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Our File No.: 05497-0257

October 12, 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

– BCUC Project No. 3698875

Please find enclosed for filing the Final Argument of FortisBC Inc., dated October 12, 2017, with respect to the above-noted matter.

Yours truly,

FARRIS, VAUGHAN, WILLS & MURPHY LLP

Per:

Nicholas T. Hooge

NTH/bd
Enclosure

BRITISH COLUMBIA UTILITIES COMMISSION

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

and

FortisBC Inc. Net Metering Reconsideration Application

FINAL ARGUMENT OF FORTISBC INC. – PHASE II RECONSIDERATION October 12, 2017

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PART 1 - INTRODUCTION

1. On March 17, 2017, FortisBC Inc. (**FBC** or the **Company**) filed an application (the **Reconsideration Application**), pursuant to section 99 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 (the ***UCA***), for reconsideration and variance of British Columbia Utilities Commission (**BCUC** or the **Commission**) Order G-199-16, dated December 29, 2016. In that order, the Commission accepted some and rejected other proposals by FBC in its Net Metering Tariff Update Application, dated April 15, 2016 (the **2016 NM Application**). In summary, Commission Order G-199-16 (the **2016 NM Order**):

2. Approved certain changes to the Net Metering (**NM**) Tariff, Rate Schedule (**RS**) 95, clarifying that the NM program is not intended for customers who generate electricity in excess of their annual consumption and that a NM system must be intended to offset only a portion or all of the customer's electricity requirements on an annual basis.

3. Directed FBC to submit certain proposed changes to RS 95 to provide that,

    (i) NM customers cannot increase their generating capacity without prior approval of FBC, which is to be evaluated on the same basis as a new customer is evaluated for entry in the NM program; and

    (ii) NM customers cannot be removed from the NM program solely on the basis of producing annual net excess generation (**NEG**).

    (b) Rejected FBC's proposal to implement a kWh bank to carry forward NEG accumulated in a billing period to offset consumption in a future billing period with an annual settlement of any remaining unused NEG (the **kWh Bank**).

    (c) Rejected FBC's proposal to change the compensation price for NEG to the British Columbia Hydro and Power Authority (**BC Hydro**) RS 3808 Tranche 1 rate.

    (d) Accepted FBC's proposed billing calculation method under RS 95, whereby the kWhs of Net Generation and Net Consumption recorded at the meter of an NM customer's premises would be netted prior to the calculation of the customer's bill.

(e) Determined that existing NM customers should be afforded the same protections as new program entrants under the revised RS 95, in that they could not be removed from the NM program by reason of producing NEG.

4. As set out in the Reconsideration Application, FBC is seeking an order varying the terms of the Commission's 2016 NM Order in three material respects.

5. ***First***, FBC is seeking to rescind that part of the order directing it to submit changes to RS 95 that would prohibit customers being removed from the NM program on the basis of producing annual NEG. The effect of the 2016 NM Order being varied in this manner would be to confirm FBC's right to remove existing or future customers from RS 95 if they do not meet the eligibility criteria by reason of producing persistent annual NEG.

6. ***Second***, FBC is seeking to vary the Commission's order such that the kWh Bank proposal described in Section 5 of the 2016 NM Application is approved for implementation and the terms of RS 95 be amended accordingly.

7. ***Third***, FBC is seeking to vary the order such that approval is granted to compensate any positive kWh balance remaining in a NM customer's kWh Bank at the end of the annual period using the BC Hydro RS 3808 Tranche 1 rate.

8. FBC's Reconsideration Application outlines a number of material errors of fact and law in the Commission panel majority's decision (the **Majority Decision**) in respect of the 2016 NM Order that justify reconsideration and variance as set out above. In its Phase 1 decision in this process, the reconsideration panel determined as follows:

> The Panel is persuaded that a *prima facie* case has been made and that the Commission may have erred in its interpretation of the rights and obligations set out in RS 95 is respect of customers that consistently produce annual NEG. The Panel is also persuaded that a *prima facie* case has been made and that the Commission may have erred in the treatment of, and compensation rate for, NEG.[1]

[1] BCUC Order and Decision G-76-17 (**Phase 1 Decision**), p. 5

9. The reconsideration panel also determined that the *prima facie* errors have significant material implications that justified proceeding to Phase Two of the reconsideration process on all issues raised by FBC in its Reconsideration Application.[2]

10. FBC has, pursuant to the Phase 1 Decision, filed additional evidence in this process (Ex. B-4) and answered one round of information requests (**IRs**) from interveners and Commission staff (Exs. B-8 to B-11). This Final Argument will refer to the Phase 2 evidence, to the Reconsideration Application itself, as well as to filings from the initial 2016 NM Application process and from FBC's Application to the Commission in 2009 that originally established the NM program (the **2009 NM Application**).

11. The balance of this Final Argument is organized as follows:

12. Part 2 addresses the proper interpretation of RS 95 and the right FBC asserts to remove customers, including existing customers, from the NM program on the basis of producing persistent annual NEG.

13. Part 3 addresses the NEG treatment issues, in particular,

    (i) the kWh Bank proposal and the panel majority's error in treating this solely as a "mechanism to implement FBC's proposed pricing method" rather than consider the independent benefits of a kWh Bank that justify its implementation; and

    (ii) the appropriate compensation price for annual NEG and the panel majority's errors in determining that current retail rates are the appropriate price.

14. Part 4 concludes FBC's submissions.

15. FBC submits that the order sought in its Reconsideration Application should be granted. The proposals it has put forward for the NM program strike the appropriate balance

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[2] Ibid.

among customers generally and between NM customers and the utility and are the most consistent with regulatory rate making and cost of service principles. If the 2016 NM Order is not varied, then:

16. A small number of existing NM customers will have an entrenched rate preference compared to other NM customers and new entrants to the program and FBC will have no ability to regulate against these customers maximizing annual NEG contrary to the intent of the program.

17. NM customers with average consumption and generation patterns will lose the benefits of a kWh Bank, including the opportunity to use banked kWhs to off-set more expensive Tier 2 consumption in subsequent billing periods and to smooth billing fluctuations during the winter months when customer generation tends to be lower and consumption is usually higher in FBC's service territory.

18. Annual NEG will continue to be overcompensated as compared to FBC's avoided cost of energy and some NEG will continue to be compensated at the much higher Tier 2 rate with no regulatory justification. This also sends price signals that are contrary to the intent of the NM program and incents production of NEG that is largely unnecessary from a system perspective.

19. NM customers will continue to be subsidised by other FBC rate-payers and will avoid paying an equitable share of the fixed costs of FBC's electric system. While FBC's proposals do not completely eliminate these circumstances, they do mitigate against the inherent subsidy built into the NM Program design.

PART 2 - RS 95 INTERPRETATION/ELIGIBILITY ISSUES

A. Legal Interpretation of RS 95

20. FBC's Reconsideration Application contains a detailed analysis of the legal interpretation applicable to RS 95 at paragraphs 20 to 35. The submissions contained at those paragraphs of the Reconsideration Application are specifically adopted and

relied upon for the purposes of this Final Argument. The following section of this Final Argument supplements those submissions.

21. The Reconsideration Application addresses certain legal principles that apply to the interpretation of contracts or other legal instruments that, in FBC's submission, support the position that RS 95 entitles it to remove customers from the NM program that do not meet the eligibility criteria. FBC's Electric Tariff and Rate Schedules are contractual in nature and must be interpreted in accordance with the general legal principles that apply to the interpretation of contracts. For example, in *Princeton Light & Power Co. Ltd. v. MacDonald*, the BC Court of Appeal stated that a residential customer's "contract [with the utility] consists of the application [for service] and the Electric Tariff, as amended from time to time with the approval of the Commission".[3] Similarly, in *British Columbia Hydro and Power Authority v. Heathcote*, the BC Supreme Court noted that BC Hydro's "Electric Tariff is a contract for services that exists between" BC Hydro and its customers.[4]

22. As part of its contract with customers who apply for NM service, and assuming that it is valid and enforceable, RS 95 must have a single, definitive legal meaning. This is so even if the wording is ambiguous or unclear. Even the meaning of contract terms that, viewed objectively, bear two or more reasonable interpretations can be and are reconciled through legal principles of contract interpretation.[5]

23. The Majority Decision cited certain ambiguities in RS 95 and approved FBC's proposed revisions as providing improved clarity.[6] This is certainly pragmatic and helpful going forward; however, it does not resolve whether RS 95, as it stood prior to the 2016 NM Application, does or does not allow FBC to remove customers from the NM Program if they are persistent producers of annual NEG. The panel majority made the bare determination that, "FBC does not have this right under the current RS 95 tariff, nor

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[3] Princeton Light & Power Co. Ltd. v. MacDonald, 2005 BCCA 296, at para. 44
[4] British Columbia Hydro and Power Authority v. Heathcote, 2011 BCSC 394, at para. 13
[5] Gilchrist v. Western Star Trucks Inc., 2000 BCCA 70 at para. 17
[6] Majority Decision, p. 8-9, 11

should they going forward".[7] As noted in the Reconsideration Application, this determination was made without engaging in an analysis of the proper legal interpretation of the relevant tariff terms.

24. FBC submits that on a proper legal interpretation it does have, and has always had, the right to remove customers that, by producing persistent annual NEG, do not meet the eligibility criteria in RS 95. The two key provisions that have existed in RS 95 since its inception are the following:

- The definition of "Net Metered System" which is "A facility for the production of electric energy that", among other things, "is intended to offset part or all of the Customer-Generator's requirements for Electricity" (underlining added).

- The section titled "Eligibility" provides that: "To be eligible to participate in the Net Metering Program, Customers must generate a portion or all of their own retail Electricity requirements using a renewable energy source. The generation equipment ... must be intended to offset a portion or all of the Customer's requirements for Electricity" (underlining added).

25. One thing that is clear on the face of these provisions is that customers who do not meet the eligibility criteria in RS 95 are subject to removal from the NM program. The word "eligible" is defined by the *Oxford English Dictionary* as, "meeting the conditions to do or receive something".[8] An existing NM customer that no longer meets the conditions set out in the tariff to receive service under RS 95 is by definition ineligible "to participate in" the NM Program. FBC must necessarily be able to remove that customer from the NM Program. The customer would continue to receive service from FBC pursuant to the applicable underlying rate schedule (Residential, Commercial, etc.) and would continue to receive the primary benefit of having self-generation capability, but could no longer receive the specific benefits of participating in the NM program.[9]

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[7] Majority Decision, p. 14
[8] *Compact Oxford Dictionary* (***OED***), Third Ed. (Oxford University Press, 2009), p. 298
[9] Responses to BCUC IRs 1.1.1, 1.1.2 and 1.1.2.1 (Ex. B-8, p. 3-4)

26. This interpretation is also consistent with the whole of FBC's Electric Tariff. There are no explicit provisions anywhere in the other rate schedules stating that FBC can remove customers who do not meet the relevant eligibility criteria. However, it is indisputable that customers who cease to meet eligibility criteria in other rate schedules would no longer be entitled to service, and could be removed from, a previously applicable rate. For example, a Residential service customer whose residence was converted to a commercial enterprise would be 'removed' from RS 1 and would be transferred to the applicable commercial rate schedule.[10] Similarly, a Small Commercial service customer who initially met the criteria in RS 20 (i.e. demand of not more than 40 kW), but whose commercial load subsequently increased above this amount on a consistent basis, would be 'removed' from RS 20 and transferred to RS 21.[11]

27. The real interpretation issue under RS 95 is not the consequence of becoming ineligible – FBC clearly has the asserted right of removal – but instead whether a NM customer that produces persistent annual NEG has become ineligible. The relevant eligibility condition stated in RS 95 is that the customer's generation facilities must be "intended to offset a portion or all of the Customer's requirements for Electricity". This phrase is repeated twice in RS 95: in the definition of Net Metered System and in the Eligibility section.

28. In our submission, customers who persistently produce annual NEG are operating NM systems that do more than "offset a portion or all of" their requirements for electricity. The word "offset" means "to cancel out something with an equal and opposite force or effect".[12] NM customers who consistently generate more energy than they need to consume each year are not merely cancelling out their electricity requirements. They are operating generation facilities that produce consistent surplus power for which they receive compensation that, under the current program terms, is far in excess of its value. In such circumstances, their generation facilities no longer meet the definition of "Net

[10] Response to Shadrack IR 1.8.v. (Ex. B-11, p. 16-17)
[11] Response to BCUC IR 1.3.1 (Ex. B-8, p. 10-11
[12] *OED*, p. 636

Metered System" in RS 95 and the customers themselves no longer meet the eligibility criteria. As such, they are no longer entitled to participate in the NM program.

29. It is also notable that the Majority Decision concluded that adding the word "only" to this eligibility condition (i.e. "... must be intended to offset *only* a portion or all of the Customer's requirements for Electricity") "does, in fact, impose a limit on customers' use of the program, and that this is appropriate and within the original intent of the program".[13] Adding "only" brings helpful clarity to this provision; indeed the panel majority described FBC's proposed amendment as "a more emphatic statement of the general intent".[14] It does not, on the other hand, change the substantive legal interpretation as demonstrated by the meaning of the word "offset" noted above. Further, the "original intent" of the NM program is a key part of the "factual matrix" in which RS 95 was drafted. As described in the Reconsideration Application at paragraphs 25-26, the factual matrix is a fundamental component of contractual interpretation that must be considered in every case. The panel majority's own finding regarding the original intent of the NM program supports FBC's interpretation. The ineligibility of persistent NEG producers is consistent with the object and intent of the NM program.

30. The panel majority's determination that persistent NEG producers cannot be removed from the NM program also renders the eligibility criteria in RS 95 essentially meaningless. If NM customers are potentially able to generate far in excess of their own annual consumption, year-over-year and without any legal consequences, then the condition that NM generation must be "intended to offset a portion or all of the Customer's requirements for Electricity" serves no real purpose and has been effectively written-out of the tariff. This is directly contrary to the principle of contract interpretation that "meaning must be given to all of the words in a contract".[15]

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[13] Majority Decision, p. 11
[14] Majority Decision, p. 9
[15] G. Hall, *Canadian Contract Interpretation Law*, 2nd ed. (2012) at p. 15 (see Reconsideration Application, Book of Authorities, Tab 3)

31. FBC has provided evidence of the principles it would apply in determining whether a NM customer has become a persistent annual NEG producer and subject to removal from RS 95 in its response to BCUC IR 1.3.1.[16] The evaluation will be holistic and flexible in order to ensure that specific customer circumstances are accounted for and that the non-adherence to program intent is persistent and meaningful rather than temporary or in respect of trivial quantities of annual NEG. General principles that would guide such review being triggered include consecutive years of annual NEG as well as annual NEG exceeding expected generation of the particular installation by somewhere in the range of 5 to 10 percent.[17] FBC does not view the removal of customers from the NM program to be a desirable outcome;[18] however, clear-cut instances of persistent annual NEG must result in some potential legal consequences or the eligibility criteria in RS 95, and the intent of the NM program generally, will lose all purpose and effect. As discussed in further detail at paragraph 29 below and in the response to BCSEA IR 1.8.3.1 in this proceeding, FBC is also open to options that would allow any customers removed from the NM program to continue to receive some compensation for their net generation that enters FBC's electrical system.[19]

32. In FBC's submission the principles it has articulated in the response to BCUC IR 1.3.1 in this process provide sufficiently objective standards for customers to understand and plan for, while still allowing needed flexibility around enforcement of the eligibility criteria. Given the significant investment required for generation facilities, it is reasonable to expect that NM participants have and will in the future review the eligibility criteria in RS 95 and take appropriate steps for the purposes of remaining eligible, which may include seeking input from FBC.[20] FBC plans to review and determine whether more information on the general principles that apply to eligibility determinations could be usefully added to NM program documentation and will also

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[16] Ex. B-8, p. 10-11
[17] Ex. B-8, p. 10-11
[18] Response to BCSEA IR 1.8.2 (Ex. B-9, p. 15)
[19] Ex. B-9, p. 16-17
[20] Response to Shadrack IR 1.8.v (Ex. B-11, p. 19)

include a discussion related to maintaining ongoing eligibility in its discussions with NM customers.[21] Any customer that is removed from RS 95 could of course challenge FBC's determination through a complaint to the Commission under section 72(1) of the *UCA* and the Commission would be the ultimate arbiter of the eligibility criteria.

B. Whether the Commission Should Order Substantive Amendment to RS 95

i. The Commission's Public Interest Determination

33. As noted above, in addition to the panel majority's determination that FBC does not have a right to remove ineligible customers from RS 95, it also concluded that FBC should not have such a right going forward. The panel majority's approach, as explained in the Reconsideration Application at paragraph 36, erroneously assumed that the issue was whether it should "grant" FBC a new right under it Electric Tariff.[22] In fact, the proper context for the issue was that of an existing contractual right that the Commission was effectively abrogating by the amendments it directed to RS 95.

34. FBC accepts that the Commission has the authority under the *UCA* to amend RS 95 and to vary the rights and obligations applicable to the NM program. However, the public interest rationale provided in the Majority Decision does not support doing so in this circumstance. Amending RS 95 so that customers cannot be removed for producing annual NEG is, in FBC's submission, contrary to the public interest and contrary to the *UCA*'s prohibition on preferential or discriminatory rates.

35. The panel majority's first reason for concluding that a right of removal is not in the public interest was that it would create an unacceptable risk, given the initial investment involved, that would deter customers who would otherwise qualify and may wish to participate in the NM program.[23] This rationale is inconsistent with the intention of the NM program, which the panel majority recognized was only to allow customers to offset some or all of their own consumption. Accordingly, prospective NM participants could

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[21] Ibid.
[22] Majority Decision, p. 9
[23] Majority Decision, p. 14

have no reasonable expectation of being regularly and consistently compensated for annual NEG and should not be factoring into their investment decisions the ability to generate excess revenue over and above the costs associated with offsetting their own consumption. . NM participants who adhere to the eligibility requirements in RS 95, within reasonable limits, face no risk of removal. Removed customers would also continue to benefit from having self-generation facilities that offset the need to consume electricity from FBC.

36. Secondly, the panel majority reasoned that customers might generate annual NEG for good faith reasons, such as a change in occupancy of a property or implementing conservation measures that reduce consumption. According to the panel majority, these customers "should still be entitled to compensation for all the energy that they generate, given that they were approved into the Program with appropriately sized generation capacity" and denying compensation risks "dampening the incentive for them to reduce electricity consumption".[24]

37. FBC is in agreement with this sentiment; however, there are a number of reasons that the risk being envisioned is not significant. First of all, as FBC explained in IR responses in this reconsideration process, there is only a small likelihood of occurrences of consistent annual NEG that would trigger a Company review and, further, the impetus for customers to install generation in excess of their consumption would be mitigated by FBC's proposed change to an avoided cost rate for annual NEG compensation.[25] Second, the flexible approach FBC has proposed to review NM customer accounts for potential removal would allow for specific customer circumstances, such as these, to be addressed. Annual NEG that is strictly a result of customer conservation or normal course changes in occupancy is not likely to be of sufficient quantity to justify removal and these are factors that could weigh against a decision to remove.

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[24] Majority Decision, p. 14
[25] Response to BCUC IR 1.3.1 (Ex. B-8, p. 12); Response to BCSEA IRs 1.1.2, 1.2.3 and 1.2.3.1 (Ex. B-9, p. 2-4)

38. In addition, FBC has in its IR responses in this process raised the possibility of customers who are removed from the NM program being compensated for their net generation on a monthly basis at the BC Hydro RS 3808 tranche 1 rate.[26] This would provide a level of equity for their net deliveries of energy to FBC's system and compensation akin to what FBC pays for unscheduled deliveries by other independent power producers (**IPPs**).[27] In FBC's submission, such an alternative is an appropriate way to address the public interest concern raised in the Majority Decision that customers should be entitled to some compensation for all energy they generate.

ii. The Directed Change to RS 95 Entrenches a Rate Preference Contrary to the UCA

39. While the Commission can direct changes to RS 95, the changes must be consistent with the rate setting provisions of the *UCA*. Section 59(1) of the *UCA* provides that a public utility "must not make ... (a) ... an unduly discriminatory or unduly preferential rate for service provided by it in British Columbia". The definition of "rate" in section 1 includes "(b) a rule, practice, measurement, classification or contract of a public utility ... relating to a rate" and "(c) a schedule or tariff respecting a rate". In addition, section 59(2)(b) provides that a public utility must not "extend to any person a form of agreement, a rule or a facility or privilege" unless it is "uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description".

40. By directing RS 95 be amended so that NM customers cannot be removed for producing annual NEG and by grandfathering existing NM customers so they would benefit from the amended tariff provision, the Majority Decision has effectively entrenched a rate preference that potentially benefits only a small number of existing customers.

41. The Commission's 2016 NM Order will result in clarifying changes to RS 95 emphasizing that an initial installation of an NM system cannot be sized beyond a

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[26] Response to BCSEA IR 1.8.3.1 (Ex. B-9, p. 16-17)
[27] Ibid.

customer's expected consumption and the Commission has approved FBC's practice of rejecting applications that involve oversized generating facilities.[28] The 2016 NM Order will also result in changes to RS 95 that prohibit NM customers from increasing their generating capacity without prior approval from FBC.[29] The panel majority concluded that these changes will resolve the issue of persistent NEG "on a go-forward basis".[30] FBC agrees with this conclusion insofar as it pertains to new NM customers and existing customers with appropriately sized generating facilities. Such customers are unlikely to become persistent producers of annual NEG.

42. However, the evidence demonstrates that there is a small group of existing NM customers that have the potential to produce annual NEG on a regular basis. FBC's new Phase 2 evidence included a billing analysis in respect of 35 residential customers who had a full 12 months of participation in the NM program from 2015 to 2016. Of this group, four customers produced annual NEG for the period sampled.[31] Two of these customers in particular generated significantly greater amounts of electricity than they consumed. These customers both had NEG in every billing period and had negative net consumption of -114,386 kWh and -30,610 kWh, respectively, which would represent a combined annual pay-out of $21,252 for these two customers alone.[32] An additional Commercial class customer also received an annual NEG payout in 2016 of $16,410.[33] For the first half of 2017, FBC has made payments for annual NEG totaling $18,375 of which more than $18,000 went to a single customer.[34]

43. Without FBC having the ability to review and determine if these customers have potentially become ineligible for the NM program, and to take steps to remove them if they have, this small group of customers will be able to continue to produce annual NEG (in very high amounts in some cases), and to receive the associated monetary benefits,

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[28] Majority Decision, p. 11
[29] *Ibid.*, p. 12
[30] *Ibid.*, p. 19
[31] Ex. B-4, Part 2, p. 1
[32] Ibid., p. 2
[33] Response to Shadrack IR 1.6.ii (Ex. B-11, p. 9)
[34] Ibid.

every year for the life of their respective generating facilities. No other NM customers have the same potential or opportunity to receive this level and type of compensation. The changes to RS 95 directed by the Commission give a small group of existing customers a privilege that is not available to the vast majority of other present and future participants in the NM program, which is a form of rate preference and contrary to sections 59(1) and 59(2)(b) of the *UCA*.

iii. Other Factors Support the Right of Removal

44. Other factors not considered in the Majority Decision also demonstrate that the asserted right of removal is in the public interest.

45. For one, it performs a deterrence function against customers seeking to maximize their production of NEG contrary to the intention of the program. If there are no potential consequences of any kind for producing persistent annual NEG, then customers have no disincentive against maximizing the spread between their generation and consumption.

46. FBC has no visibility of customer generation facilities behind the meter and would not necessarily be able to identify unauthorized changes that increase generation capacity. The sale of premises with generating facilities also creates potential opportunities to take advantage of these circumstances. A customer with a properly sized NM system could sell the property to a customer with a much lower level of expected consumption (due to occupancy differences, for example), who could then profit from the ability to consistently generate NEG. The right of removal allows FBC to guard against such risks. It is in the public interest for FBC to able to do so.

47. More generally, the right of removal promotes the integrity of FBC's Electric Tariff and Rate Schedules. If the eligibility criteria in RS 95 are not given meaning and legal effect, then they are not serving their purpose. Customers can and will continue to receive service for which they are otherwise ineligible under RS 95. This could have a corrosive effect on the eligibility criteria in other FBC rate schedules and on customer adherence with the intent of the rate on which they receive service.

PART 3 - TREATMENT OF NEG ISSUES

A. Overview

48. FBC's 2016 NM Application proposed two related changes to the NM program: ***first***, the implementation of a kWh Bank in place of the existing dollar credit system; and ***second***, the use of the BC Hydro RS 3808 Tranche 1 rate to compensate all NM customers for annual NEG remaining in the kWh Bank at year end.

49. Though not strictly a "package", these proposals are inter-related and complementary.[35] Together, they represent a model that is more consistent with regulatory and rate design principles than the existing NM program structure.[36] Their implementation will help address a number of principled issues with the current program design and will be of future benefit as the NM program continues to grow in size.

B. kWh Bank

i. FBC's Proposal and the Majority Decision

50. As part of its 2016 NM Application, FBC sought Commission approval to implement the kWh Bank – a "NEG carry-forward methodology" that alternately carries NEG forward to offset consumption in a future billing period, or applies previously accumulated NEG in a billing period when net consumption exceeds net generation.[37]

51. FBC's evidence and submissions in support of the 2016 NM Application outlined a number of benefits of the kWh Bank proposal. Also noted was that use of some form of kWh banking mechanism has broad jurisdictional support across Canada. Indeed, all of the Canadian utilities FBC surveyed use some type of kWh bank for their net metering programs.[38] Both of these topics will be returned to in more detail below.

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[35] Response to BCUC IR 1.5.2 (Ex. B-8, p. 17)
[36] Response to CEC IR 1.2.2 (Ex. B-10, p. 5)
[37] 2016 NM Application, p. 10
[38] 2016 DSM Application, App. D

52. The panel majority's determination regarding the kWh Bank proposal is contained in a single paragraph, two sentences in length. The determination, which was stated as follows, came notably after the majority had considered and rejected a change to the NEG compensation rate:

> The Panel has previously determined the existing practice of valuing NEG generated in each billing period at the customer's retail rate should be continued. As a result, there is no need for the development of an energy bank mechanism to implement FBC's proposed pricing method".[39]

53. FBC respectfully submits, that the panel majority erred in concluding that the kWh Bank was solely a "mechanism to implement FBC's proposed pricing". The panel majority failed to consider the numerous independent benefits of a kWh Bank and other reasons to implement such a mechanism.

ii. Benefits of the kWh Bank

54. The Reconsideration Application summarizes a number of benefits of a kWh Bank, which are repeated here for convenience. Notably, these benefits arise independently of a change in the annual NEG compensation rate:

55. The annual reconciliation of NEG pursuant to the kWh Bank allows customers the benefit of using their net excess generation during seasons in which generation is higher than consumption to offset consumption in periods where the opposite occurs.[40]

56. As a result, a kWh Bank reduces bill volatility relative to the current NM program design and smooths out billing for customers by mitigating circumstances where they pay nothing for electricity during periods of lower demand, but then face higher bills the rest of the year.[41]

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[39] Majority Decision, p. 20 (underlining added)
[40] 2016 NM Application – Response to BCUC IR 1.5.3 (Ex. B-4, p. 12)
[41] Response to Shadrack IR 1.7.v. (Ex. B-11, p. 16); 2016 NM Application – FBC Reply Submissions, dated September 30, 2016, at para. 9

57. A kWh bank also benefits customers under RCR because unused kWhs that are carried forward to a future billing period may be valued at the higher Tier 2 rate rather than the Tier 1 rate.[42] NM participants would therefore receive maximum value for the generation that is used to offset consumption using a kWh bank.[43]

58. FBC's new evidence submitted for Phase 2 of this reconsideration process also buttresses the fact that the kWh Bank proposal is beneficial to NM customers with appropriately sized generation facilities. As noted above, this new evidence includes a billing analysis of 35 residential customers who actively participated in the NM program for a full year from April 1, 2015 to March 31, 2016 (i.e. six billing periods).[44] Of this group:

59. 20 customer customers did not produce NEG in any billing period and are therefore unaffected by FBC's proposed changes.

60. Four customers did have NEG during the year, but did not consume energy at Tier 2 in any billing period. These customers would not receive a monetary benefit from FBC's proposals for the period sampled, although they would benefit from the bill smoothing effects of the NEG carry forward. Also, in future years with potentially higher consumption, their NEG could save against Tier 2 energy charges.

61. Five of the customers would be placed in a better position and receive monetary benefits by using the kWh Bank to shift consumption from Tier 2 to Tier 1 rates.

62. The four customers that are worse off under FBC's proposals are those with annual NEG (in two cases very large amounts). They are worse off monetarily because of the proposed change from retail rates to compensate annual NEG to the avoided cost rate (RS 3808 Tranche 1), not from anything specific to the use of a kWh bank.

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[42] 2016 NM Application – FBC Final Submissions, dated September 16, 2016, at para. 37
[43] BCUC IR 1.8.1 (Ex. B-5, p. 24)
[44] Ex. B-4, Part 2, p. 1

63. In addition to the analysis from actual billing data, FBC has also provided in its Phase 2 evidence a "Generic Billing Comparison Model". The model allows for different values of annual household consumption and generation to be input and then calculates the annual billing details under both FBC's proposed billing method using a kWh Bank and the RS3808 Tranche 1 rate and the existing billing treatment for the NM program.[45] Household consumption is allocated among the monthly billing periods according to the residential class load profile used for FBC's 2017 revenue requirement calculations; annual solar output is allocated using an on-line calculator developed by the National Renewable Energy Laboratory, with Summerland, BC as the proxy location.[46]

64. This model demonstrates that for residential customers with NM systems sized such that generation corresponds approximately to typical consumption, they will be better off financially under a kWh Bank system, independent of the rate at which annual NEG is compensated. For example, the average annual load for residential customers in FBC's service area is 12,000 kWh.[47] If an NM customer's annual generation were at the equivalent level (12,000 kWh), then the customer would have a total annual bill of $192.74 under FBC's proposal, as compared to a total annual bill of $210.34 under the present billing treatment using retail rates to credit NEG. The model also shows that an average residential customer with consumption of 12,000 kWh per year is also better off under the proposed kWh Bank system with annual generation ranging anywhere from 8,500 kWh to 12,000 kWh. Below that level of generation, the total annual bill is the same under both scenarios described. Above that level, i.e. if annual NEG is produced, the customer receives more monetary benefit under the existing system (because the retail compensation rate is higher).

65. The foregoing demonstrates that the kWh Bank proposal favours the vast majority of NM customers with appropriately sized generation relative to their consumption. Again, this is true even with the annual NEG compensation rate being reduced to RS 3808 Tranche 1. This is appropriate as these customers are adhering to the purpose and

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[45] Ex. B-4, Part 3, Live Spreadsheet Attachment
[46] Ex. B-4, Part 3, p. 2
[47] 2016 NM Application – Response to BCUC IR 1.6.3

intent of the program, which is to offset only a portion or all electricity consumption. The proposal does not favour the small group of customers who currently produce annual NEG or may do so in the future. Again, this is consistent with the purpose and intent of the NM program. It should not be designed to provide the greatest benefit to those limited customers whose NM systems do not comply with the intent of the program.

66. The Dissenting Opinion of Commissioner Revel (the **Dissent**) captures this point well in the following passage:

> I find myself persuaded of the merits of the proposed KWh bank proposal and consider it will serve, very well, the vast majority of the current customers in the NM who produce small amounts of NEG intermittently. I consider that it will improve their positions as it will allow them to carry any NEG forward over a year and receive, potentially, offsetting power at a time when their production may be substantially limited. I note that this is particularly beneficial to those customers with appropriately sized NM systems to generate on average most of their residential needs and does not affect those who produce no NEG.[48]

67. In addition to the financial benefits, the kWh Bank is also more consistent with the general concept of net metering. As BCSEA put it in an IR, the kWh Bank "allows a customer who generates some or all of his, her or its own electricity to, in effect, use that electricity at times other than when it is generated. Net metering facilitates a swap of electricity, not money, between the customer and the utility".[49]

68. Because of this dynamic, the kWh Bank is also the most practical mechanism by which to implement a single NEG compensation rate, which as discussed in detail below, is needed in order to mitigate the inherent subsidy currently built into the NM program. A new, uniform compensation price for NEG could be implemented under the present dollar credit system; however, assuming the price is lower than current retail rates (such as the RS3808 Tranche 1 rate), this would result in NM customers not receiving the

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[48] Dissent, p. 10
[49] Response to BCSEA IR 1.3.1 (Ex. B-9, p. 6)

equivalent of full retail value for monthly NEG that is used to offset consumption charges in subsequent billing periods.

69. A kWh bank also reduces billing volatility since customers will pay, at minimum, the Customer Charge in each billing period.[50] Although the Customer Charge is still present in the existing billing methodology, bills can be reduced to zero.[51]

iii. Jurisdictional Support

70. Given the above, it is perhaps not surprising that the net metering programs of all other Canadian utilities that FBC surveyed for the purposes of the 2016 NM Application, including BC Hydro, use some form of kWh banking mechanism.[52] The panel majority did not explain why it is appropriate for FBC to remain the outlier in this regard and FBC respectfully submits that there is no evidence that the circumstances specific to FBC's service territory support different regulatory treatment on this particular matter.

71. Furthermore, going back to the initial stages of development of BC Hydro's net metering program, the Commission has itself supported the use of kWh banking in British Columbia. In its decision of July 22, 2003, the Commission directed BC Hydro to prepare an application for a net metering tariff that would be based on a number of parameters including the following:

> Customer generation should be limited to own use only at the registered location of the net metering installation. In determining consumption charges, net excess generation may be banked as a credit to the customer's account to be applied against future net consumption.
>
> The Commission agrees with BC Hydro that at a pre-determined anniversary date net excess generation should be transferred to BC Hydro, but it is not convinced, even in light of the lower quality energy likely available from net metering in B.C., that this transfer of energy should come at zero cost to BC Hydro. The Commission recommends that BC Hydro

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[50] Response to Shadrack IR 1.7.v. (Ex. B-11, p. 16); 2016 NM Application – FBC Reply Submissions, dated September 30, 2016, at para. 9
[51] Response to BCSEA IR No. 1.4.1 (Ex. B-9, p. 8)
[52] 2016 NM Application, p. 11 and App. D

> propose a rate for purchase of net excess generation on a given anniversary date and consult further with interested groups as necessary to develop its proposal in this regard.[53]

iv. The kWh Bank Should be Approved

72. The initial 2009 NM Application indicates that a kWh Bank was not proposed from the outset for FBC's NM program because of administrative and cost related concerns. Carrying forward excess generation on a kWh basis was noted as requiring additional resources to manually administer a separate account for each customer.[54] Using a dollar credit based on existing retail rates (which were flat for residential customers at the time) was considered to be simpler and to require less internal resources and associated cost.[55]

73. The experience of approximately seven years since the NM program was launched has demonstrated that billing under the dollar credit system is itself a manual process that has proven more administratively burdensome than initially anticipated.[56] The NM program has also grown substantially since 2009 and continues to trend upwards in levels of customer participation. In the first full year of operation, 2010, the NM program had only four customers participating and there were 20 or less participants for the first four full years (2010-2013).[57] No NEG was sold to FBC in any of the first three years of the program. As of April 2016, on the other hand, there were 86 NM customers and counting, with a cumulative installed generating capacity of 534.5 kW that resulted in payments to NM customers of over $35,000 in total for annual NEG transfererred to FBC.[58]

74. The rationale of administrative simplicity and cost savings that argued against a kWh Bank in 2009 are clearly now irrelevant in the current circumstances of the NM program.

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[53] BCUC Letter No. L-37-03, dated July 22, 2003, p. 2 (underlining added)
[54] 2009 NM Application, p. 21
[55] *Ibid.*, p. 10; Response to BCUC IR 1.7.4 (Ex. B-8, p. 22)
[56] Response to Shadrack IR 1.3.i (Ex. B-11, p. 4)
[57] Response to Shadrack IR 1.6.ii (Ex. B-11, p. 9)
[58] Ibid.

75. For all of these reasons, FBC respectfully submits that its kWh Bank proposal should be approved.

C. Compensation Rate for NEG

i. FBC's Proposal and the Majority Decision

76. In the 2016 NM Application, FBC proposed that, in conjunction with the implementation of the kWh Bank, the compensation price for annual NEG would be the BC Hydro RS 3808 Tranche 1 rate (4.70¢ per kWh) for all NM customers, regardless of customer class.

77. The use of retail rates to compensate NEG had initially been proposed and adopted in 2009 when residential customers were charged a flat rate for consumption. As noted, FBC considered that, in those circumstances, retail rates were more administratively simple to use and required less internal resources and management than a separate compensation rate.[59]

78. However, in 2012, the Commission ordered the implementation of the two-tiered Residential Conservation Rate (**RCR**) pursuant to Order and Decision G-3-12 (the **RIB Decision**). As of 2012, there were only 16 customers enrolled in the NM program.[60] There is no indication in the RIB Decision or the filings in that proceeding that the effect of the RCR on the NM program was given any consideration at the time.

79. By April 2016, at the time the 2016 NM Application was filed, the number of NM participants had jumped to 86.[61] By June 2016, a total of 97 customers had been enrolled in the program, of which 79 (or more than 80 percent) were Residential class customers.[62] As of the date of this Final Argument, there are now 233 customers

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[59] 2009 NM Application, p. 21-22
[60] Response to Shadrack IR 1.3.i (Ex. B-11, p. 4)
[61] Ibid.
[62] 2016 NM Application – Response to BCUC IR 1.2.2 (Ex. B-4, p. 4)

enrolled for the NM program, meaning the size of the program has more than doubled in approximately one year.

80. The consequences and complications of using the RCR to compensate NEG under the NM program that FBC identified in the application were that: [63]

81. NEG can be and is compensated at different dollar values depending on the level generated, without any particular rationale (indeed, as discussed below, contrary to established rate-making principles);

82. NEG can be and is compensated at the Tier 2 rate of over 15¢per kWh, which is far in excess of the cost of other comparable resources available to FBC and is actually in excess of any measure of long run marginal cost (**LRMC**) even though NEG is not considered a long term resource; and

83. the high compensation rate for NEG under the RCR incents generation above the levels needed to offset personal consumption contrary to the intent of the NM program.

84. FBC's 2016 NM Application also highlighted that the use of retail rates to compensate NEG resulted in power received from NM customers being given a greater value than other readily available resources or purchases from other IPPs.[64] As noted above Tier 2 under RCR is in excess of 15¢ per kWh, but even Tier 1 at 10.117¢ per kWh is well above the cost of other short term resource options, such as RS3808 Tranche 1 (4.7¢ per kWh) or market purchases, which can be even lower cost.

85. Accordingly, FBC proposed that all annual NEG produced by NM customers be compensated at the RS 3808 Tranche 1 rate, which better reflects the resource value of the NEG to FBC and is more consistent with the approach used to price ad-hoc deliveries to FBC's system by IPPs.[65] With the kWh Bank implemented, customers

[63] 2016 NM Application, p. 9
[64] 2016 NM Application, p. 10-11
[65] 2016 NM Application, p. 11

would still receive full retail value for banked kWhs that they use to offset consumption in later billing periods.

86. Of the interveners who participated in the 2016 NM Application process, BCOAPO agreed that the RS 3808 Tranche 1 rate is appropriate and CEC argued that a lower rate, equivalent to the current market price of energy should be used.[66] Of the other four interveners, only Mr. Donald Scarlett advocated for maintaining the status quo of using the RCR.[67]

87. The panel majority rejected FBC's proposal, confirming the continued use of retail rates to compensate NEG both as credits per billing period and for the annual pay-out. In doing so, the majority framed the underlying issue for it to decide as "whether circumstances have changed sufficiently to warrant a departure from" its original 2009 decision, Order G-92-09 (the **2009 NM Decision**) approving the use of retail rates:

> By design, the Program is intended for customers to offset their own consumption. This point has been made repeatedly by FBC, and is accepted by the Panel. The Panel also notes that the Commission, in approving the initial NM Program, found that compensating NEG at retail rates was in the public interest.
>
> The question before this Panel, then, is whether circumstances have changed sufficiently to warrant a departure from that original determination. In our view, they have not.[68]

88. The panel majority concluded that circumstances had not changed sufficiently, even after the adoption of RCR, to justify a change to the NM program. It also rejected FBC's proposal because it was "based on an implicit change in the analytic paradigm from valuing (i.e. pricing) NEG in the context of what a customer pays for each kWh purchased from FBC, to valuing the same kWh in terms of its replacement cost to FBC".[69]

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[66] Majority Decision, p. 16
[67] Ibid.
[68] Majority Decision, p. 18 (underlining added)
[69] Majority Decision, p. 19

ii. The Majority Did Not Give Due Regard to the Present Circumstances of the NM Program

89. The approach to this issue adopted in the Majority Decision reflects an error of law for the reasons explained at paragraphs 60-66 of the Reconsideration.

90. The focus on the original 2009 NM Decision and whether the circumstances had changed to a significant enough degree was not the correct legal standard against which to assess FBC's proposals. Framing the issue in this way had the effect of treating the 2009 NM Decision as a binding precedent, contrary to section 75 of the *UCA*. It provides that, "The commission must make its decision on the merits and justice of the case, and is not bound to follow its own decisions".

91. This statutory provision reflects the common law principle that administrative tribunals cannot fetter their own discretion through prior decisions. The principle is "essential to ensure that administrative tribunals have the flexibility to respond to new circumstances on a case-by-case basis ... particularly ... in the case of policy and factual determinations".[70] Application of the principle requires that the Commission give "the fullest hearing and consideration to the whole problem before it" in each separate application.[71]

92. In FBC's respectful submission, the Commission's task on the 2016 NM Reconsideration was simply to determine whether FBC's proposals for RS 95, which is a rate under the *UCA*, were just and reasonable based on all of the evidence in the record before it. Stability and consistency were relevant factors, but should not have been the dominant concern, particularly given that it had been almost seven years since the NM Program was originally approved.

iii. The Present Circumstances Show that a New NEG Price is Warranted

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[70] *Bell Canada v. Canada (Attorney General)*, 2011 FC 1120 at para. 90 (see Reconsideration Application, para. 64 and Book of Authorities, Tab 4)
[71] *Ibid.*, para. 89

93. The present circumstances do warrant a different model for NEG compensation.

94. The use of retail rates to compensate NEG significantly overvalues the energy from a resource perspective. It also further exacerbates a subsidy NM customers receive at the expensive of other FBC customers that is built into the current program design.

95. At the time of the initial implementation of the NM program in 2009, these were not pressing concerns and the emphasis of the program design in the 2009 NM Application was on administrative efficiency and simplicity. The small number of participants in the NM program and the limited quantities of NEG that were transferred to FBC in the first 3-4 years of the program, as described at paragraph 57 above, demonstrated that this approach was reasonable. However, now that participation levels have increased exponentially, particularly in recent years, there are more significant issues of regulatory principle and equity among FBC customers that need to be addressed.

96. The implementation of a kWh Bank and the adoption of the RS 3808 Tranche 1 rate as a uniform compensation price for annual NEG are appropriate, just and reasonable rate proposals when all of the current circumstances of the NM program are properly considered.

97. The implementation of the two-tiered RCR, in particular, is an additional rate design change that affects how the majority of NM customers are charged for their energy consumption. The impacts of the RCR on the functioning of the NM program further support FBC's proposals.

98. Each of these matters are addressed in more detail below.

iv. Retail Rates Overvalue NEG and Exacerbate the Inherent Subsidy to NM Customers

99. FBC's NM program, as currently structured, involves an embedded subsidy to NM customers that is effectively paid for by FBC's other ratepayers.

100. The subsidy arises from the ability of NM customers to avoid paying energy charges, which for the residential class include about 65 percent of the fixed costs of the electric

system.[72] NM customers do this in two ways. First, by generating their own electricity NM customers correspondingly reduce the amount of energy they purchase from FBC thereby avoiding payment of the portion of the energy charges that are designed to recover customer contributions to fixed costs. For example, a NM customer that matches generation and consumption each billing period would pay no energy charges and would be billed only for the Customer Charge each month; however, that charge only recovers about 45 percent of the actual fixed costs for the residential class.[73]

101. Second, NM customers receive credit for NEG produced in a billing period at full retail value. This credit is carried forward and used by NM customers to offset charges for actual consumption in subsequent billing periods. This allows NM customers to make a negative contribution to fixed costs.[74]

102. In these ways, NM customers avoid making an equal contribution to the utility's fixed costs despite being connected to FBC's system in all hours and using the grid to balance supply and demand throughout the day.[75] The reduced contribution to fixed costs by NM customers is in effect subsidized by FBC's other customers who pay increased energy rates to cover the costs.

103. This inherent subsidy is exacerbated by the compensation rate for annual NEG. As discussed below, retail rates (including Tier 1 rates under the RCR) are far higher than FBC's avoided cost of energy. As FBC explained in IR responses in this process, the use of ***any*** retail rate, including the current residential flat rate under RS 3 (the Exempt Residential Service Rate), cannot be justified on the basis of an appropriate alternate resource and does not mitigate the inherent subsidy built into the NM program design to the same extent as the RS 3808 rate FBC has proposed.[76] The additional cost of paying NM customers for annual NEG at prices that are significantly in excess of what

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[72] Response to BCUC IR 1.6.1.1 (Ex. B-8, p. 19)
[73] Ibid.
[74] Response to BCSEA IR 1.4.1 (Ex. B-9, p. 8)
[75] Response to BCUC IR 1.6.1.1 (Ex. B-8, p. 19)
[76] Response to BCUC IR 1.7.3 (Ex. B-8, p. 21)

the energy is worth are again borne by all FBC ratepayers through the utility's revenue requirements. A reduction in the compensation rate for annual NEG that reasonably reflects the value of the energy to FBC would help mitigate (although it would not eliminate) the inherent subsidy.[77] An increase in the Customer Charge would also be required to fully address the issue.[78]

v. The Complementary Benefits of the kWh Bank should be Considered

104. The panel majority rejected FBC's proposal regarding the price at which annual NEG is compensated in its decision prior to and without consideration of the kWh Bank proposal and the various benefits and other reasons for it to be implemented. This approach resulted in legal error. Whether the NEG compensation rate should be changed was addressed as a question of the public interest in the Majority Decision and, accordingly, it was an error of law for the Commission panel majority to "exclude from consideration any class or category of interests which form part of the totality of the general public interest".[79]

105. The independent benefits of the kWh Bank proposal were relevant to the issue of NEG compensation. Although FBC's two proposals regarding the treatment of NEG are not strictly a package, in that they could be implemented independently, they are complementary and have a clear inter-relationship.[80] In particular, if the Commission is satisfied that implementing the kWh Bank is appropriate and reasonable then it does not make sense practically or analytically to maintain the use of retail rates to set the price of annual NEG.

106. FBC explained the numerous problems with doing so in response to BCUC IR 1.5.1 in this process.[81] In summary:

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[77] Response to BCSEA IR 1.4.1 (Ex. B-9, p. 8)
[78] Response to BCUC IR 1.6.1.1 (Ex. B-8, p. 18)
[79] Nakina (Township) v. Canadian National Railway Co. (1986), 69 N.R. 124 at para. 5 (F.C.A.), quoted with approval in Tsawwassen Residents Against Higher Voltage Overhead Lines Society v. B.C. Utilities Commission, 2006 BCCA 537 at para. 27 (Reconsideration Application, Book of Authorities at Tab 9)
[80] Response to BCUC IR 1.5.2 (Ex. B-8, p. 17)
[81] Ex. B-8, p. 16-17

107. Using existing retail rates creates a problem of consistency and equity in compensation for NEG between Residential and Commercial customers. As set out above, RCR and the Commercial general service rate have tiered structures whose pricing incentives are completely the opposite of each other. Commercial customers receive a lower price the more annual NEG they produce, while Residential customers receive a much higher price for generating more NEG.

108. More generally, if a kWh Bank is implemented and retail rates are used to value annual NEG, then customers in different rate classes will receive payments at different prices for excess generation (i.e. generation that did not match their retail consumption for the year) for no apparent reason.[82] The retail rates customers in different classes pay for electricity are based on differences in cost of service that have no relationship to the cost or value of the NEG itself.

109. If tiered retail rates are used, Residential customers may receive one of two rates under RS 1 depending on how much NEG remains in the kWh Bank, as would commercial customers under RS 21. For the reasons explained below, and at pages 23-25 of the Reconsideration Application, the rationale for valuing electricity consumed at different tiers does not apply to the valuation of excess generation produced by NM customers.

110. Using tiered residential rates to compensate NEG under a kWh Bank methodology would also result in increased administrative burden and associated cost as compared to a uniform compensation rate. As explained above, the use of a single compensation rate with a kWh Bank, such as BC Hydro's RS 3808 Tranche 1 rate, is a relatively simple administrative process that only involves multiplying the amount of unused kWh in a customer's bank at year-end by the compensation price. On the other hand, as explained in FBC's IR response: "... if tiered rates such as RCR continue to apply, then an additional manual process would be required to segregate any excess generation into Tier 1 and Tier 2 buckets each billing period and then to track how much of the banked generation from each bucket is used to off-set consumption at the applicable tiers over

[82] 2016 NM Application, Response to BCUC IR 1.8.2 (Ex. B-4, p. 25)

the course of the year and the amount of remaining unused NEG at year-end that is to be compensated at Tier 1 or Tier 2 rates".

111. For all of these reasons, we submit that a single annual NEG compensation rate is a practical pre-requisite to the adoption of a kWh Bank. Tellingly, of the 11 Canadian utilities and jurisdictions that were surveyed for the 2016 NM Application only three use retail rates as the compensation price for annual NEG under their kWh banking mechanisms: Manitoba Hydro (which only provides a set rate for installations below 200 kW), Newfoundland (under its 2015 provincial policy), and Nova Scotia Power; however, in each case the rate structures involved are flat retail rates.[83] There are, therefore, no other Canadian examples of a kWh Bank being used in net metering in conjunction with tiered retail rates.

112. Accordingly, the Commission should have regard for the benefits and other reasons supporting the use of a kWh Bank in connection with its consideration of the appropriate price at which FBC compensates NEG. In our submission, the many benefits of the kWh Bank proposal weigh heavily in favour of a new, uniform price for annual NEG that would be applicable to all NM customers. The appropriate rate for annual NEG is addressed below.

vi. The Appropriate Compensation Rate is RS 3808 – Tranche 1

113. The Majority Decision did not substantively address FBC's proposed rate for annual NEG under a kWh Bank system or the views of other interveners about the appropriate price. The panel majority did not address this issue because of its determination that the circumstances of the NM program had not changed sufficiently to warrant new NEG pricing. For the reasons set out below, FBC respectfully submits that the panel majority erred in this regard and the Reconsideration Application requires the Commission to fully address the issue.

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[83] 2016 NM Application, App. D, p. 1, 3, 5

114. FBC submits that, together with the implementation of the kWh Bank, the BC Hydro RS 3808 Tranche 1 rate should be approved as the appropriate compensation rate for annual NEG.

115. In FBC's submission, the annual NEG it purchases from NM customers should reflect its resource value and should not be artificially given a greater value than other readily available resources or for purchases from IPPs that currently deliver power into the FBC system.[84] Current retail rates (including Tier 1 under the RCR) are far in excess of FBC's avoided cost of power and, as explained above, payment of annual NEG at these high prices exacerbates existing subsidies that NM customers receive at the expense of FBC's other customers.

116. The use of RS 3808 Tranche 1 as the compensation rate would better reflect the value of annual NEG to FBC. FBC has other, lower cost resource options available to it at any given time, but the RS 3808 Tranche 1 rate represents a consistent short term option for purchasing incremental energy.[85] FBC also pays the lower of the RS 3808 Tranche 1 rate or a market-based price to existing IPPs; it is therefore an appropriate proxy for FBC's short term cost of energy.[86]

117. The annual NEG output of NM customers is not considered a long term resource and therefore the short term cost of energy is the more appropriate value. This is because there is significant uncertainty regarding the intermittent output of NM systems. Indeed, under the current RS 95 the intent of the program is that NM customers should <u>not</u> be producing significant if any annual NEG. Further, there is no long term commitment from the owner of an NM system to continue operating and, more likely, there is the possibility of a customer increasing load, such as through the addition of an electric vehicle, which could reduce or eliminate the amount of NEG produced.[87]

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[84] 2016 NM Application, p. 10-11
[85] 2016 NM Application, p. 11
[86] 2016 NM Application – Response to BCUC IR 1.9.4.2 (Ex. B-4, p. 31)
[87] Response to CEC IR 1.1.2 (Ex. B-10, p. 2)

118. In addition, using the RS 3808 Tranche 1 rate to compensate annual NEG would send a price signal to NM customers that is more consistent with the purpose and intent of the program and would reduce the incentive for these customers to produce generation in excess of their own annual consumption needs.

119. We also note that a number of other Canadian utilities do not pay customers at all for remaining NEG at year end. NM customers of SaskPower, Hydro Quebec, NB Power, Maritime Electric, NWT Power, and North Bay Hydro (Ontario) all receive zero compensation for banked kWh credits that remain after the annual period.[88]

120. For these reasons, the proposed use of the RS 3808 Tranche 1 rate best reflects the value of the generation and is consistent with the intent of the NM program. The Commission should approve it as the compensation price for annual NEG.

vii. The Previous Rationale for Compensating NEG at Retail Rates is now Inapplicable

121. As described above, and as is evident from the filings in the 2009 NM Application process, the use of retail rates to value generation and compensate NEG was originally conceived as a matter of practicality; it was the most cost effective and administratively easy method to implement without the use of a kWh bank and in the context of flat rates.[89]

122. Given the expansion of the NM program since 2009 and the reality that using retail rates to value excess generation is itself a manual process that is more burdensome than initially anticipated, the justification of administrative simplicity and cost savings no longer has the same relevance. In fact, from a general perspective switching to a kWh Bank with a single compensation rate for annual NEG could be more administratively efficient to process than the current dollar credit system. As described above, under FBC's proposal, a customer's kWhs of NEG would simply be tracked through the year and any remaining balance at year end would be multiplied by the compensation rate.[90]

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[88] 2016 NM Application, App. D
[89] 2016 NM Application – Response to BCUC IR 1.8.1 (Ex. B-5, p. 24)
[90] Response to BCUC IR 1.5.1 (Ex. B-8, p. 17)

The existing system, on the other hand, requires a manual calculation, on a monthly basis, of the monetary value of any NEG produced, which varies depending on whether the Tier 2 threshold in the RCR has been surpassed, plus annual account reconciliation. FBC's proposal seems at least as administratively simple as the current process, if not more so.

123. The other justification that originally favoured the use of retail rates, and which the panel majority emphasized, was that "valuing (i.e. pricing) NEG" should be consistent with "what a customer pays for <u>each</u> kWh purchased from FBC".[91] The panel majority concluded that this principle still favoured the use of retail rates to compensate NEG, even after the adoption of RCR:

> FBC also raised the point that the introduction of two-tiered pricing in some tariffs argues for a change in the price of NEG. That said, given the changes to the tariff, the anticipated Annual NEG for any given Program participant is expected to be in the range of the amounts that FBC anticipated at the outset of the Program when it put forward arguments in favour of using the retail rates for NEG, and the Panel considers those arguments to still be compelling today.[92]

124. This reasoning contains two related factual errors. First, it treats as equivalent the amount of NEG produced under the NM program with the price at which that NEG is compensated. The implementation of tiered residential retail rates has clearly changed the price at which FBC compensates customers for NEG. NM customers can and do now receive compensation for NEG at the much higher Tier 2 rate (15.617¢ per kWh). There are also, as noted above, exponentially more NM customers at present than when the program was launched in 2009. Even if the amount of NEG produced under the NM program is equivalent to what was anticipated in 2009, on a per customer basis, that does not mean that the overall cost to compensate customers in respect of that NEG has not increased.

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[91] Majority Decision, p. 19 (underlining added)
[92] Majority Decision, p. 19

125. Second, the panel majority's reasoning seems to imply that the change to RCR only has financial consequences if program participants produce NEG on annual basis. In fact, when their NEG exceeds 1,600 kWh over two months, residential NM customers are receiving billing credits at the Tier 2 rate that is much higher than the credits they received at the pre-RCR retail rates. Indeed, FBC's evidence is that the average rate at which NM accounts have been credited for energy delivered to the FBC system has increased from 10.8¢ per kWh in 2012, when RCR was adopted, to 12.4¢ per kWh in 2016.[93] Further, this increase in the value at which NEG is compensated has occurred over a period during which the prevailing value of power from alternate resources has fallen significantly.[94] This is an additional change in circumstances since the introduction of the NM program that the panel majority did not consider in determining that retail rates are the appropriate way to compensate NEG at present.

126. More generally, in our respectful submission, the panel majority failed to recognize that, since two-tiered residential rates were adopted, the value ascribed to a customer's NEG credits can be higher than the value of the generation consumed by the same customer during the same billing period. Perhaps more importantly, the regulatory basis for charging a higher rate for Tier 2 consumption has no rational relationship with, and is in fact contrary to, the appropriate pricing incentives that are relevant to the valuation of NEG, given the purpose and intent of the NM program.

127. As explained in the Reconsideration Application at paragraph 73, the main purpose of the RCR is to promote conservation. The higher second tier residential rate is specifically designed to incent customers to reduce their consumption.[95] If the RCR is operating as designed, then customers should actively be attempting to avoid or minimize their consumption at the Tier 2 rate. When the RCR is applied to the NM program, on the other hand, the incentive for customers is to maximize their self generation because the more they generate the higher the monetary compensation they

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[93] Ex. B-4, Part 1, Response to Shadrack IR 2.24.i from LTERP process
[94] Response to BCUC IR 1.7.1
[95] RIB Decision, p. 3

can receive. It is in residential NM customers' best interests to produce as much generation at the Tier 2 level as possible because of its higher monetary value.

128. Compensating NEG at the Tier 2 rate does not, however, serve the conservation purposes that RCR is intended to achieve. It simply promotes more generation, frequently at times that are sub-optimal for the Company's overall energy management considerations.[96] This is also directly contrary to the intent of the NM program, which is for customers to only offset some or all of their requirements for energy.

129. Also significant, though not commented upon in the Majority Decision, is that Commercial Service customers who are able to participate in the NM program pay retail energy charges on a declining block rate under RS 21. These customers accordingly receive less value for their NEG the more generation they produce. This was possibly not of significant concern when the majority of NM participants were on flat retail rates; however, the effect of RCR is that residential and some commercial NM customers are now receiving completely the opposite pricing signals with respect to volume of NEG they produce.

viii. The RCR Overvalues NEG

130. In addition to the analytical issues set out above, the panel majority's conclusion that retail rates are appropriate for NEG compensation because they match the rate at which consumption is valued is also factually inaccurate. Customers can and do receive compensation for NEG at Tier 2 rates in billing periods where their level of consumption does not trigger the Tier 2 rate threshold.

131. More specifically, NM customers can generate NEG above the 1,600 kWh threshold and be compensated at Tier 2 rates in a given billing period, even if they have not actually consumed an amount of electricity above the Tier 1 threshold during that same period. An example of such a circumstance was provided at paragraph 80 of the

---

[96] 2016 NM Application – CEC IR 1.1.8 (Ex. B-7, p. 5); BCUC IR 2.13.1 (Ex. B-12, p. 4-5)

Reconsideration Application. In FBC's Phase 2 evidence, it determined that there were 16 instances of this occurring for the 35 residential NM customers sampled over a one year period.[97] FBC expects that there will likely be an increase in instances of billing period NEG over time, given that participation in the NM program is increasing.[98] This in turn creates an increased potential for billing periods in which NEG is credited at Tier 2 under the existing system, but net energy delivered to the customer by FBC did not exceed 1,600 kWh (and therefore the Tier 2 rate would not apply but for the NM program).

132. In our submission, NEG that is credited to NM customers in such circumstances is overvalued by the difference between the Tier 1 and the Tier 2 rates. The trigger for energy being valued at the Tier 2 rate under RCR is consumption exceeding 1,600 kWh in the two month billing period. If a customer's consumption never reaches the threshold to trigger the higher Tier 2 energy value, then there is no basis for the generation to be credited at the rate. Despite this, under the current NM program terms, the customer's overvalued NEG credit is then carried forward and can offset charges for energy consumption or even the Customer Charge in subsequent billing periods. To put it in the language of the Majority Decision, the NEG is not being priced "in the context of what a customer pays for each kWh purchased from FBC" is these circumstances.

133. As discussed in the Reconsideration Application at paragraphs 77-79, the consequence of the mismatch between Tier 2 NEG and Tier 1 consumption in some billing periods is that FBC is not receiving just and reasonable rates for services provided. This issue is specific to the use of the RCR to compensate NEG; however, for the reasons stated above, even if the flat retail rate was still applicable for residential service, it would overvalue the annual NEG, from a resource perspective, to the detriment of customers that are not participating in the NM program.

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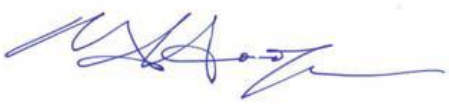
[97] Ex. B-4, Part 2, p. 1
[98] Response to Shadrack IR 1.6.vi. (Ex. B-11, p. 11)

PART 4 - CONCLUSION

134. For the reasons given in the Reconsideration Application and this Final Argument, and based on the evidence in the record, FBC submits that the reconsideration should be allowed and the Commission's 2016 NM Decision varied as set out in paragraphs 3-5 of Part 1, above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 12, 2017



Nicholas T. Hooge
Counsel for FortisBC Inc.

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.
PHASE II RECONSIDERATION – FINAL ARGUMENT

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substances that cannot be changed or broken down. **3** any of the four substances (earth, water, air, and fire) which were formerly believed to make up all matter. **4** a trace. **5** a distinct group within a larger group. **6** (**the elements**) weather conditions such as rain, wind, and cold. **7** a part in an electric device through which an electric current is passed to provide heat.

SYNONYMS **1** *an essential element of the local community* **component,** constituent, part, section, portion, piece, segment, aspect, factor, feature, facet, ingredient, strand, detail, member. **2** *there is an element of truth in this stereotype* **trace,** touch, hint, smattering, soupçon. **3** (**elements**) *I braved the elements* **weather,** climate, weather conditions.

elemental ▸ **adjective 1** fundamental. **2** having to do with or like the primitive forces of nature.

elementary ▸ **adjective 1** relating to the most basic aspects of a subject. **2** straightforward and uncomplicated.

SYNONYMS **1** *an elementary astronomy course* **basic,** rudimentary, preparatory, introductory. **2** *a lot of the work is elementary* **easy,** simple, straightforward, uncomplicated, undemanding, painless, child's play, plain sailing; informal a piece of cake.
ANTONYMS advanced, difficult.

elephant ▸ **noun** (plural **elephant** or **elephants**) a very large animal with a trunk, long curved tusks, and large ears, found in Africa and Asia.

elephantine /el-i-**fan**-tyn/ ▸ **adjective** resembling an elephant.

elevate ▸ **verb** (**elevates, elevating, elevated**) **1** lift to a higher position. **2** raise to a higher level or status.

SYNONYMS **1** *we need a breeze to elevate the kite* **raise,** lift (up), raise up/aloft, hoist, hike up, haul up. **2** *he was elevated to Secretary of State* **promote,** upgrade, move up, raise; informal kick upstairs.
ANTONYMS lower, demote.

elevated ▸ **adjective** of a high intellectual or moral level.

SYNONYMS **1** *an elevated motorway* **raised,** overhead, in the air, high up. **2** *elevated language* **lofty,** grand, exalted, fine, sublime, inflated, pompous, bombastic. **3** *his elevated status* **high,** high-ranking, lofty, exalted, grand, noble.
ANTONYMS sunken, everyday, lowly.

elevation ▸ **noun 1** the action of elevating. **2** height above a given level, especially sea level. **3** the angle of something with the horizontal.

elevator ▸ **noun** N. Amer. a lift in a building.

eleven ▸ **cardinal number 1** one more than ten; 11. (Roman numeral: **xi** or **XI**.) **2** a sports team of eleven players.
■ **the eleventh hour** the latest possible moment.
□ **eleventh** ordinal number.

elevenses ▸ **plural noun** Brit. informal a mid-morning snack.

elf ▸ **noun** (plural **elves**) (in folk tales) a creature resembling a small human figure with pointed ears.

elfin ▸ **adjective** (of a person) small and delicate.

elicit /i-**liss**-it/ ▸ **verb** (**elicits, eliciting, elicited**) produce or draw out a response or reaction.

SYNONYMS **obtain,** draw out, extract, bring out, evoke, induce, prompt, generate, trigger, provoke.

elide /i-**lyd**/ ▸ **verb** (**elides, eliding, elided**) **1** omit a sound or syllable when speaking. **2** join together.

eligible ▸ **adjective 1** meeting the conditions to do or receive something. **2** desirable as a husband or wife.

SYNONYMS **1** *those eligible to vote* **entitled,** permitted, allowed, qualified, able. **2** *an eligible bachelor* **desirable,** suitable, available, single, unmarried, unattached.

□ **eligibility** noun.

eliminate ▸ **verb** (**eliminates, eliminating, eliminated**) **1** completely remove or get rid of. **2** exclude someone from a competition by beating them.

SYNONYMS **1** *a policy that would eliminate inflation* **remove,** get rid of, put an end to, do away with, end, stop, eradicate, destroy, stamp out. **2** *he was eliminated from the title race* **knock out,** exclude, rule out, disqualify.

□ **elimination** noun.

elision /i-**li**-*zh*'n/ ▸ **noun** the omission of a sound or syllable in speech.

elite /i-**leet**/ ▸ **noun** a group of people regarded as the best in a particular society or organization.

SYNONYMS **best,** pick, cream, crème de la crème, flower, high society, beautiful people, aristocracy, ruling class.
ANTONYMS dregs.

elitism ▸ **noun 1** the belief that a society should be run by an elite. **2** the superior attitude associated with an elite.
□ **elitist** adjective & noun.

elixir /i-**lik**-seer/ ▸ **noun** a drink believed to make people live for ever or have other magical effects.

Elizabethan ▸ **adjective** relating to the reign of Queen Elizabeth I (1558–1603).

British Columbia Hydro and Power Authority v. Heathcote, 2011 BCSC 394 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia Hydro and Power Authority v. Heathcote,* 2011 BCSC 394

Date: 201100331
Docket: S107080
Registry: Vancouver

Between:

British Columbia Hydro and Power Authority

Plaintiff

And

Ronald P. Heathcote, Sharon Byers, and Keith S. Robertson

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:	Aniz Alani
Counsel for the Defendants:	Gregory P. DelBigio
Place and Date of Hearing:	Vancouver, B.C. February 2, 2011
Place and Date of Judgment:	Vancouver, B.C. March 31, 2011

[1] The plaintiff, British Columbia Hydro and Power Authority, has applied to dismiss, strike or stay the counterclaim (the "Counterclaim") that has been filed by one of the defendants, Mr. Heathcote. Hydro has filed a jurisdictional response under Rule 21-8 to the Counterclaim. It also relies, in the alternative, on Rule 9-5(1)(d) and asserts that the Counterclaim is an abuse of the court's process.

Background

[2] The background to this application is found in the pleadings that have been filed. The affidavits which have been filed do not, subject to a few facts to which I will return, supplement that background.

[3] Hydro seeks, in its Notice of Claim, to recover approximately $171,000 from the defendants. It asserts that this is the value of the electricity that was diverted ahead of Hydro's electric meters at Mr. Heathcote's property in Langley, British Columbia. Hydro alleges that the diverted electricity was used, in part, to power a marijuana grow operation at that property over a four-year period from May 2006 to April 15, 2010. On April 15, 2010 the RCMP executed a search warrant at the property and are alleged to have found, among other things, three stolen meters belonging to Hydro, marijuana grow equipment and over 35 pounds of packaged marijuana.

[4] Hydro relies on various causes of action in its claim which include contract, conversion and fraudulent misrepresentation. The following portions of its Notice of Civil Claim, which advances its contract claim, are of particular import:

> 5. At all material times, the defendants, and each of them, were customers of BC Hydro in respect of the Property and, as such, were bound by the terms and conditions of BC Hydro's Electric Tariff approved by Order of the British Columbia Utilities Commission pursuant to the *Utilities Commission Act*, R.S.B.C. 1996 c. 473 (the "Electric Tariff").
>
> ...
>
> 13. In accordance with the provisions of section 5.8 of the Electric Tariff, the defendants, and each of them, are liable to pay BC Hydro the value of the Diverted Electricity, the direct administrative costs incurred by BC Hydro in the investigation into the tampering and diversion that resulted in the Diverted Electricity and the direct costs of repair or replacement of equipment (the "Administrative Costs") plus interest at the rate of 19.6% per annum compounded monthly from the date of the original under-billed invoice until the amount under billed is paid in full.

[5] The Response to Civil Claim filed by Mr. Heathcote has as its focus the fact that his property contains multiple buildings. One of those buildings is his residence. There is also an outbuilding on the property. It is alleged that it was at that outbuilding that the RCMP executed its search warrant, that the outbuilding has a separate electric meter and that the contract for the provision of electric services to the outbuilding is between Hydro and the defendant Keith Robertson. Mr. Heathcote pleads that the contract for

services he has with Hydro is limited to the electricity provided to his residence. He denies that he diverted electricity and he challenges the validity of Hydro's calculations that relate to the quantity of electricity it says has been stolen.

[6] The Counterclaim advances similar facts and relies on the same central thesis - the contract Mr. Heathcote had with Hydro is limited to his residence. Mr. Heathcote further alleges that the disconnection of electrical services to his residence was a breach of contract, that that breach was "arbitrary and malicious" and that the breach has caused him loss and expense. Mr. Heathcote seeks both general and "aggravated, exemplary or punitive damages". He also seeks an order that Hydro reinstate electric services to his residence.

[7] The legal basis for the Counterclaim is expressed in the following terms:

> Part 3: LEGAL BASIS
>
> 1. BC Hydro is required to [*sic*] serve its customers solely in accordance with BC Hydro's Electric Tariff approved by Order of the British Columbia Utilities Commission pursuant to the *Utilities Commission Act*, R.S.B.C. 1996 c. 473 (the "Electric Tariff").
>
> 2. The Electric Tariff sets out the terms and conditions for the contract of service between BC Hydro and its customers,
>
> 3. Section 2.3 of the Electric Tariff sets out an exhaustive list of reasons for which BC Hydro may refuse to provide service to a customer.
>
> 4. BC Hydro's discontinuance of service to Mr. Heathcote was arbitrary, malicious, and in breach of the terms and conditions of the Contract for Service between Mr. Heathcote and BC Hydro.
>
> 5. BC Hydro is required under the Contract for Service to immediately reinstate electrical services to Mr. Heathcote's Residence.

[8] Finally, Hydro filed a Jurisdictional Response in Form 108 disputing the court's jurisdiction in respect of the Counterclaim or alternatively submitting that the court should not exercise its jurisdiction. It also filed, as was its right under Rule 21-8(1)(c), a response to the Counterclaim in which it both repeated its objections to jurisdiction and its assertions that the filing of the Counterclaim constituted an abuse of process. Still further it advanced the following plea:

> 4 In the alternative, BC Hydro was contractually entitled to disconnect service to the Residence, without notice to the Defendant Ronald P. Heathcote, pursuant to section 2.3 of the Electric Tariff.
>
> 5 Further, and in the alternative, BC Hydro is contractually entitled to withhold reconnection of service to the Residence pursuant to section 2.1 of the Electric Tariff.

Hydro's Position

[9] Hydro is a public utility within the meaning of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 ("the *Act*") and is regulated by the British Columbia Utilities Commission (the "Commission") pursuant to the *Act*.

[10] Hydro argued that the Commission has the exclusive jurisdiction to do the following:

a) hear and determine complaints by customers who challenge Hydro's disconnection of services to their property,

b) determine whether Hydro was entitled to disconnect services in the circumstances that it did, and

c) order Hydro to reconnect service if determined appropriate.

[11] The following provisions of the *Act* are central to Hydro's position:

> **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.
>
> ...
>
> **Jurisdiction of commission exclusive**
>
> 105 (1) The commission has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act.
>
> (2) Unless otherwise provided in this Act, an order, decision or proceeding of the commission must not be questioned, reviewed or restrained by or on an application for/ judicial review or other process or proceeding in any court.

[12] Thus, s. 72 of the *Act* establishes the matters over which the Commission has jurisdiction and s. 105 confirms that its jurisdiction in respect of such matters is exclusive.

[13] Both Hydro and Mr. Heathcote recognize that the Electric Tariff is a contract for services that exists between them. That tariff constitutes an order of the Commission. Section 2.3 of the Electric Tariff, expressly referred to by both parties, provides:

2.3. Refusal to Provide Service and Discontinuance of Service

BC Hydro may refuse to provide service or may discontinue without notice service to any Customer who:

1. failed to pay for service at any or all Premises, or
2. breached the terms and conditions upon which service is provided by BC Hydro, or
3. refused to provide reference information and identification acceptable to BC Hydra, when applying for service or at any subsequent time on request by BC Hydro, or
4. occupies the Premises with another occupant who has an outstanding account incurred for service while occupying any Premises at the same time as the Customer, or
5. refuses to provide reasonable access for meter servicing or to read the meters for billing purposes.

For the purpose of this paragraph the term "Customer" shall have its ordinary meaning and shall not be restricted by its definition in these Terms and Conditions.

BC Hydro shall not be liable for any loss, injury or damage suffered by any Customer by reason of the discontinuation of or refusal to provide service as aforesaid.

[14] The resolution of Hydro's application turns on an analysis of what relief is being sought in the Counterclaim and how Mr. Heathcote's claim is properly described. The Counterclaim advanced by Mr. Heathcote seeks two distinct things. It seeks a) the restoration of his electric services, and b) damages for Hydro's alleged wrongful breach of its contract with him.

[15] Hydro's jurisdictional submissions, which I have captured in paragraph 10 of these reasons, are all framed in terms of the Commission's exclusive jurisdiction to determine whether Hydro's "disconnection of services" was proper. When I turn to a consideration of the relevant authorities, it will be clear why Hydro seeks to focus on its right to disconnect electric services. A focus on this issue without a more searching analysis would, in real terms, preserve all questions of whether Hydro performed its underlying contract with its clients to the Commission. The question of disconnection is, in a sense, the second part of the analysis. The first issue relates to the performance of the contract that exists between the parties. Under the Electric Tariff - Hydro's contract with the consumer - Hydro can disconnect its services for various reasons. It can do so, for example, because its accounts have not been paid or because its meters have been tampered with.

[16] In this case it is not clear which term Hydro relied on in the Electric Tariff to disconnect Mr. Heathcote's services. I was told that Hydro may have relied on an express term in the Tariff or potentially on some unspecified implied term. It did not matter - all such questions fell within the exclusive purview of the Commission and Hydro was under no obligation to identify what

alleged breach on the part of Mr. Heathcote it had relied on to disconnect his electric services.

[17] Thus, by way of example, if Hydro overbilled a client, who could not pay that account, and whose service was thereafter disconnected, with attendant loss to the client, the client would be required to first take the matter of the overbilling to the Commission before he could sue for its loss. I leave aside, in this example, the separate question of that client making application to have its services reconnected. If the Commission agreed that Hydro's account was invalid, the client would, with that determination in hand, begin an action in the courts for an assessment of its loss. By reason of s. 79 of the *Act,* the decision of the Commission would be determinative of Hydro's liability. Conversely, if the Commission decided that the amount of the bill was appropriate then, absent an appeal, a potential monetary claim brought by the client in the courts would be foreclosed. Section 79 of the *Act* would again prevent the court from considering the merits of the client's breach of contract claim.

[18] The same analysis would pertain, for example, if Hydro erroneously terminated the wrong person's electrical services and thereby caused loss to that person. Under Hydro's analysis, any and all questions of whether Hydro breached its contract with the client are to be determined by the Commission. All such breach of contract cases are required then to go through a bifurcated process with liability being determined by the Commission and the question of damages, if the client was successful, remaining for the courts.

[19] Hydro accepts that s. 72 of the *Act* does not extend to a claim brought by Hydro. Thus, its efforts to enforce the Electric Tariff and collect on its accounts, falls within the purview of the courts.

[20] It also accepts that a corollary of the jurisdictional structure it posits could give rise to both inconsistent results and multiple proceedings. Thus, in this case, a court could allow Hydro's claim and determine that the account or bills it had rendered were valid. That determination, under s. 80 of the *Act*, would not be binding on the Commission. The Commission could then find that Hydro's billing was invalid and that it had no basis to terminate Mr. Heathcote's services. Mr. Heathcote would then return to the courts for an assessment of his losses.

[21] Hydro says, and I believe correctly, that the question of convenience is immaterial in considering the jurisdictional question. Nevertheless, it is worth understanding fully the ramifications of what has been proposed. Thus, rather than have a single proceeding which addressed and determined these various issues between the parties, the structure which Hydro says is mandated by the *Act* could give rise to three hearings, exclusive of an appeal from the Commission. This would include; i) Hydro's claim before the courts, ii) Mr. Heathcote's "liability" claim before the Commission, and iii) if successful, his "damages" claim before the courts.

Analysis

[22] The case of *Princeton Light and Power Co. Ltd. v. MacDonald*, 2005 BCCA 296 (CanLII), is determinative of this application. It addresses both Hydro's principal submission and identifies those finite aspects of the Counterclaim that are beyond this court's jurisdiction. Because *Princeton Light* arose out of factual circumstances that bear significant similarity to the instant case and because the court in that case directly addressed submissions which, in large part, mirror those raised before me, I have dealt with the background of the case as well as the court's analysis at greater length than I might normally.

[23] The decision of the court in *Princeton Light* arose from an appeal of the decision of Ralph J. in which he had dismissed the company's motion for a directed verdict in connection with the defendant Mr. MacDonald's counterclaim. The following facts from the case are relevant. In 1996, Mr. MacDonald purchased a rental property. The rent he charged his tenant included utilities. In 1999, Mr. MacDonald obtained a new tenant. Shortly thereafter, Princeton Light discovered an unusually high electrical use at the property. The police discovered that Mr. MacDonald's tenant was operating a marijuana grow operation at the residence and had used Hydro bypass to steal electricity. Princeton Light disconnected the electrical service to the residence and billed Mr. MacDonald for stealing from Hydro from 1996 onwards as it claimed that the electric usage from the time of Mr. MacDonald's initial ownership was higher than in previous years. Mr. MacDonald had earlier asked that the Commission order that Princeton Light reconnect the power. The Commission declined to order the reconnection on the basis that Princeton Light had acted in accordance with its tariff and had the right to disconnect the power until the charges were paid. In its action to collect on the alleged debt, Princeton Light argued that the Commission had the exclusive power to find the utility in breach of either a statutory or contractual duty. The jury had found that Mr. MacDonald did not owe any money to Princeton and awarded him damages for breach of contract and punitive damages.

[24] At the outset of the judgment, Huddart J.A., for the court, identified both the issues raised by the appeal and the court's conclusion in relation to those issues:

> [1] This appeal raises two interesting issues. The first is whether the British Columbia Utilities Commission has exclusive jurisdiction to decide whether a public utility has complied with the applicable Electric Tariff in back-billing a customer for unauthorized use of electric power. The second is whether the appellant public utility can be held liable for damages for breach of duty of good faith and fair dealing to its customer, the respondent.
>
> [2] On the view I have reached, I am persuaded the Commission does not have exclusive jurisdiction to determine whether Princeton Light properly back-billed the respondent, and, in the absence of any submission to the contrary, that a duty of good faith and fair dealing is implied in the utility's standard form service agreement. I conclude that Princeton Light breached its contract with the respondent when it back-billed him for 36 months and did so in such a manner as to justify the jury's award of punitive damages. I

would dismiss the cross-appeal for an increase in the award of punitive damages.

[25] After reviewing the history of the matter, Huddart J.A. said:

> [16] By counterclaim, Mr. MacDonald sought damages for Princeton Light's breach of a duty to deal with its customers fairly and in good faith. He alleged Princeton Light had no reasonable grounds to believe he had stolen power, or that he had done so for three years. He claimed that Princeton Light opposed vigorously his attempts to have power reconnected and offered no reasonable terms for repaying the back-bill. He sought punitive damages on the basis that Princeton Light had acted in bad faith and conducted itself reprehensibly with a wilful and conscious disregard for him, subjecting him to cruel and unusual hardship. In defence, Princeton Light pleaded its right to suspend service under paragraph 8.2 of the Tariff.

[26] It is noteworthy that in *Princeton Light* the company expressly relied on paragraph 6.7(4) of the Electric Tariff to justify its back-billing. That paragraph stated (reproduced at para. 13 of *Princeton Light*):

> 6.7 Generic Back-billing Tariff
>
> 4. *If there are reasonable grounds to believe that the customer has tampered with* or otherwise used *the utility's service in an unauthorized way, or evidence of fraud, theft or other criminal act exists, then the extent of back-billing will be for the duration of the unauthorized use*, subject to the applicable limitation period provided by law, and the provisions of items 7, 8, 9 and 10 below do not apply. In addition, the customer is liable for the direct (unburdened) administrative costs incurred by the utility in the investigation of any incident of tampering, including the direct cost of repair, or replacement of equipment. *Under billing resulting from circumstances described above will bear interest at the rate normally charged by the utility on unpaid accounts from the date of the original under billed invoice until the amount billed is paid in full.*
>
> [Emphasis added by Huddart J.A.]

[27] Huddart J.A. addressed the significance of paragraph 6.7(4) and said:

> [14] Mr. MacDonald's counterclaim is founded on a breach of this provision and Princeton Light's ensuing conduct. The exclusion of items 7, 8, 9 and 10 permitted back-billing for three years and the discontinuance of power until the back-bill was paid, even where there was a legitimate dispute about the duration of the under billing. Paragraph 8.2 of the Tariff permitted the suspension order:
>
> > 8.2 Suspension of Supply
> >
> > *The Company shall have the right to suspend service at any time without notice whenever the Customer has breached any agreement with the Company, or failed to pay arrears within specified time, fraudulently used the service, tampered with the Company's equipment or committed similar actions* ... Suspension of service by the Company shall not operate as a cancellation of any contract with the

> Company, and shall not relieve any Customer of its obligations under these Terms and Conditions or the applicable Rate Schedule.

[Emphasis added by Huddart J.A.]

[28] During the hearing before me, Hydro referred to paragraph 5.8.4 of the Electric Tariff which mirrors the language of the former paragraph 6.7(4) of the Electric Tariff. Though Hydro has not expressly relied on paragraph 5.8.4 in its pleadings I was advised that this was one of the paragraphs that it might rely on in its claim against Mr. Heathcote. I was also directed to a portion of paragraph 9.6 of the present Electric Tariff which contains language which is similar, in effect, to paragraph 8.2 of the Tariff referred to by Huddart J.A.

[29] The position of Princeton Light, at trial and on appeal, mirrored the submissions of Hydro before me:

> [29] In Princeton Light's view, ss. 72(2) and 73 of the *Act* give the Commission the power not only to order reconnection, but also the exclusive power to find a utility in breach of a statutory or contractual duty. Thus, in its view, Mr. MacDonald, as a customer, was obliged to seek a declaration from the Commission that Princeton Light had breached a statutory or contractual duty before he could seek an award of damages from a court. Conversely, Princeton Light was obliged to sue its customers in court for breach of contract because the *Act* granted no remedial powers to the Commission over its customers. In such an action, the Commission's ruling on tariff compliance would be binding on the court.
>
> [30] It follows logically from this submission that Princeton Light takes the view that only the Commission can determine the amount of stolen power; that a customer is obliged to seek a declaration of the amount owing on a contract from the Commission; and a customer's only defence to a utility's action in debt is payment. However, Princeton Light accepts that a customer may defend a debt action by establishing error on the part of a utility in its billing or records. This comes to an acceptance that a dispute over the amount of a bill must be resolved in court, not by the Commission. It also reflects what happened in this case.

[30] In addressing this submission by Princeton Light, the court referred to the reasons of Ralph J., who had said:

> [24] At para. 18, the trial judge explained why the Supreme Court has jurisdiction to hear and resolve the dispute:
>
> > ... the essential nature of the dispute ... arises out of the manner in which the plaintiff made its decision to back-bill Mr. MacDonald $18,500.00 and to cut off power to the property until the amount was paid. It does not essentially call for a detailed consideration of the tariff, but for a consideration of the circumstances which caused the plaintiff to apply the tariff in this particular case. Essential to this determination, it seems to me, is whether power was stolen for approximately three months or approximately three years. This is the underlying dispute.

Consequently he concluded the dispute did not come within the exclusive jurisdiction of the Commission under s. 105 of the *Act*, as a matter over which jurisdiction is conferred on it by s. 72(1) of the *Act*, as Princeton Light had argued.

[31] The court then said:

[32] The dispute in this case was over the amount of the bill, the duration of the unauthorized use, and more particularly, whether Princeton Light had reasonable grounds to believe that stolen power was used to benefit Mr. MacDonald's property from June 1996 to April 1999. None of these issues were before the Commission, but even if they were, the Commission did not have the jurisdiction to determine them.

[32] After referring to ss. 72 and 73 of the *Act* the court said:

[34] Thus, the Commission has the jurisdiction to inquire into and determine whether a utility is permitted to suspend service and issue a back-bill. These are questions about the interpretation of the Electric Tariff. But I can find nothing in the *Act* giving the Commission jurisdiction to resolve a factual dispute about the liability of a customer under a service agreement. Not a word is said in the Electric Tariff or the service agreement to suggest a Commission decision about a customer's liability binds the customer and the court when a utility sues to enforce payment. We are not asked to infer that power in the absence of an express provision to that effect. If the Legislature intended to give the Commission power to resolve disputes about the amount of a bill, I would have expected a specific provision to that effect, accompanied by a suitable enforcement mechanism. Moreover, the *Act* does not contemplate or make any provision for the adjudication or enforcement of contractual claims by a customer against a utility.

[33] The court concluded:

[37] So here, the Commission has no jurisdiction over the issues raised in the counterclaim. When Mr. MacDonald's claim went to the jury, he was no longer challenging the Commission's order denying power reconnection to his property or its interpretation of the Electric Tariff, but the reasonableness of Princeton Light's belief that he had tampered with the power supply personally, and that the unauthorized use had begun before March 1999. There is no concern here that Mr. MacDonald is seeking to avoid the Commission order by defending the debt action or bringing a counterclaim.

[38] In my view, Ralph J. correctly considered and applied the authorities. He determined the jarisdiction issue by, "analyzing the essential nature of the dispute as opposed to the causes of action that may arise from it". He correctly found the "essential nature of the dispute" to be a private law matter arising from the service agreement. The court's jurisdiction over the dispute is not excluded by s. 105 of the *Act*.

[39] The jury was not asked to find whether Princeton Light breached the service agreement, or to identify a breach of a specific contractual provision. The verdict leaves no doubt the jury found Princeton Light had

> no reasonable grounds to believe the unauthorized use of power had begun before March 1999, and that it treated Mr. MacDonald in bad faith when he challenged that belief until Justice Singh's proposal of a compromise led to an agreement in February 2000. The jury's award of punitive damages necessarily implies it found Princeton Light's conduct to be a "marked departure from ordinary standards of decent behaviour" deserving of punishment beyond that provided by the compensatory damage award.

[34] In this case Mr. Heathcote, in the Counterclaim, alleges that Hydro "arbitrarily and maliciously" disconnected electrical services to his residence in breach of the contract of service he had with Hydro. As in Princeton this claim "does not essentially call for detailed consideration of the tariff, but for consideration of the circumstances which caused the plaintiff to apply the tariff in this case". In *Princeton Light* the question was "whether power was stolen for approximately 3 months or approximately 3 years. This was the underlying dispute". In this case the underlying dispute appears to be whether Hydro's contract was with Mr. Heathcote for the periods in question or with the tenant in the outbuilding on Mr. Heathcote's property. There also appears to be some question, as in *Princeton Light*, about whether the accounts Hydro delivered to Mr. Heathcote are accurate.

[35] Still further, as noted earlier in para. 32 of Huddart J.A.'s reasons, the dispute in issue was over "the amount of the bill, the duration of the unauthorized use, and more particularly, whether Princeton Light had reasonable grounds to believe that stolen power was used to benefit Mr. MacDonald's property from June 1996 to April 1999". Once again, those issues mirror, in large part, the issues raised by the Counterclaim.

[36] Huddart J.A. also referred to the case of *Crestbrook Pulp and Paper Ltd. v. Columbia Natural Gas Ltd.* (1978), 1978 CanLII 1943 (BC CA), 87 D.L.R. (3d) 248, [1978] 5 W.W.R. 1. In that case *Crestbrook* alleged that it had been overcharged for gas supplied under a contract approved by the Commission. The utility argued that the claim was a collateral attack on the Commission's rate schedule. Robertson J.A., for the court, concluded that the essence of the claim was one for money paid under a mistake of the fact or for damages for breach of contract. At 252 [cited to D.L.R.], the court referred to s. 87 of the then *Act*. That section provided "... complaining that a person... operating... an energy utilities service... has done, is doing, or has failed to do any act, matter or thing required to be done by this Act". As such, section 87 closely parallels section 72(1) of the present *Act*.

[37] In rejecting the argument that Crestbrook was required, in the first instance, to take its claim to the Commission, Robertson J.A. said at 253-256:

> I am unable to distil from s. 87 any jurisdiction in the Commission to adjudicate between persons with a view to granting or refusing relief of the sort sought here. The essence of what Crestbrook seeks is a judgment for money paid under a mistake of fact, or for money paid for the use of Crestbrook, or for damages for breach of contract. The claims all sound in contract: see *Health Labour Relations Association of British Columbia v.*

Hospital Employees Union, a case decided in this Court on February 21,1978, and not yet reported, and *Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.* (1975), 1975 CanLII 156 (SCC), 55 D.L.R. (3d) 1 at pp.10-11, [1976] 2 S.C.R. 147 at p. 160, [1975] 4 W.W.R. 591, cited there. In order to make out its case Crestbrook does not have to rely on the Act. It founds upon the contract, and relies upon the common law. While a contract may be filed and approved as part of a rate schedule, it does not thereby lose its identity as a contract: see ss. 23, 39 and 53 and also the definition of "rate" in s. 1. Similarly, if a utility sues a customer for the price of gas sold, the basis of its claim is the contract of sale and not a provision of the Act. It follows that s. 87 contains no words that are apt to empower the commission to grant the relief sought. The gist of Crestbrook's claim is not that Columbia "has done, is doing, or has failed to do any act, matter or thing *required to be done by this Act*, or any other general or special Act, or by any regulation, order, by-law, or direction made hereunder."

...

If the Act were to be construed as Columbia would have us construe it, several anomalous results would follow. First, while upon a complaint by a customer against an energy utility the Commission could construe the contract between the parties, there is no provision for entertaining a claim by a utility against a customer for unpaid rates equally requiring construction of the contract. What logic or magic is there that makes the determination of who may exclusively adjudicate upon the contract depend on which party initiates the proceeding? Second, under s. 100 the Commission may decline to take any action upon a complaint: no matter how meritorious a claim in contract or in tort might be, the complainant might in the discretion of the Commission be forever barred from pressing his claim and having it adjudicated on. Third, s. 91 would be entirely inappropriate: such a provision may be appropriate to the general supervision of utilities, but it would shock one if it were to apply to money claims founded on contract or tort. Fourth, if under s. 114 the Commission were to take possession of the business and property of an energy utility and manage them, exercising all the powers and functions of its directors, officers and managers, and a claim such as that in issue here were to be made against the utility, the Commission would become the judge in its own case: unless, of course, it dodged its responsibility by invoking s. 100.

...

Section 87 is not to be read in isolation. It must be read in its context, and the context is provision for the general regulation and supervision of all energy utilities, into the details of which I have already gone. That context lends no support to the submission that the Commission is to replace the Courts in adjudicating upon money claims between utilities and their customers. Such an idea is not capable of being related to the apparent purposes of the Act.

...

I should note that another way in which Columbia's argument was put was to this effect: Columbia says that it charged the proper rate; Crestbrook says it did not; the issue is, what is the rate, and so the dispute relates to

> the essence of rate-making, which is under the supervision of the Commission. I cannot accept this. The dispute is not over rate-making. The rate was "made" by the contract and its acceptance for filing. The dispute is over the interpretation and implementation of the contract.
>
> [Emphasis added by Robertson J.A.]

[38] The foregoing comments of the court in *Crestbrook* have direct relevance to the Counterclaim as well as to the pragmatic difficulties which are inherent in the submissions of Hydro.

[39] Finally, I return to *Princeton Light* and emphasize two further paragraphs from the reasons of Huddart J.A. The first, para. 28, captures the submission of *Princeton Light*, the second, para. 44, identifies what was held to be the real issue advanced in the Counterclaim of Mr. MacDonald.

> [28] Princeton Light submits the trial judge's ruling on jurisdiction was unsound. It seeks a new trial of its claim and an order dismissing the counterclaim. It argues the Commission determined the propriety of its decision to suspend power and issue a back-bill when it found that the utility had complied with the Tariff provisions. ...
>
> ...
>
> [44] In my view, when the counterclaim is stripped to its essentials, it is a claim for damages flowing from the breach of an express provision of the contract the parties made on 19 April 1996. The contract consists of the application and the Electric Tariff, as amended from time to time with the approval of the Commission. The breach alleged is that Princeton Light had no "reasonable grounds to believe" Mr. MacDonald or his tenant(s) had "tampered with or otherwise used [its] services in an unauthorized way" ...

[40] I have focused on the foregoing comments because in this case, as in *Princeton Light*, Hydro seeks to couch or tie its submissions to the question of the Commission's jurisdiction to deal with questions of disconnection or reconnection of electrical services. Instead, "stripped to its essence", Mr. Heathcote's Counterclaim is a claim for damages arising from a breach of contract.

[41] I am satisfied that the claim advanced in the Counterclaim is one that "sounds in contract". Both *Crestbrook* and *Princeton* establish that s. 72, or its earlier versions, do not serve to "replace the courts in adjudicating upon the money claims between utilities and their customers". Accordingly, Hydro's central application is dismissed.

[42] A further issue, however, arises from the relief which is sought within the Counterclaim. Specifically, Mr. Heathcote seeks an order that Hydro "immediately reinstate electrical services" to his residence. The ability of Mr. Heathcote to seek this relief from a court was also addressed in *Princeton Light*.

[43] Mr. MacDonald appears to have initially brought a petition in which he sought an order that "power services be reconnected to the property". That petition was dismissed by Singh J. In the Court of Appeal, Huddart J.A., at para. 11, simply said: "It is not disputed that the Commission had exclusive jurisdiction to order the reconnection of power to Mr. MacDonald's property".

[44] Thus, it seems clear that the relief which Mr. Heathcote seeks in para. 1 of Part 2 and in para. 5 of Part 3 of the Counterclaim is beyond the jurisdiction of this court. Those subparagraphs are to be struck from the Counterclaim.

[45] Finally, Hydro's alternate submission, based on Rule 9-5(1)(d), is that the Counterclaim constitutes an abuse of process because it seeks relief that this court lacks the jurisdiction to grant. The cases which Hydro relies on, for example, *Shuswap Lake Utilities Ltd. v. Mattison*, 2006 BCSC 1546 (CanLII), aff'd 2008 BCCA 176 (CanLII), involve instances where the court was satisfied that it was "plain and obvious" that it lacked the jurisdiction to address the claim advanced. In such instances Rule 9-5(1)(d), formerly Rule 19(24)(d), may be properly engaged. Such circumstances do not arise in this instance and Rule 9-5(1)(d) does not advance Hydro's submissions.

[46] Hydro's application is dismissed except to the extent that the Counterclaim seeks relief which would compel Hydro to reconnect Mr. Heathcote's electrical services.

[47] Costs of this application are to be in the cause.

"Voith J."

Gilchrist v. Western Star Trucks Inc., 2000 BCCA 70 (CanLII)

Date: 2000-01-28
Docket: CA025023
Other citations: 73 BCLR (3d) 102; 133 BCAC 144; [2000] BCJ No 164 (QL)
Citation: Gilchrist v. Western Star Trucks Inc., 2000 BCCA 70 (CanLII), <http://canlii.ca/t/537p>, retrieved on 2017-10-12

Citation: Gilchrist v. Western Star Trucks Inc. 2000 BCCA 70

Date: 20000128
Docket: CA025023
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

JAMES GILCHRIST

PLAINTIFF
(RESPONDENT)

AND:

**WESTERN STAR TRUCKS INC.,
WESTERN STAR TRUCKS HOLDINGS LTD.,
WESTERN STAR TRUCKS SALES CORPORATION, and
TERRENCE E. PEABODY**

DEFENDANTS
(APPELLANTS)

Before: The Honourable Chief Justice McEachern
The Honourable Madam Justice Ryan
The Honourable Madam Justice Saunders

Gordon D. Phillips — Counsel for the Appellants

D. Murray Tevlin and J. Lamonte — Counsel for the Respondent

Vancouver, British Columbia

Place and Date of Hearing:	22 September 1999
Place and Date of Judgment:	Vancouver, British Columbia 28 January 2000

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Madam Justice Ryan

Concurring Reasons in the Result by:
The Honourable Chief Justice McEachern (Page 15, Para. 27)

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] On February 13, 1998 Western Star Trucks Inc. dismissed James Gilchrist as its Vice-President, Corporate Controller. Mr. Gilchrist sued for damages, including for sums he claimed were owing to him pursuant to an agreement concerning stock options.

[2] On a summary trial under Rule 18A of the Rules of Court all issues were adjourned to full trial with the exception of the stock option issue. On that question the trial judge concluded that Mr. Gilchrist was entitled to two-thirds of the sum he claimed, leaving the question of his entitlement to the other one-third to the trial of the other issues in the case, which she held were unsuitable for resolution under Rule 18A. Thus Mr. Gilchrist obtained judgment against the appellants for $400,000. The appellants appeal, asking for dismissal of Mr. Gilchrist's claim for that sum.

[3] On appeal, the parties raised two questions: did the option agreement require the option to be exercised before the obligation to pay Mr. Gilchrist money, and if so, did Mr. Gilchrist exercise the option? These reasons address the first issue only. The trial judge did not decide the second question. Without findings of fact from the trial court, including on the question of whether the option was issued, this Court is not able to decide whether Mr. Gilchrist exercised the option or, indeed, whether he is excused from exercising the option.

The Circumstances

[4]
Mr. Gilchrist was hired as Vice-President, Corporate Controller of Western Star Trucks Inc. after a period of secondment to the company from a large accounting firm. A written employment contract, effective May 1, 1995, set out the terms of his employment. Included in the remuneration and benefits was an option to purchase 70,000 shares of the appellant Western Star Trucks Holdings Ltd., a company listed for public trading on the Toronto Stock Exchange, at the market price as of May 1, 1995. This price turned out to be $16 1/8 per share. The parties accepted that this option was subject to the terms of a plan known as the Director and Employee Stock Option Plan, although there was no mention of the Option Plan in the employment contract. It was a term of the Option Plan that the right to exercise the option for one-third of the optioned shares vested after each of the first three completed years of employment.

[5] In June 1995 the appellant Mr. Peabody, Chief Executive Officer of both Western Star Trucks Inc. and Western Star Holdings Ltd., told Mr. Gilchrist that the number of shares subject to the option (70,000) was so high as to displease other executives. Mr. Peabody asked Mr. Gilchrist to reduce the number covered by the option at that time to only 40,000 shares, and to write an agreement that he, Mr. Gilchrist, would be happy with concerning the remaining 30,000 shares.

[6] Mr. Gilchrist drafted a letter agreement and delivered the draft to Mr. Peabody on June 6, 1995. Mr. Peabody returned it, signed as accepted, the next day. The letter agreement recited the request that Mr. Gilchrist temporarily relinquish his entitlement to the option on 30,000 of the shares on the express understanding it would be re-issued at a later date. The letter agreement provided:

> In consideration of my consent to this I request that you agree to the following:
>
> 1. The 30,000 shares represented by these options will be held be held (sic) in an option pool and will not be distributed to any other employee of the Company until such time as they are released to me. In any event the options will be reissued to me within two years of the date of this agreement, or upon the change in control of

the majority of the common shares in the Company.

2. The exercise price of these options will be $16 1/8 as it is with the other 40,000 options granted at the date of the commencement of my employment. If the price at the date of re-issue (the "Re-issuance Price") exceeds the $16 1/8 then the amount by which the reissuance Price exceeds the Original Option Price will be paid to me by you, upon demand which shall not precede exercise of the options.

3. In the event of my termination by the Company the options referenced herein will be deemed to have been issued one week prior to such termination (the "Deemed Issuance Date") at the Original Option Price and you will upon demand pay to me the amount which equals the difference between the Original Option Price and the amount at which the shares are traded publicly on the Deemed Issuance Date.

[7] By June 1997 Mr. Gilchrist was entitled to exercise and had exercised his option to purchase two-thirds of the 40,000 shares still subject to option under the employment contract. Under the terms of the Option Plan, the option on the balance of the 40,000 shares could not be exercised until he had completed his third year of employment.

[8] The case proceeded before the trial judge as if the option on 30,000 shares referred to in the letter agreement set out above, was re-issued on June 7, 1997. On June 7, 1997 the market price of shares in Western Star Trucks Holding Ltd. was $36 1/8, fully $20 a share higher than the initial option exercise price of $16 1/8, making the amount described in paragraph 2 of the letter agreement $20 per share.

[9] On June 29, 1997 Mr. Gilchrist sent a letter to Mr. Peabody which read:

> I draw your attention to the private agreement between yourself and the writer, dated June 6, 1995.
>
> As I am sure you remember this agreement dealt with 30,000 common share options which were not

registered at the time of my commencing employment with the Company as a result of objections raised by Gerry McParland.

I would like to meet with you on your next visit to Kelowna to discuss the resolution of this issue in a manner satisfactory to both of us. I am open to time and place, at your convenience.

[10] Mr. Peabody and Mr. Gilchrist met to discuss the matter in July 1997. At no time after June 7, 1997 did Mr. Gilchrist or the appellants suggest that the letter agreement required him to exercise his options before he was entitled to the payment described in paragraph 2 of the agreement. Discussions between the parties concerned a tax advantageous structure for the payment. By the time Mr. Gilchrist was dismissed from his employment, he neither had given formal notice of exercise of his option, nor tendered the purchase price for the shares.

[11] The trial judge concluded that paragraph 2 of the letter agreement entitled Mr. Gilchrist to payment of $20 per share. However, had the original option on 70,000 shares been effective, Mr. Gilchrist would have been able to exercise the option on only two-thirds of the shares by February 1998. Accordingly the trial judge held that Mr. Gilchrist was entitled to $400,000 compensation, that is, $20 per share multiplied by two-thirds of 30,000 shares. In reaching this conclusion she said at paragraph 29 of her reasons:

> [29] I conclude that a reasonable interpretation of the Letter Agreement entitles Mr. Gilchrist to payment in respect of 2/3 of the 30,000 stock options or $400,000 regardless of whether he was terminated for cause. The Letter Agreement provided that at the date of re-issuance, June 7, 1997, the defendants would pay the plaintiff the difference ($20 per share) between the original price ($16 1/8) and the re-issuance price ($36 1/8) "upon demand which shall not precede exercise of the options." Mr. Gilchrist effectively made his demand for payment by initiating discussions with Mr. Peabody in late June 1997. I interpret the phrase "which shall not precede exercise of the options" to refer to his entitlement to exercise his options under the Option Plan. The Letter Agreement prevented him from making a demand prior to June 7, 1997. If he had not relinquished 30,000 of his share options, he would

> have been able to exercise 20,000 of them under the Option Agreement by that date. That is the only rational interpretation of the wording of the Letter Agreement. If Mr. Gilchrist had not been dismissed, he would have been entitled to the $400,000 (20,000 shares X the price difference of $20) as of June 7, 1997 and the re-issuance of 20,000 stock options which he could demand when the time came to exercise the remaining 1/3 on May 1,1998.

[12] The trial judge left the issue of compensation for the option on the remaining 10,000 shares to full trial, holding that the result may turn on the issue of cause for dismissal.

[13] On appeal the appellants contended that the agreement was unambiguous and the payment to Mr. Gilchrist of $20 a share was conditional on his exercise of the option to purchase shares (at $36 1/8). They say that Mr. Gilchrist never exercised the option and thus was never entitled to the sum claimed.

[14] Mr. Gilchrist replied that the trial judge gave a reasonable interpretation of the contract, consistent with the factual matrix. Further, he contended that if she was wrong in her interpretation of the contract, he had effectively exercised the option on June 29, 1997, by asking Mr. Peabody to meet to discuss resolution of the matter.

Interpretation of the Letter Agreement

[15] I turn to the interpretation issue: does the letter agreement reasonably support the interpretation given to it by the trial judge that Mr. Gilchrist is entitled to a cash payment?

[16] Mr. Gilchrist refers not only to the words of the letter agreement, but also to the surrounding circumstances at the time the agreement was made including the original employment agreement, and to the events in the summer of 1997, to support the interpretation he advocates. The basic tools available to a court that is interpreting an agreement, therefore, must be kept in mind.

[17] The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made. The most significant tool is the

language of the agreement itself. This language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations, may the court consider other matters such as the post-contracting conduct of the parties: ***Delisle v. Bulman Group Ltd.*** (1991), 1991 CanLII 295 (BC SC), 54 B.C.L.R. (2d) 343 (S.C.), approved by Chief Justice McEachern in ***Bramalea Ltd. v. Vancouver School Board No. 39*** (1992), 1992 CanLII 5958 (BC CA), 65 B.C.L.R. (2d) 334 (C.A.); ***Prenn v. Simmonds***, [1971] 3 All E.R. 237 (H.L.); ***Eli Lilly and Co. v. Novopharm Ltd.*** (1998), 1998 CanLII 791 (SCC), 161 D.L.R. (4th) 1, (S.C.C.).

[18] The first inquiry, then, is to determine whether there is only one reasonable meaning to the words in the contract, or more than one. In this search one must look to the surrounding circumstances and the whole of the contract. The words of the contract must be looked at in their ordinary and natural sense and cannot be distorted beyond their actual meaning: ***MacMillan Bloedel Ltd. v. British Columbia Hydro & Power Authority*** (1992), 1992 CanLII 2287 (BC CA), 72 B.C.L.R. (2d) 273 (C.A.); ***Melanesian Mission Trust Board v. Australian Mutual Provident Society***, [1997] 1 N.Z.L.R. 391 (P.C.).

[19] The language in issue is:

> 2. The exercise price of these options will be $16 1/8 as it is with the other 40,000 options granted at the date of the commencement of my employment. If the price at the date of re-issue (the "Re-issuance Price") exceeds the $16 1/8 then the amount by which the reissuance Price exceeds the Original Option Price will be paid to me by you, upon demand <u>which shall not precede exercise of the options</u>.
>
> (Emphasis added)

[20] The trial judge concluded that paragraph 2 above did not require the optioned shares to be purchased before the obligation to pay the difference between the issuance price and the original option price crystallized. In my view this conclusion is contrary to the plain and natural meaning of the words of the agreement, in the context of

the surrounding circumstances. I say this for the following reasons:

1. Both the employment contract and the letter agreement speak of options. An option is, in ordinary and legal parlance, an offer to sell something subject to the terms of the option, and is irrevocable except in accordance with its terms: ***Baughman v. Rampart Resources Ltd.*** (1995), 1995 CanLII 2910 (BC CA), 4 B.C.L.R. (3d) 146 (C.A.); ***Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada***, 1995 CanLII 87 (SCC), [1995] 2 S.C.R. 187. Applying this common meaning of the term option to the letter agreement reveals an agreement that Mr. Gilchrist would be provided an opportunity to purchase shares.

2. The circumstances surrounding the letter agreement include the original employment agreement. The employment agreement provided an option to Mr. Gilchrist to purchase shares and made no provision for payment only of cash. Under the employment contract Mr. Gilchrist could only realize a benefit relating to the option by purchasing the shares on the terms provided. This circumstance suggests that the letter agreement was intended to grant Mr. Gilchrist the same kind of benefit as that which was originally given when he was first employed, protecting him as to the purchase price.

3. The structure of the letter agreement supports the appellants' contention that the option must be exercised before the payment obligation was crystallized: the introductory language of the letter refers to re-issuance of the option at a later date; the opening words of paragraph 2 refer to the exercise price of the option; and the question of payment then follows to provide for the possibility that the purchase price may be higher than the price provided in the employment contract.

4. Most significantly, the clause in paragraph 2, "upon demand which shall not precede exercise of the options", is, in my view, unambiguous. This phrase establishes two conditions for crystallization of the payment obligation under the terms of the letter agreement: first, demand must have been made; and second, the option must have been exercised.

5. The interpretation advanced by Mr. Gilchrist, that the money was payable at the first date he could exercise the options, that is on the date of re-issuance, renders the phrase "on demand which shall not precede exercise of the options" surplusage. Words preceding this phrase established the amount of payment by reference to the re-issuance price, which in turn depended upon the date of re-issuance. Thus upon Mr. Gilchrist's interpretation, the first part of the paragraph would have been sufficient to determine both when the payment obligation crystallized and the amount of the obligation. There would, then, be no need for the last phrase, contrary to the norm that all language in an agreement has a purpose.

[21] I am buttressed in my conclusion by the observation that had the parties simply intended the letter agreement to provide for a cash payment, they could have said so more easily and more directly than the language in the letter agreement.

[22] For these reasons, I am of the view that the contract does not reasonably support the interpretation given it by the learned trial judge.

[23] Mr. Gilchrist argued that this interpretation is inconsistent with the course of dealings between the parties in 1997. On the authorities above, post-contracting dealings are not admissible in the absence of ambiguity. In this I concur with Madam Justice Newbury in ***Strata Plan No. LMS44 v. RBY Holdings Ltd.*** (1993), 3 B.C.L.R. (3d) 28 (S.C.), that evidence of negotiations after the signing of the contract will not be admitted to create an ambiguity.

[24] I find the trial judge erred in her interpretation of the contract. For these reasons I would grant the appeal, set aside the judgment below and refer the issue to full trial along with the other issues between these parties.

[25] The trial judge accepted the plaintiff's interpretation of the letter agreement. Having done so, it was unnecessary for her to go on, and she did not go on, to address other issues under either its paragraph 2 or 3. There is, therefore, an insufficient factual basis for this Court to address other issues of Mr. Gilchrist's entitlement under that letter agreement. The issue of Mr. Gilchrist's entitlement under the letter

agreement ought to be returned to the trial list for determination, along with the other issues still outstanding between the parties.

[26] In the result, I would set aside the order of the trial judge appealed from. Given the results of this appeal and the course of proceedings, the defendants are entitled to their costs of appeal and their costs of the Rule 18A hearing.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Ryan"

Reasons for Judgment of the Honourable Chief Justice McEachern:

[27] I adopt the statement of facts contained in the Reasons for Judgment of Madam Justice Saunders. As there is to be a trial, I prefer to say as little about this matter as possible.

[28] Although it is not entirely clear, it appears to me that the Defendant did not re-issue the option for the additional 30,000 shares as it had agreed to do, and the plaintiff for that or other reasons did not communicate any formal exercise of the option. Whether any such exercise was possible or necessary in these circumstances must be determined at a trial before it may be determined whether the dealings between the parties could amount to an exercise of the option. A subsidiary question may then arise whether, if the option was not reissued, the Plaintiff was entitled to recover the amount in question as a debt or as damages.

[29] As a result, I conclude that the requisite facts necessary for the determination of the plaintiff's entitlement were not before the learned trial judge, and it was not possible for her to determine whether the Plaintiff had sufficiently exercised the "reissued" or un-reissued option. In other words, it seems to me that

the real questions in issue were not ripe for trial. That can only be corrected by a conventional trial.

[30] It is accordingly necessary to set aside the trial judgment. I agree with my colleagues that this part of the case must be referred to the trial list along with the other issues already directed to be tried at a conventional trial, where all issues will be at large.

[31] I regret that I cannot agree with my colleagues on the question of costs. It may be that the Defendant should have paid the Plaintiff either on the due date (June 6, 1995) or when the Plaintiff asked for payment on (June 27, 1995). For that reason, I believe the costs of the abortive Rule 18A trial and of this appeal should abide the outcome of the trial. I would leave those questions to the trial judge.

The Honourable Chief Justice McEachern

Princeton Light & Power Co. Ltd. v. MacDonald, 2005 BCCA 296 (CanLII)

Date: 2005-05-30
Docket: CA031473
Other citations: 254 DLR (4th) 431; [2005] 9 WWR 641; 41 BCLR (4th) 271; 213 BCAC 85
Citation: Princeton Light & Power Co. Ltd. v. MacDonald, 2005 BCCA 296 (CanLII), <http://canlii.ca/t/1kw1h>, retrieved on 2017-10-12

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Princeton Light & Power Co. Ltd. v. Mac Donald,*** 2005 BCCA 296

Date: 20050530

Docket: CA031473

Between:

Princeton Light & Power Co. Ltd.

Appellant
(Plaintiff)

And

Randy MacDonald

Cross-Appellant/Respondent
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Hall

T.R. Berger Q.C. and M.D. Vanderkruyk	Counsel for the Appellant
J.M. Prodor and B.P. Trainor	Counsel for the Respondent

Place and Date of Hearing:	Vancouver, British Columbia 11 March 2005
Place and Date of Judgment:	Vancouver, British Columbia 30 May 2005

Written Reasons by:
The Honourable Madam Justice Huddart

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Hall

Reasons for Judgment of the Honourable Madam Justice Huddart:

[1] This appeal raises two interesting issues. The first is whether the British Columbia Utilities Commission has exclusive jurisdiction to decide whether a public utility has complied with the applicable Electric Tariff in back-billing a customer for unauthorized use of electric power. The second is whether the appellant public utility can be held liable for damages for breach of a duty of good faith and fair dealing to its customer, the respondent.

[2] On the view I have reached, I am persuaded the Commission does not have exclusive jurisdiction to determine whether Princeton Light properly back-billed the respondent, and, in the absence of any submission to the contrary, that a duty of good faith and fair dealing is implied in the utility's standard form service agreement. I conclude that Princeton Light breached its contract with the respondent when it back-billed him for 36 months and did so in such a manner as to justify the jury's award of punitive damages. I would dismiss the cross-appeal for an increase in the award of punitive damages.

Evidence

[3] In March 1996, Mr. MacDonald bought a retirement property near Princeton, British Columbia for which he paid $185,000. He rented it the same month to John Judge, with utilities included. On 19 April 1996, he signed a service agreement with Princeton Light in which he agreed, "to pay the rates and charges for [electrical] service on the basis of Tariff 'B.C.U.C. No. 4' together with any amendments thereto" and "to notify [Princeton Light] and to obtain consent before increasing my connected load substantially". Thereafter, the respondent was billed bi-monthly on the basis of meter readings of consumption varying from 1512 kwh to 4632 kwh until the appellant cut off the power supply on 25 June 1999 after discovering the presence of a marijuana grow-operation ("grow-op") and a power bypass. In July 1999, Mr. MacDonald's wife learned of the cut off and the presence of the grow-op when she called Princeton Light during her husband's absence to enquire why they had not received the usual electricity bill.

[4] Meter readers for Princeton Light testified they smelled "growing marijuana" at the property from time to time between 1996 and 1999. Princeton Light's records include two notes by a meter reader: "pot smell horrendous" in February 1998 and "pot smell" in February 1999. Suspecting a

grow-op on the property as a result of a meter reader's complaint, on 8 May 1997, Graham Gould, the general manager of Princeton Light at the time, ordered the removal and replacement of the meter and an inspection for a bypass on the property. No evidence of a bypass was found. Mr. MacDonald testified he did not smell marijuana on many visits to the property while Mr. Judge was a tenant there. Mr. Judge's daughter admitted to smoking medical marijuana for her fibromyalgia occasionally.

[5] Some time in March 1999, Mr. Judge gave notice he would vacate the premises at the expiry of his lease on 15 April 1999. Mr. Judge testified he gave one month's notice and left "sometime in April" when "there was still snow on the ground". Mr. MacDonald testified Mr. Judge told him he would leave the key at the premises when he left, and that Mr. Verrier, who responded to an ad he placed in the local newspaper, paid him rent for May and June 1999.

[6] On 5 May 1999, Princeton Light installed a Flagship Monitor on the transformer pole outside the property to record the power consumption. It remained there until 25 June 1999, when the RCMP executed a search warrant on the property and found a grow-op and a power bypass located ahead of the meter in the main service to the house. Princeton Light disconnected electrical service.

[7] Police officers arrested Mr. Verrier and charged him with the cultivation of marijuana. The RCMP gave a copy of their Continuation Report to Princeton Light. The Report noted: Mr. Verrier was the tenant from 25 March 1999 to 25 June 1999; the plants were, at most, three to five months old; and the house was unusually clean for a marijuana grow-op, indicating a short-term use. At trial, Constable Pederson confirmed the information contained in the Report.

[8] Mr. Gould concluded from Princeton Light's records of meter readings that the grow-op had started shortly after the application date (19 April 1996) because the June 1996 reading of 4632 kwh was a "drastic change" from the previous owner's usage of 2322 to 2877 kwh/month from December 1995 to April 1996. On cross-examination, he agreed the previous residents' Customer Bill History included readings of 4480 kwh for June 1992 and 3860 kwh for August 1992. He knew the previous residents personally and acknowledged he never suspected them of running a grow-op despite these relatively high bills. If the jury were to compare the previous residents' power usage from January 1990 to April 1996 with that of Mr. MacDonald's tenants from June 1996 to April 1999, it would have found little, if any, overall difference. The same can be said of Mr. Gould. He testified he did not see the RCMP Report until October 2003.

[9] Nevertheless, by registered letter dated 11 August 1999, Princeton Light advised Mr. MacDonald it had cut off the power and would not reconnect it until the sum of $18,546.01 was paid and the electrical wiring met B.C. Electrical Code standards as "passed by a qualified electrical contractor". Mr.

Gould calculated the back-bill by projecting backwards three months of stolen power (15,566 kwh between 5 May 1999 and 25 June 1999) to 19 June 1996.

[10] Without a power supply, Mr. MacDonald was unable to rent his premises. Without income from the property, he was unable to pay the back-bill. He could not post a letter of credit. Princeton Light continued to insist on immediate full payment before it would reconnect the electrical service. On 16 November 1999, with the onset of colder weather and no heat, Mr. MacDonald petitioned the Supreme Court for an order "that power services be reconnected to the property" pursuant to s. 44 of the ***Utilities Commission Act***, R.S.B.C. 1996, c. 473 (the "***Act***"), s. 39(1) of the ***Law and Equity Act***, R.S.B.C. 1996, c. 253, and Rule 45 of the ***Rules of Court***. On 7 December 1999, at the suggestion of the solicitor for Princeton Light, Mr. MacDonald's solicitor wrote to the Commission seeking an order for re-connection pending resolution of the dispute over the back-billing, promising to continue "good faith negotiations" with Princeton Light.

[11] The Commission rejected Mr. MacDonald's application, explaining by letter to his solicitor dated 13 December 1999, "The Commission finds that [Princeton Light] has acted in accordance with its filed Electric Tariff and that if your interpretation is contrary to that finding, you may wish to pursue the matter through the courts". This was a reference, Princeton Light suggests, to an appeal to this Court permitted with leave by s. 101 of the ***Act***, because the Commission was exercising its "exclusive jurisdiction to adjudicate the question of Tariff compliance". It is not disputed that the Commission had exclusive jurisdiction to order the reconnection of power to Mr. MacDonald's property. That was the conclusion of Justice Singh when he heard and dismissed the petition on 16 February 2000.

[12] Meanwhile, on 21 December 1999, Princeton Light had filed a writ and statement of claim seeking judgment for $18,546.01 and interest at 1.5 per cent a month (19.56 per cent compounded annually) on the basis of the service agreement.

[13] To justify its back-billing, Princeton Light relied on paragraph 6.7(4) of the Electric Tariff. It reads:

> 6.7 Generic Back-billing Tariff (Cont'd)
>
> 4 If there are reasonable grounds to believe that the customer has tampered with or otherwise used the utility's service in an unauthorized way, or evidence of fraud, theft or other criminal act exists, then the extent of back-billing will be for the duration of the unauthorized use, subject to the applicable limitation period provided by law, and the provisions of items 7, 8, 9 and 10 below do not apply. In addition, the customer is liable for the direct (unburdened) administrative costs incurred by the utility in the investigation of any incident of tampering, including the

direct cost of repair, or replacement of equipment. Under billing resulting from circumstances described above will bear interest at the rate normally charged by the utility on unpaid accounts from the date of the original under billed invoice until the amount billed is paid in full.

[Emphasis added.]

[14] Mr. MacDonald's counterclaim is founded on a breach of this provision and Princeton Light's ensuing conduct. The exclusion of items 7, 8, 9 and 10 permitted back-billing for three years and the discontinuance of power until the back-bill was paid, even where there was a legitimate dispute about the duration of the under billing. Paragraph 8.2 of the Tariff permitted the suspension order:

8.2 Suspension of Supply

The Company shall have the right to suspend service at any time without notice whenever the Customer has breached any agreement with the Company, or failed to pay arrears within specified time, fraudulently used the service, tampered with the Company's equipment or committed similar actions. ... Suspension of service by the Company shall not operate as a cancellation of any contract with the Company, and shall not relieve any Customer of its obligations under these Terms and Conditions or the applicable Rate Schedule.

[Emphasis added.]

[15] Paragraph 2 of the Tariff defines "customer" to include a person "who consumes electricity at one premises, or whose application for service is accepted by the Company". It is not now disputed Mr. MacDonald was a customer by reason of his application, who "by taking service" had agreed "to abide by the provisions of these Terms and Conditions" that included paragraph 6.7(4) of the Tariff. At trial, Mr. MacDonald disputed the duration of the period of the bypass and argued he owed nothing, having paid $1,200 for the period he accepted the bypass was probably on the property unbeknownst to him. The jury agreed with him, finding no amount owing to Princeton Light.

[16] By counterclaim, Mr. MacDonald sought damages for Princeton Light's breach of a duty to deal with its customers fairly and in good faith. He alleged Princeton Light had no reasonable grounds to believe he had stolen power, or that he had done so for three years. He claimed that Princeton Light opposed vigorously his attempts to have power reconnected and offered no reasonable terms for repaying the back-bill. He sought punitive damages on the basis that Princeton Light had acted in bad faith and conducted itself reprehensibly with a wilful and conscious disregard for him, subjecting him to cruel and

unusual hardship. In defence, Princeton Light pleaded its right to suspend service under paragraph 8.2 of the Tariff.

[17] When Singh J. dismissed Mr. MacDonald's petition, he suggested a compromise for the parties' consideration. On 18 February 2000, Mr. MacDonald's solicitor advised Princeton Light the electrical wiring had been brought back to the Code standards and offered to deposit $400/month if power were restored. On 7 March 2000, Princeton Light offered to reconnect power to the property if the repairs were inspected and passed by an electrical contractor, and the full amount owing on the back-billing was put in trust on sale of the property. Mr. MacDonald accepted the offer a few days later.

[18] The repairs passed the necessary inspection on 11 July 2000. Princeton Light reconnected power the next day. Unfortunately, by then, Mr. MacDonald was unable to rent the property and make the mortgage and tax payments. In January 2001, the Provincial Government threatened forfeiture of the property for unpaid property taxes. On 27 February 2001, Valley First Credit Union brought foreclosure proceedings. On 13 June 2001, Mr. MacDonald sold the property for $140,000.

[19] On 6 October 2003, Mr. MacDonald paid $904.41 plus interest for a total of $1,200 for three months of stolen power. His solicitor wrote to Princeton Light, "We do not dispute that approximately three months of power was stolen – but certainly not three and one half years", and noted his intention to rely on the letter at trial. Included was this statement of Mr. MacDonald's position:

> However, we strongly believe that Princeton Light & Power could have arrived at that figure had it diligently pursued the facts and employed a proper Accountant rather than arbitrarily and wrongly picking a start-up date in its' [*sic*] calculations.

[20] This allegedly arbitrary back-billing and continuing refusal to review its account for five years founded the respondent's counterclaim for damages.

The Proceedings

[21] The trial began on 24 November 2003 and continued until 9 December 2003 when Ralph J. gave judgment in accordance with the verdict of the jury dismissing Princeton Light's action and awarding Mr. MacDonald $19,672.61 as compensatory damages and $62,000.00 as punitive damages on his counterclaim.

[22] At the conclusion of Princeton Light's case, Ralph J. dismissed Princeton Light's application for a directed verdict on the counterclaim. He ruled, however, that Princeton Light was entitled to disconnect the service, to bill Mr. MacDonald for stolen power, and to refuse to reconnect power until the bill was paid. Not only did the trial judge agree with the Commission's interpretation of the Tariff, but he also held the Commission's interpretation was binding on the court under s. 79 of the ***Act***. Mr. MacDonald does not

appeal this ruling. Princeton Light appeals the order dismissing its application for a directed verdict, submitting that an action for breach of contract is a matter within the exclusive jurisdiction of the Commission and that Ralph J. erred when he decided otherwise.

[23] At para. 16 of his reasons for the impugned ruling [2003 BCSC 2010], Ralph J. described Mr. MacDonald's claim this way:

> Before this Court, Mr. MacDonald seeks to prove that on an objective standard, Princeton Light had no objectively reasonable basis on which to calculate three years worth of back-billing when its own evidence showed only 51 days of potential power theft. He says further that Princeton Light had no reasonable basis on which to deny reconnecting power to Mr. MacDonald's property and Mr. MacDonald suffered damages as a result.

[24] At para. 18, the trial judge explained why the Supreme Court has jurisdiction to hear and resolve the dispute:

> ... the essential nature of the dispute ... arises out of the manner in which the plaintiff made its decision to back-bill Mr. MacDonald $18,500.00 and to cut off power to the property until the amount was paid. It does not essentially call for a detailed consideration of the tariff, but for a consideration of the circumstances which caused the plaintiff to apply the tariff in this particular case. Essential to this determination, it seems to me, is whether power was stolen for approximately three months or approximately three years. This is the underlying dispute.

Consequently he concluded the dispute did not come within the exclusive jurisdiction of the Commission under s. 105 of the ***Act***, as a matter over which jurisdiction is conferred on it by s. 72(1) of the ***Act***, as Princeton Light had argued.

[25] In reaching this conclusion, Ralph J. applied the reasoning of Macaulay J. in ***Strata Plan LMS 1816 v. British Columbia Hydro and Power Authority***, [2002] B.C.J. No. 673, 2002 BCSC 485 (CanLII). The Commission's jurisdiction is determined by analyzing the essential nature of the dispute, and then determining if the ***Act*** provides a means of resolving the dispute such that the objectives of the ***Act*** would be undermined if the action proceeded in court.

[26] The trial judge did not address directly Princeton Light's submission that any award of "damages for bad faith" required Mr. MacDonald to prove the utility breached its contract by failing to reconnect service. I infer from his refusal to direct a verdict of dismissal and his directions to the jury that the trial judge was persuaded compensatory and punitive damages could flow from a breach of a duty of good faith and fair dealing, whether that duty derived from

contract or tort. Unreasonable back-billing was the underlying wrong. The jury apparently agreed, because its award of compensatory damages suggests they held Princeton Light liable only for the loss caused to Mr. MacDonald by its conduct before the agreement to reconnect upon repair was made in March 2000.

The Jurisdiction Issue

[27] The first issue on this appeal is whether the Commission's decision not to require a utility to reconnect power protects Princeton Light from any defence to its action for debt, and from a counterclaim for damages for breach of contract.

[28] Princeton Light submits the trial judge's ruling on jurisdiction was unsound. It seeks a new trial of its claim and an order dismissing the counterclaim. It argues the Commission determined the propriety of its decision to suspend power and issue a back-bill when it found that the utility had complied with the Tariff provisions. If the Commission had agreed with Mr. MacDonald's application for reconnection in December 1999, it could have ordered reconnection then. But it did not, and Mr. MacDonald could not bring a collateral action in court to reverse that ruling.

[29] In Princeton Light's view, ss. 72(2) and 73 of the ***Act*** give the Commission the power not only to order reconnection, but also the exclusive power to find a utility in breach of a statutory or contractual duty. Thus, in its view, Mr. MacDonald, as a customer, was obliged to seek a declaration from the Commission that Princeton Light had breached a statutory or contractual duty before he could seek an award of damages from a court. Conversely, Princeton Light was obliged to sue its customers in court for breach of contract because the ***Act*** granted no remedial powers to the Commission over its customers. In such an action, the Commission's ruling on tariff compliance would be binding on the court.

[30] It follows logically from this submission that Princeton Light takes the view that only the Commission can determine the amount of stolen power; that a customer is obliged to seek a declaration of the amount owing on a contract from the Commission; and a customer's only defence to a utility's action in debt is payment. However, Princeton Light accepts that a customer may defend a debt action by establishing error on the part of a utility in its billing or records. This comes to an acceptance that a dispute over the amount of a bill must be resolved in court, not by the Commission. It also reflects what happened in this case.

[31] Princeton Light did not apply to have the counterclaim dismissed for want of jurisdiction. Nor did Mr. MacDonald or Princeton Light ask the Commission to resolve the dispute over the amount of Mr. MacDonald's debt. When Mr. MacDonald sought an order for reconnection, he was asking the Commission to remedy what he saw as a failure of Princeton Light to fulfil its statutory duty to provide power to his property. He questioned an interpretation of the Tariff that permitted both the suspension of power and

back-billing when a tenant, without the landlord's knowledge, stole electrical power.

[32] The dispute in this case was over the amount of the bill, the duration of the unauthorized use, and more particularly, whether Princeton Light had reasonable grounds to believe that stolen power was used to benefit Mr. MacDonald's property from June 1996 to April 1999. None of these issues were before the Commission, but even if they were, the Commission did not have the jurisdiction to determine them.

[33] The ***Act*** provides for the general regulation and supervision of public utilities and gives the Commission power to see that a utility fulfils its statutory duties (ss. 23 to 26, 29, 30, and 38). Section 31 gives the Commission power to make and change the conditions to be included in service agreements. Sections 72 and 73 give the Commission authority to deal with applications like those of Mr. MacDonald in these words:

> 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.
>
> 73 (1) The commission may order and require a person to do immediately or by a specified time and in the way ordered, so far as is not inconsistent with this Act, the regulations or another Act, anything that the person is or may be required or authorized to do under this Act or any other general or special Act and to which the commission's jurisdiction extends.
>
> (2) The commission may forbid and restrain the doing or continuing of anything contrary to or which may be forbidden or restrained under any Act, general or special, to which the commission's jurisdiction extends.

[34] Thus, the Commission has the jurisdiction to inquire into and determine whether a utility is permitted to suspend service and issue a back-bill. These are questions about the interpretation of the Electric Tariff. But I can find nothing in the ***Act*** giving the Commission jurisdiction to resolve a factual dispute about the liability of a customer under a service agreement. Not a word is said in the Electric Tariff or the service agreement to suggest a Commission decision about a customer's liability binds the customer and the court when a utility sues to enforce payment. We are not asked to infer that power in the absence of an express provision to that effect. If the Legislature intended to give the Commission power to resolve disputes about the amount of a bill, I would have expected a specific provision to that effect, accompanied by a suitable enforcement mechanism. Moreover, the ***Act*** does not contemplate or make any provision for the adjudication or enforcement of contractual claims by a customer against a utility.

[35] The authorities considering such a claim are all contrary to the appellant's submission. In ***Crestbrook Pulp and Paper Co. v. Columbia Natural Gas Ltd.*** (1978), 1978 CanLII 1943 (BC CA), 87 D.L.R. (3d) 248 (B.C.C.A.), Crestbrook alleged it had been overcharged by the utility for gas supplied to it under a contract approved by the British Columbia Energy Commission. The utility argued that Crestbrook's claim was an impermissible collateral attack on the Commission's rate schedule. Robertson J.A., writing for the majority, disagreed. He found the essence of Crestbrook's claim was for money paid under a mistake of fact, or for damages for breach of contract. Crestbrook did not need to rely on the ***Energy Act***, S.B.C. 1973, c. 29, to make out its claim. The fact that the contract was filed and approved as part of a rate schedule by the Commission did not mean that it thereby lost its identity as a contract. The utility could not enlarge the jurisdiction of the Commission and escape judicial scrutiny by characterizing the matter between the parties as a "rate dispute". Likewise, in the case at bar, Princeton Light cannot characterize the dispute as a matter of "Tariff compliance" to avoid Mr. MacDonald's defence of its action in debt or as a defence against his counterclaim.

[36] To similar effect is the recent decision in ***Garland v. Consumer Gas Co.***, 2004 SCC 25 (CanLII), [2004] 1 S.C.R. 629. In an earlier decision [1998 CanLII 766 (SCC), [1998] 3 S.C.R. 112], the Supreme Court held that the utility's late penalty payments amounted to a criminal rate of interest under s. 347 of the ***Criminal Code***. They remitted the claim to the trial court for further consideration. At trial [(2000), 2000 CanLII 22630 (ON SC), 185 D.L.R. (4th) 536], Winkler J. found the plaintiff's action to be an impermissible collateral attack on the Ontario Energy Board's rate order. McMurtry C.J.O. for the Court of Appeal [(2001), 2001 CanLII 8619 (ON CA), 208 D.L.R. (4th) 494] disagreed. In that court's view, the plaintiff was not challenging the merits or legality of the Board's order or attempting to raise a matter already dealt with by the Board. Rather, the proposed action raised issues over which the Board had no jurisdiction.

[37] So here, the Commission has no jurisdiction over the issues raised in the counterclaim. When Mr. MacDonald's claim went to the jury, he was no longer challenging the Commission's order denying power reconnection to his property or its interpretation of the Electric Tariff, but the reasonableness of Princeton Light's belief that he had tampered with the power supply personally, and that the unauthorized use had begun before March 1999. There is no concern here that Mr. MacDonald is seeking to avoid the Commission order by defending the debt action or bringing a counterclaim.

[38] In my view, Ralph J. correctly considered and applied the authorities. He determined the jurisdiction issue by, "analyzing the essential nature of the dispute as opposed to the causes of action that may arise from it". He correctly found the "essential nature of the dispute" to be a private law matter arising from the service agreement. The court's jurisdiction over the dispute is not excluded by s. 105 of the ***Act***.

Breach of Contract

[39] The jury was not asked to find whether Princeton Light breached the service agreement, or to identify a breach of a specific contractual provision. The verdict leaves no doubt the jury found Princeton Light had no reasonable grounds to believe the unauthorized use of power had begun before March 1999, and that it treated Mr. MacDonald in bad faith when he challenged that belief until Justice Singh's proposal of a compromise led to an agreement in February 2000. The jury's award of punitive damages necessarily implies it found Princeton Light's conduct to be a "marked departure from ordinary standards of decent behaviour" deserving of punishment beyond that provided by the compensatory damage award.

[40] The two questions left with the jury regarding Princeton Light's claim, with the jury's answers, are these:

1. Was there electrical power supplied to the property of the Defendant, Mr. MacDonald, which was stolen from Princeton Light & Power Co. Ltd.? **YES**

2. If the answer to Question 1 is "Yes", what amount is owed by Mr. MacDonald to Princeton Light and Power?
$ 0

Consequently, the trial judge dismissed the action to enforce a debt.

[41] The questions regarding the counterclaim with the answers are these:

3. Was there a failure by Princeton Light & Power to deal fairly and in good faith with Mr. MacDonald?
YES

4. If the answer to Question 3 is "Yes", did Mr. MacDonald suffer losses arising from Princeton Light & Power's failure to deal fairly and in good faith in any of the following matters:

a. Loss of rental income
YES
b. Loss of appliances
NO
c. Property damage (glass, frozen pipes)
NO
d. Loss of equity in his property
NO
e. The cost of electrical work
NO
f. Legal expenses for house sale
YES
g. Legal expenses for seeking to have power reconnected
YES
h. Trips to Princeton for house repairs
NO
i. Cost of real estate commission
YES

5. For any items in Question 4 answered "Yes" what is the amount of the loss for that item?

Loss of rental income $ 7,500.00
Legal expenses for house sale $ 722.99
Legal expenses for seeking to have power reconnected $ 2,675.62
Cost of real estate commission $ 8,774.00

Total:
$19,672.61

6. Should punitive damages be awarded against Princeton Light & Power? **YES**

7. If so, in what amount?
$62,000.00

The trial judge entered judgment in accordance with the verdict for those amounts.

[42] The second question on this appeal is whether that order can be upheld.

[43] Princeton Light sees the counterclaim as founded on a stand alone duty of good faith in the performance and enforcement of a contract. I agree that Canadian courts have not recognized a stand alone duty of good faith independent from the express terms of a contract or from the objectives that

emerge from such terms: see, ***Transamerica Life Canada Inc. v. ING Canada Inc***. (2003), 2003 CanLII 9923 (ON CA), 68 O.R. (3d) 457 (C.A.), and ***Shelanu Inc. v. Print Three Franchising Corp.*** (2003), 2003 CanLII 52151 (ON CA), 64 O.R. (3d) 533 (C.A.). I also agree with counsel for the respondent that jurisprudence from Quebec and other civil law jurisdictions and from the United States and other common law jurisdictions has moved or is moving toward a unified principled approach to a good faith and fair dealing obligation in contract. In Canada, the Law Reform Commission of Ontario in its *Report on Amendment of the Law of Contract* (Ottawa: Ministry of the Attorney General, 1987) c. 9, has recommended legislative action in this regard. I also recognize that the British Columbia Legislature expressly recognizes the concept of good faith and a test of commercial reasonableness for security arrangements in the ***Personal Property Security Act***, R.S.B.C. 1996, c. 359, s. 68(2). However, on the view I take of this matter, I need not enter that debate.

[44] In my view, when the counterclaim is stripped to its essentials, it is a claim for damages flowing from the breach of an express provision of the contract the parties made on 19 April 1996. The contract consists of the application and the Electric Tariff, as amended from time to time with the approval of the Commission. The breach alleged is that Princeton Light had no "reasonable grounds to believe" Mr. MacDonald or his tenant(s) had "tampered with or otherwise used [its] service in an unauthorized way" before 25 March 1999. That conclusion seems beyond argument on the evidence and the jury found so by its answer to Question 2. The jury effectively found that a fair and reasonable estimate of the value of the stolen power with interest was no more than the $1,200 Mr. MacDonald had paid before the trial.

[45] Thus, the issue on the counterclaim becomes whether Mr. MacDonald is entitled to damages consequential to that breach of contract in the amount the jury awarded. They did so in response to this instruction of the trial judge:

> Mr. MacDonald seeks damages from Princeton Light & Power for its failure to deal fairly and in good faith with him. Because of this failure or breach of an obligation, Mr. MacDonald claims he has suffered damages. Your responsibility is to decide whether Princeton Light& Power did fail to deal fairly and in good faith with Mr. MacDonald, and, if so, to determine what damages he has suffered.
>
> Princeton Light & Power as a public utility has an obligation to provide service which is "just and reasonable". In providing its service, it must conduct itself in a fair and reasonable manner. The burden of proving that Princeton Light & Power has failed to so conduct itself is on Mr. MacDonald.
>
> Mr. MacDonald must prove on a balance of probabilities that a reasonable person examining all the circumstances would find that Princeton Light failed to deal with him fairly and in good faith. It is also necessary that Mr. MacDonald prove that the alleged failure to deal with him fairly and in good faith was the cause of his losses. If

> Mr. MacDonald does not meet that burden of proof, his counterclaim must be dismissed. If he does meet that burden of proof, you should go on to decide what amount of damages you should award him. The goal of an award of damages is to put Mr. MacDonald in the same position as if he had been dealt with fairly and in good faith by Princeton Light & Power.
>
> So in summary, you should look at all of the circumstances surrounding the cutting off of power to Mr. MacDonald's property in June 1999, and the events which followed, to determine whether Princeton Light & Power failed to deal with Mr. MacDonald fairly and in good faith.
>
> As I understand it, it is the position of Mr. MacDonald that Princeton Light failed in that duty in that, first of all, it failed to fairly and reasonably investigate the matter; second, it calculated the under-billing as extending over a period of three years based on insufficient information and speculation; third, that Princeton Light & Power failed to assist Mr. MacDonald with a prompt and reasonable resolution; fourth, that it withheld a reconnection while recognizing that a genuine dispute existed; fifth, that it knew that the defendant wished to rent out the property and was unable to do so without power and that he would suffer damage and expense if the electricity were not reconnected; sixth, that Princeton Light had no reasonable ground to believe that Mr. MacDonald had tampered with the power or used it in an unauthorized way; and, seventh, that even if the calculation of $18,546 was correct, it never offered Mr. MacDonald reasonable terms of repayment and insisted on repayment of the full amount before the power would be reconnected.

[46] The obligation on a public utility to "provide service which is 'just and reasonable' is found in s. 38 of the ***Act***:

> 38 A public utility must
>
> > (a) provide . . . a service that the Commission considers in all respects adequate, safe, efficient, just and reasonable.

[47] That provision, together with s. 39 (as did ss. 23 and 26 of the predecessor ***Energy Act***, S.B.C. 1973, c. 29), affirms the common law obligation of a body "having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public . . . 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": ***Chastain et al. v. British Columbia Hydro and Power Authority*** (1972), 1972 CanLII 985 (BC SC), 32 D.L.R. (3d) 443, (B.C.S.C.) *per* McIntyre J. at 454.

[48] Arguably, this statutory provision responded to Justice McIntyre's decision in ***Chastain***, *supra*, and brought a public utility's billing conduct within the scope of the Commission's exclusive jurisdiction. While the reasoning in ***Crestbrook***, *supra*, contradicts that submission, it leaves open the possibility that a customer could complain about the unfairness of a utility's back-billing policy under s. 72 and seek a remedial order under s. 73. However, for the reasons I expressed on the first issue, I do not accept that a customer could seek a remedy for breach of contract under the ***Act***. Conversely, Princeton Light did not suggest that an order for payment of damages is available from the Commission for a customer's breach.

[49] It might have been more appropriate for the trial judge to have adopted the language from the contractual provision authorizing back-billing in his jury instructions, but no objection was taken to the charge in this regard and the result would have been the same in any event.

[50] In the counterclaim, Mr. MacDonald stated his allegation justifying an award of damages for breach of contract and punitive damages this way:

> 13. On or about June, or July of 1999, the Plaintiff disconnected the electrical service to the property and erroneously, without any basis in fact, calculated that the Defendant owed the Plaintiff the sum of $18,546.01, being electricity supposedly diverted from June 19, 1996 to June 25, 1999, which calculation was without any, or any [*sic*] factual foundation.
>
> 14. By letter dated September 13, 1999, and on other occasions, the Defendant, personally and through his agents, formally advised the Plaintiff that the Defendant wished to rent out the property, and was unable so to do without electrical power to the property, and that the Defendant would suffer damage, loss and expense, should the electricity not be reconnected.
>
> 15. At no time did the Plaintiff have any reasonable ground to believe that the Defendant had tampered with or otherwise used the utility's service in an unauthorized way, nor did the Plaintiff have any evidence of the duration of any unauthorized use, and certainly not for a period in excess of three (3) years.
>
> 16. Even if the calculation of $18,546.01 was correct, (which is specifically denied), at no time did the Plaintiff offer to the Defendant reasonable terms of repayment, but insisted on repayment of the entire sum of $18,546.01, and vigorously opposed any attempts by the Defendant to obtain relief from the Courts, or elsewhere, to have the power reconnected.
>
> 17. The Plaintiff has acted arbitrarily and capriciously, has breached the contract, has acted in bad faith, and acted wantonly toward the Defendant . . .

[51] In response, as noted earlier, Princeton Light pleaded a general denial of the allegations and paragraph 8.2 of the Electric Tariff. The trial judge agreed with the utility's position that, as a matter of law, the utility had the power to bill Mr. MacDonald for stolen power and to refuse reconnection until the company was paid. But he saw the question of the amount or value of the power stolen as an issue for the jury.

[52] As I also noted earlier, Princeton Light does not take issue with that ruling, but submits the trial judge erred when, in his charge, he treated Mr. MacDonald's complaints about its back-billing and refusal to reconnect as complaints open to the jury to accept or reject. In its submission, the trial judge was obliged to tell the jury that Princeton Light was entitled to disconnect the power, back-bill its customer for stolen power, and could not restore service to the property until the wiring had been brought up to the Code standards and payment was made.

[53] With respect, I find no material error in the trial judge's charge. In the context of counsel's addresses, the jury would have understood from the charge that Princeton Light had the right to suspend service, and to not restore it until the wiring passed the necessary inspections and the amount owing was paid. Its verdict reflects that understanding – the award of damages included the loss of rental income only until the April 2000 agreement. I am reinforced in this view by the absence of any objection by trial counsel for Princeton Light to what is now seen by its appellate counsel as a fundamental error undermining the jury's verdicts in both the claim and the counterclaim.

[54] The emphasis throughout the charge was on the fairness and reasonableness of the back-billing. Princeton Light was under a common law and contractual duty to act reasonably in billing its customers. Its duty under s. 38 of the ***Act*** to provide service the Commission considers "in all respects . . . just and reasonable" was exemplified by paragraph 6.7(4) of the Electric Tariff, the conditions of which were approved by the Commission to be part of the service agreement.

[55] It seems incontrovertible that Princeton Light acted unreasonably, not only in back-billing Mr. MacDonald for three years, but also in refusing to review its bill when challenged, and in insisting on payment before reconnection.

[56] While its appellate counsel now suggests the jury if properly instructed might have chosen some other commencement date, Princeton Light's trial counsel suggested only two possible dates to the jury, April 1996 and April 1999. The only evidence Princeton Light had to justify its belief that the bypass and power theft had begun in April 1996 was the meter readers' verbal information about the smell of marijuana and notes they recorded on two occasions. By its verdict, the jury determined that evidence was did not justify the back-billing to a date earlier than 25 March 1999. It follows I would not interfere with the order dismissing Princeton Light's action in debt or find in

this alleged error reason to interfere with the award of compensatory or punitive damages.

[57] The pecuniary damage to Mr. MacDonald that flowed from Mr. Gould's unreasonable belief and the decision he made on that basis was what the jury found and assessed. The jury's award of compensatory damages was eminently reasonable. I would uphold the order implementing it.

Punitive Damages

[58] By its verdict, the jury also determined Princeton Light's conduct deserved punishment. The difficult question is whether the award of punitive damages can be upheld.

[59] Throughout, Princeton Light relied on the Tariff and the Commission's decision of 13 December 1999 to defend its unreasonable back-billing and to withhold power until Justice Singh suggested a compromise. Further, Princeton Light continued to trial claiming a debt that a reasonable electric power supplier would have reviewed and revised when it was first questioned in August 1999. In aid of its claim and defence at trial, Princeton Light persisted in alleging Mr. MacDonald and several members of the Judge family were liars and criminals, either operating or knowingly covering up a marijuana grow-op. It is against this background of unreasonable and unjustifiable conduct that the jury's award of punitive damages is to be considered.

[60] The jury's award of punitive damages responded to unremarkable directions by the trial judge, about which no complaint is made. The ground of appeal is that the trial judge erred in leaving the question of punitive damages with the jury. The submission is that the jury was not asked if there had been a breach of contract, but was asked only to determine whether there had been a failure by Princeton Light to deal fairly and in good faith with the customer. In Princeton Light's view, there can be no breach of duty of good faith without a breach of contract. Thus, a claim for breach of any duty of good faith, whether in tort or by reason of an implied or express covenant, must be tied to bad faith performance of a specific provision of the contract.

[61] This submission necessarily sees the "supply of power" as the only "primary contractual obligation" of Princeton Light. It fails to recognize the significance of the duty on Princeton Light to bill its customers reasonably. In this case, Princeton Light's entitlement to suspend service depended on it having "reasonable grounds to believe" that Mr. MacDonald or a tenant had tampered with the electrical service in an unauthorized or criminal way. Its right to bill was confined to the "duration of the unauthorized use". Princeton Light had no reasonable grounds for concluding the unauthorized use had begun before March 1999. So the jury found as a fact. When Princeton Light over-billed, it breached its contract with Mr. MacDonald.

[62] Although no authority was cited for the proposition that a public utility owes a duty of good faith and fair dealing in the execution of its contractual

obligations, Princeton Light does not dispute that such a duty may be owed in a contract such as this if there is a bad faith breach of the contract. In this case, the unreasonable back-billing amounted to a breach of contractual obligations. The essence of the additional breach was the subsequent intransigent and callous conduct by Princeton Light in refusing to review the bill, grossly unreasonable on the evidence available to it.

[63] The leading authority on punitive damages is ***Whiten v. Pilot Insurance Co.***, 2002 SCC 18 (CanLII), [2002] 1 S.C.R. 595. At para. 100, Binnie J., writing for a unanimous court, affirmed the rationality test for review of a trial court's award of punitive damages developed by Cory J. in ***Hill v. Church of Scientology of Toronto***, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130:

> Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

[64] At para. 108, Binnie J. was clear that the focus of the appellate review of a punitive damage award is to be on, "whether the court's sense of reason is offended rather than on whether its conscience is shocked".

[65] Because juries are not required to give reasons for their decisions, we cannot know the reasoning of the eight members of the public who brought their collective experience and judgment to their decision to require Princeton Light to pay punitive damages for the manner in which it breached the contract with Mr. MacDonald and its subsequent mistreatment of him. But I am not willing to accede to Princeton Light's submission that the award served "no rational purpose".

[66] The underlying purpose of a punitive damage award is to penalize conduct that departs to a marked degree from ordinary standards of decent behaviour. Jurors are particularly well-suited to judge whether a public utility's behaviour towards a residential customer meets that test. Jurors are also better equipped than most courts to appreciate the effect of gross over-billing on a customer. When that over-billing is accompanied by unfounded allegations of participation in or covering up of criminal behaviour, the effect on the customer is compounded. When reasonable requests for a review of the bill are ignored and applications for restoration of power are defended by strict reliance on one employee's erroneous assessment of the evidence, I consider a jury is entitled to give that utility a wake-up call, asking it, in effect, to treat its customers with respect, to respond reasonably to their requests, and to consider their employee may have made a mistake.

[67] Customers of utilities are vulnerable to arbitrary management decisions. A stable and uninterrupted flow of electricity is an essential consumer service. Few among us have the resources to pay a bill 18 times more than it should have been. In this case, Mr. Gould knew Mr. MacDonald was renting out the premises, and that without electricity and heat, there would be no tenant and no flow of income to pay the mortgage and taxes. He must have known that without heat, tenant and income, the property would deteriorate. He should have known Mr. MacDonald was the victim of a third party's criminal behaviour, and that the record supported a back-bill of no more than $1,200. But he never reviewed the account, nor did anyone else at Princeton Light.

[68] When a utility's conduct goes well beyond an employee's bad judgment or carelessness in the performance of his job, and becomes oppressive, it is conduct a judge or jury may denounce with an award of punitive damages. The award of punitive damages here, while substantial and possibly on the high side, can be viewed as justified because of what I view as arbitrary, callous and oppressive conduct by a monopolistic public utility providing an essential service in a regulated industry. I agree that a concern about industry-wide practices and general deterrence have little place in this analysis. The trial judge did not suggest they did. What was at issue here was Princeton Light's conduct toward one vulnerable customer after its employee made a serious mistake in assessing information available to the company. Princeton Light could have corrected this mistake with little effort and little loss to Mr. MacDonald by the end of September 1999, had the utility honoured its obligation to treat its customer fairly.

[69] For these reasons, I would not interfere with the jury's award of punitive damages.

I would dismiss the appeal with costs and the cross-appeal without costs.

"The Honourable Madam Justice Huddart"

I agree:

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Mr. Justice Hall"