Argument, dated September 23, 2016, in respect of the original Application appears to show that there has only been one occasion since his solar photovoltaic facilities were installed that he produced NEG that could be used to off-set non-consumptive charges. According to the summary of his household's "grid use" and "solar transfers", Mr. Shadrack provided with his Final Argument, the only billing period in which excess generation was produced was June 2016 (where an exess of 70 kWh was generated, reflecting a credit of approximately $7.00 at then current rates).[31] On this basis, it could not be said that a customer in Mr. Shadrack's position would suffer negative financial consequences as a result of the kWh bank proposal.

12. Regarding Mr. Scarlett's submissions on the kWh bank issues, FBC has, with respect, presented more substantive arguments than his submissions acknowledge. FBC is not relying on or in any way suggesting that the the will of the majority of interveners should prevail or that the Commission must "copy" other jurisdictions. Mr. Scarlett's admonition that, "By their nature, interveners may seek to promote their own interests – which may or may not be congruent with the public interest" could also be said to apply equally to the public interest justifications he asserts in opposition to the kWh bank proposal (in particular, "fairness to the minority of a sub-group").

13. Furthermore, BCSEA, BCOAPO, and CEC are all generally supportive of the Reconsideration Application. These intereveners represent not individual views, but a broad cross-section of FBC customers, as well as diverse interests and view points. Their position that

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[31] Shadrack Final Argument, dated September 23, 2016, Appendix B, p. 11 (pdf)

reconsideration is warranted is deserving of respect and should be given commensurate weight in the Commission's deliberations. Indeed, their views provide greater insight into the public interest than those of a limited number of individual customers with direct financial interest in the outcome of the proceeding.

14. FBC questions how favouring the financial interests of a minority of customers in the NM program "subgroup" could ever be in the public interest when the proposals being advanced provide an opportunity to all members of that subgroup to offset their consumption that would otherwise be billed at Tier 2 rates. In any case, the public interest justifications Mr. Scarlett cites were not addressed by the Commission previously because the kWh bank proposal was not considered on its own merits. These issues should be addressed at phase two of the reconsideration process.

D. FBC REPLY RE: NEG PRICING

15. Mr. Shadrack's submission on appropriate NEG pricing is, in effect, that he did not know that the compensation price set out in the NM tariff could be lowered. With respect, this belief is directly at odds with Mr. Shadrack's own submission that the Commission has broad authority to make amendments and revisions to the terms of FBC's rate schedules based on the merits and justice of the case.[32] Mr. Shadrack's stated belief is also contrary to the terms and conditions of FBC's Electric Tariff, which provide that electricity rates in the Company's rate schedules are subject to being amended from time to time:

> 6.3 Rates for Electricity
>
> The Customer shall pay for Electricity in accordance with these Terms and Conditions and the Customer's applicable rate schedule, as amended from time to time and accepted for filing by the British Columbia Utilities Commission.[33]

16. Mr. Scarlett argues that FBC could have raised the issue regarding unjust and unreasonable rates during the Commission proceeding regarding FBC's NM Tariff Update

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[32] Ex. C4-1, p. 4-5 (pdf)
[33] FBC Electric Tariff B.C.U.C. No. 2, s. 6.3 (TC17)

Application. In reply, we note, first, that there is nothing in the Commission's procedural rules with respect to reconsideration that precludes a party from raising a new issue. Indeed, the fact that the Commission regularly allows for new evidence on reconsideration is strong indicator that new issues can be appropriately raised. Second, the new submission flows from the panel majority's determination that the circumstances have not changed sufficiently to justify a new NEG price and its criticism that FBC's proposal is "based on an implicit change to the analytic paradigm" in how NEG is valued. FBC is entitled to challenge these determinations on reconsideration by demonstrating their effects on the Company's ability to recover a just and reasonable return for the services provided.

17. Mr. Scarlett also submits that FBC receives the Tier 2 rate disproportionately from some communities that do not have access to natural gas. This submission is a direct attack on RCR and has recently been considered by the Commission and dismissed in another process.[34] In any event, the variability of access to natural gas is not a justification for the present rate treatment of NEG under the NM tariff.

E. IMPACT OF THE LTERP/LT DSM PLAN

18. Mr. Shadrack objects to reconsideration of the kWh bank proposal until after the LTERP and LTD DSM Plan have been considered by the Commission.[35] FBC submits that the LTERP/LT DSM Plan proceeding does not preclude reconsideration of Order G-199-16 and that the specific issues it seeks to have addressed in this Reconsideration Applicaiton will not be impacted by any determinations that could be made in other extant Commission proceedings. FBC notes that the panel majority's comment regarding these processes was that the LTERP, as well as the Self-Generation Policy proceeding, would be potentially relevant to "broader issues" than those determined in the original Application.[36]

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[34] BCUC Report to the Government of British Columbia on the Impact of BC Hydro and FortisBC's Residential Incling Block Rates, dated March 28, 2017, Executive Summary, p. i
[35] Ex. C4-1, p. 7 of 7 (pdf)
[36] Majority Decision, pp. 5, 19

F. MATERIAL IMPLICATIONS

19. Mr. Shadrack argues that FBC's Reconsideration Application does not establish any "significant material implications" that result from the Majority Decision. In particular, he notes that the dollar amount of NEG in issue is low when considered in the context of FBC's entire residential customer base.[37] Mr. Scarlett likewise questions the magnitude of the issue, but also comments, on the other hand, that "significant consistent NEG ... [has been] produced" during the five years the NM program has been in effect.[38]

20. FBC disputes that the materiality of the financial impact of the Majority Decision should be considered from the context of FBC's entire residential customer base as Mr. Shadrack suggests. Rather, the impact is more appropriately judged in the context of the NM program itself and should take into account that the model being proposed will apply to the NM program as it grows over time. The fact that the residential NM customer group who would benefit from FBC's proposals are only a fraction of the larger residential customer base does not lessen the significance of the issues to the NM program or its participants. Mr. Shadrack's argument, if taken to its logical conclusion, would preclude <u>any</u> issue arising from the NM program from being material enough for the purposes of Commission reconsideration.

21. FBC also notes that the material implications of the Majority Decision are not limited to financial considerations. For instance, the panel majority's interpretation of and the changes it has directed to RS 95 have raised a question regarding FBC's legal rights in relation to customers on other rate schedules who cease to satisfy the relevant eligibility criteria.[39] The Majority Decision has also, in FBC's submission, entrenched a rate preference in favour of a small subset of NM customers while simulatenously preventing FBC from receiving just and reasonable rates. Fundamental principles of the Commission's rate setting jurisidiction are therefore in issue. These are not immaterial or insignificant issues that can be reasonably ignored without further process.

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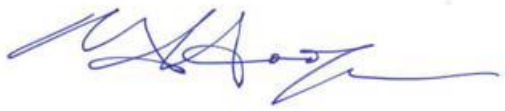
[37] Ex. C4-1, p. 3 of 3 (pdf)
[38] Ex. C5-1, p. 2
[39] See Reconsideration Application, para. 40

G. NEW EVIDENCE/PARTIES

22. FBC reiterates its request for leave to submit new evidence on the NEG compensation issues. In particular, it proposes to present evidence of the billing data described at paragraphs 82-83 of the Reconsideration Application. In addition to being relevant to the issue of just and reasonable rates, the billing evidence will also demonstrate the financial impact of the kWh bank for residential NM customers.

23. None of the inteveners has advocated for new parties to be given an opportunity to present new evidence. FBC shares that view.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



May 1, 2017
Dated

Nicholas T. Hooge
Farris, Vaughan, Wills & Murphy LLP
Counsel for FortisBC Inc.

THIS Reconsideration Application is prepared and delivered by Nicholas T. Hooge of the firm Farris, Vaughan, Wills & Murphy LLP, Barristers & Solicitors, whose place of business and address for service is 2500 – 700 West Georgia Street, Vancouver, British Columbia, V7Y 1B3. Telephone: (604) 684-9151. Facsimile: (604) 661-9349. **Attention: Nicholas T. Hooge**.

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF
the *Utilities Commission Act*, R.S.B.C. 1996, chapter 473

and

FortisBC Inc. Application for Reconsideration and Variance of
Commission Order G-199-16 on the FortisBC Inc.
Net Metering Tariff Update Application

BOOK OF AUTHORITIES OF FORTISBC INC.
RE: PHASE 1 REPLY SUBMISSIONS

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ecobase Enterprises Inc. v. Mass Enterprise Inc.,* 2017 BCCA 29

Date: 20170120
Docket: CA42199

Between:

Ecobase Enterprises Inc.

Respondent
(Plaintiff)

And

Mass Enterprise Inc. and
Seyed Siamek Mirmohamaddi Tehrani

Appellants
(Defendants)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated August 28, 2014 (*Ecobase Enterprises Inc. v. Mass Enterprise Inc.*, 2014 BCSC 1652, Vancouver Docket No. S113271).

Counsel for the Appellants:	D.K. Georgetti
Counsel for the Respondent :	C.N. Mangan
Place and Date of Hearing:	Vancouver, British Columbia October 7, 2016
Place and Date of Judgment:	Vancouver, British Columbia January 20, 2017

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Harris

Summary:

The appellants contend the trial judge provided insufficient reasons to explain his finding that promissory estoppel did not apply. Held: appeal dismissed. The reasons provided by the judge adequately explain his findings and permit appellate review when read in the context of the record. The judge was not required to address each piece of evidence relied on by the appellants at trial to establish the elements of promissory estoppel.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

INTRODUCTION

[1] The appellants challenge the sufficiency of the trial judge's reasons for his finding that they could not rely on promissory estoppel as a defence to the respondent's claim for repayment of a loan.

BACKGROUND

[2] The underlying dispute arose out of business dealings between the respondent Ecobase Enterprises Inc. and the appellant Mass Enterprises Inc. Ecobase was controlled by Raoof Parvaresh and his son Shervin Parvaresh. Mass was controlled by the appellant Siamek Tehrani and his son Arman Tehrani. The trial judge described the parties' dealings this way:

> [2] In August 2008 [the two companies] entered into a "Joint Venture Agreement" to purchase and develop land in New Westminster with each company contributing $150,000. To make its investment Mass borrowed $150,000 from Ecobase.
>
> [3] In a document entitled "addendum to joint venture agreement Promissory note" the $150,000 loan with interest at 10% per annum was agreed to be repaid within a year from August 27, 2008. Seyed Siamek Mirmohamaddi Tehrani ("Mr. Tehrani"), the principal of Mass agreed to give a personal cheque for $165,000 to Ecobase "as a guaranty of the repayment of this account, dated for August 27, 2009". If Mass was not able to repay the loan with interest on August 27, 2009, the date of repayment would be extended to February 27, 2010 with interest continuing at 10% per annum. If the February 27, 2010 date for repayment was not met, Mass agreed to transfer its one-half interest in the New Westminster property to Ecobase "at market price and if the property value will be less than its final liability amount (loan + interest), the balance of the loan needs to be paid in cash …".
>
> …
>
> [5] A question arose at the trial about whether the $165,000 "guaranty" cheque was actually given by Mr. Tehrani to Ecobase. In his amended response to civil claim in the Ecobase action, Mr. Tehrani denies he "executed any guaranty of $150,000 loan" but "does admit that he provided a cheque to [Ecobase] in the amount of $165,000 to stand as security for the obligation of Mass to pay this sum of $150,000 to [Ecobase]".

[3] Eventually the joint venture to develop the New Westminster property failed. In February 2010, the parties made a handwritten notation on the joint venture agreement: "this

[10] I turn now to the adequacy of the reasons relating to estoppel in this case. As set out in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at 57, a party seeking to rely on promissory estoppel must establish four elements:

1. an existing legal relationship;

2. a promise or assurance made by the other party and intended to affect their legal relationship;

3. reliance on the promise or assurance; and

4. a change in position to the party's detriment.

[11] The trial judge found Mass had failed to establish the second element, i.e., that Ecobase had made a promise or given an assurance to Mass intended to affect their legal relationship. Since Mass was required to prove each of the four elements, that failure put an end to the defence and the judge did not address the other elements.

[12] I note that the issue on appeal is not whether the trial judge erred in finding that Ecobase did not make an unequivocal representation to Mass, but rather whether he adequately explained why he came to that conclusion. Mass argues that the primary deficiency in the reasons is the judge's failure to address evidence that Ecobase returned the $165,000 cheque Mass had provided as security for the loan.

[13] In oral submissions on appeal, Mass initially described that event as "a clear and unequivocal representation that the loan was repaid". Mass argued the return of the cheque was particularly important in light of the provision in the addendum to the joint venture agreement which provided:

> …
>
> Mr. Siamak Tehrani gives a personal cheque with the amount of CAN$165000 to EcoBase as a guaranty of the repayment of this amount, dated for August 27, 2009. The check will be returned to Mr. Tehrani after the complete repayment of the loan. [Emphasis added.]
>
> …

[14] However, Mass acknowledged that it did not rely on this evidence as "a standalone issue" at trial. Mass further acknowledged that because Ecobase denied the cheque had been returned, the testimony supporting its return was given less emphasis than other uncontested evidence Mass relied on to establish promissory estoppel. Mass says nonetheless that it was an important part of its case and "the judge was invited to make a finding on it".

The Maritime Life Assurance Company *Appellant*

v.

Saskatchewan River Bungalows Ltd. and Connie Doreen Fikowski *Respondents*

INDEXED AS: SASKATCHEWAN RIVER BUNGALOWS LTD. *v.* MARITIME LIFE ASSURANCE CO.

File No.: 23194.

1994: March 14; 1994: June 23.

Present: La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Insurance — Policy lapse — Waiver — Insurance premium remaining unpaid after grace period expired — Insurer requesting immediate payment of premium — Whether insurer waived right to compel timely payment under policy — If so, whether waiver still in effect when payment tendered.

Insurance — Relief against forfeiture — Waiver — Insurance premium remaining unpaid after grace period expired — Insurer requesting immediate payment of premium — Whether insurer waived right to compel timely payment under policy — If not, whether relief against forfeiture should be granted under s. 10 of Judicature Act, R.S.A. 1980, c. J-1.

In 1978, Maritime issued an insurance policy on the life of MF to the respondent Saskatchewan River Bungalows Ltd. ("SRB"). In 1984, ownership of the policy was transferred to the respondent Fikowski ("CF"), who became the beneficiary. SRB remained responsible for paying the annual premiums. On July 24, 1984, SRB mailed a cheque to pay the annual premium due on July 26, but this cheque was never received by Maritime, nor was it deducted from SRB's bank account. After the grace period expired on August 26, Maritime sent a late payment offer to SRB agreeing to accept payment of the July premium if it was postmarked or received by September 8, but SRB did not respond to this offer. In November Maritime wrote a letter advising CF that the premium due on July 26, 1984 remained unpaid and stating that "this policy is now technically out of force, and we

La Maritime, Compagnie d'assurance-vie *Appelante*

c.

Saskatchewan River Bungalows Ltd. et Connie Doreen Fikowski *Intimées*

RÉPERTORIÉ: SASKATCHEWAN RIVER BUNGALOWS LTD. *c.* LA MARITIME, COMPAGNIE D'ASSURANCE-VIE

N° du greffe: 23194.

1994: 14 mars; 1994: 23 juin.

Présents: Les juges La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Assurance — Déchéance de police — Renonciation — Prime d'assurance demeurant impayée à l'expiration du délai de grâce — Assureur demandant le paiement immédiat de la prime — L'assureur a-t-il renoncé au droit d'exiger le paiement dans le délai prévu par la police? — Dans l'affirmative, la renonciation s'appliquait-elle toujours lorsque le paiement a été offert?

Assurance — Levée de déchéance — Renonciation — Prime d'assurance demeurant impayée à l'expiration du délai de grâce — Assureur demandant le paiement immédiat de la prime — L'assureur a-t-il renoncé au droit d'exiger le paiement dans le délai prévu par la police? — Dans la négative, y a-t-il lieu de lever la déchéance aux termes de l'art. 10 de la Judicature Act, R.S.A. 1980, ch. J-1?

En 1978, La Maritime a établi une police d'assurance sur la tête de MF en faveur de l'intimée Saskatchewan River Bungalows Ltd. («SRB»). En 1984, la propriété de la police a été transférée à l'intimée Fikowski («CF») qui en est alors devenue la bénéficiaire, SRB conservant l'obligation de payer les primes annuelles. Le 24 juillet 1984, SRB a mis à la poste un chèque pour payer la prime annuelle échéant le 26 juillet, mais La Maritime n'a jamais reçu ce chèque qui n'a pas non plus été débité du compte bancaire de SRB. Après l'expiration du délai de grâce le 26 août, La Maritime a envoyé une offre de paiement tardif à SRB. Elle y offrait d'accepter le paiement de la prime de juillet à la condition qu'il porte une date d'oblitération qui ne soit pas postérieure au 8 septembre ou qu'il soit remis à cette même date. SRB n'a toutefois pas répondu à cette offre. En novem-

That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

As there is little doubt that Maritime had full knowledge of its rights under the respondents' policy, the waiver issue turns entirely on Maritime's intentions. The respondents have identified several factors which, in their view, support a finding that Maritime "clearly and unequivocally" intended to waive its right to timely payment. In particular, the respondents submit that by encouraging policyholders to pay by mail, by requesting payment of the 1984 premium after the expiry of the policy grace period, by delaying issuance of the February lapse notice, by failing to return the $45 partial payment, and in accepting late payment in 1981, Maritime waived its right to require payment in accordance with the terms of the policy.

It is not necessary to address each of the factors identified by the respondents, for it seems clear that the November letter, taken alone, constituted a waiver of Maritime's right to receive timely payment under the policy. The November letter contained the following statement:

Unfortunately this policy is now technically out of force, and we will require immediate payment of $1,361.00 to pay the July 1984-85 premium.

As late as November 28, 1984, Maritime was willing to continue coverage under the policy upon payment of the July 1984 premium. The November

du droit de l'invoquer. Cette intention peut être exprimée dans un acte juridique formel, elle peut être exprimée d'une manière informelle ou être inférée du comportement. Quelle que soit la manière dont elle est exprimée, cependant, c'est l'intention consciente de renoncer à ce droit qui doit être établie.

On ne conclura donc à la renonciation que si la preuve démontre que la partie qui renonce avait (1) parfaitement connaissance des droits en cause et (2) l'intention claire et consciente d'y renoncer. Le recours à un critère aussi strict est justifié vu l'absence de contrepartie de la part de la partie en faveur de laquelle joue la renonciation. Une interprétation trop large de la renonciation minerait l'exigence de contrepartie contractuelle.

Puisqu'il ne fait guère de doute que La Maritime connaissait parfaitement ses droits aux termes de la police des intimées, la question de la renonciation porte entièrement sur les intentions de La Maritime. Les intimées ont relevé plusieurs facteurs qui, à leur avis, permettent de conclure que La Maritime a [TRADUCTION] «clairement et sans équivoque» voulu renoncer à son droit au paiement à échéance. En particulier, les intimées soutiennent qu'en incitant les preneurs à payer par la poste, en exigeant le paiement de la prime de 1984 après l'expiration du délai de grâce de la police, en retardant l'envoi de l'avis de déchéance de février, en ne retournant pas le paiement partiel de 45 $ et en acceptant le paiement tardif en 1981, La Maritime a renoncé à son droit d'exiger le paiement conformément aux modalités de la police.

Il n'est pas nécessaire d'examiner chacun des facteurs décrits par les intimées, car il semble clair que par la seule lettre de novembre, La Maritime a renoncé à son droit de recevoir le paiement à échéance aux termes de la police. La lettre de novembre contenait la déclaration suivante:

[TRADUCTION] Malheureusement, cette police est maintenant formellement sans effet et nous exigerons le paiement immédiat de 1 361 $ pour acquitter la prime de juillet 1984-1985.

Le 28 novembre 1984, La Maritime était toujours disposée à maintenir la couverture aux termes de la police moyennant le paiement de la