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Our File No.: 05497-0245

October 20, 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: FortisBC Inc. 2016 Long Term Electric Resource Plan & Long Term Demand Side Management Plan (BCUC Project No. 3698896)

Please find enclosed for filing the Final Argument of FortisBC Inc., dated October 20, 2017, with respect to the above-noted matter.

Yours truly,

FARRIS, VAUGHAN, WILLS & MURPHY LLP

Per:

Nicholas T. Hooge

NTH/bd
Enclosure
c.c.: client
All Registered Interveners

BRITISH COLUMBIA UTILITIES COMMISSION

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

and

FortisBC Inc.'s 2016 Long Term Electric Resource Plan and
2016 Long Term Demand Side Management Plan

FINAL ARGUMENT OF FORTISBC INC.
October 20, 2017

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Nicholas T. Hooge

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PART 1 - INTRODUCTION

A. Overview

1. FortisBC Inc. (**FBC**) filed its 2016 Long Term Electric Resource Plan (**LTERP**) and Long Term Demand Side Management Plan (**LT DSM Plan**) with the British Columbia Utilities Commission (**BCUC** or the **Commission**) on November 30, 2016 pursuant to section 44.1(2) of the *Utilities Commission Act*, R.S.B.C. 1996 (the ***UCA***). The LTERP and LT DSM Plan were filed in this proceeding as Exhibit B-1, Volumes 1 and 2, respectively. The LT DSM Plan is filed pursuant to s. 44.1(2)(b) of the *UCA* and is a component of the broader LTERP. Unless otherwise stated, or the context otherwise requires, references to the "LTERP" in this Final Argument should be read as including the LT DSM Plan.

2. FBC respectfully requests that the Commission accept the LTERP under section 44.1(6) of the *UCA*. The LTERP provides a comprehensive long term plan for meeting the forecast peak demand and energy requirements of FBC's customers with demand-side and supply-side resources over the 20-year planning horizon from 2016 to 2035. The LTERP was developed pursuant to a thorough internal planning process at FBC, together with a robust consultation process with customers and other stakeholders, including First Nations.

3. The product of these processes is, in our submission, a reasoned and detailed plan for long term resource acquisition that, when implemented, will achieve the LTERP's objectives of: ensuring cost-effective, secure and reliable power for customers; providing cost-effective demand-side management (**DSM**); and, ensuring consistency with provincial energy objectives.[1] The LTERP's objectives are, in turn, consistent with the Commission's mandate in assessing long term resource plans, as stated in its decision regarding FBC's 2012 Long Term Resource Plan (**2012 LTRP**):

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[1] Ex. B-1, Vol. 1, p. 5.

> The Commission's mandate in assessing the resource plans of energy utilities is intended to assure the cost-effective delivery of secure and reliable energy services in a manner congruent with British Columbia's energy objectives.[2]

4. For the reasons explained in the balance of this Final Argument, FBC submits that the LTERP complies with all applicable legislative and regulatory requirements and that carrying out the plan would be in the public interest.

B. Orders Being Sought

5. As set out in the draft final order at Appendix M-2 of Exhibit B-1, Volume 1, the primary order FBC seeks in this proceeding is the Commission's acceptance of the LTERP, including the LT DSM Plan, under section 44.1(6)(a) of the *UCA*.

6. FBC notes that it is not seeking any specific approvals for any potential resource acquisitions or other projects identified within the LTERP. Any such acquisitions or projects would be brought forward and evaluated pursuant to separate Commission processes (if warranted under the *UCA*), which would allow for more focused review based on the circumstances present at the time.

7. FBC is also seeking an ancillary order, in relation to the LT DSM Plan: that the Commission consent to Rate Schedule (**RS**) 90 – Demand Side Management Service being rescinded from FBC's Electric Tariff pursuant to section 61(2) of the *UCA*.[3]

C. Regulatory Context

8. FBC's most recent long term resource plan filed and accepted under section 44.1 of the *UCA* was the 2012 LTRP, which was submitted as part of FBC's application to the Commission for approval of its 2012-2013 Revenue Requirements and Review of its 2012 Integrated System Plan. In its decision in that process, the Commission generally accepted the 2012 LTRP as meeting the requirements of the *UCA* and being

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[2] BCUC Decision and Order G-110-12, dated August 15, 2012, In the Matter of FortisBC Inc. 2012-2013 Revenue Requirements and Review of 2012 Integrated System Plan (**2012-13 RRA/ISP Decision**), p. 143.

[3] See Ex. B-1, Vol. 2 (LT DSM Plan), p. 24-26.

in the interests of British Columbians who receive or may receive service from FBC.[4] FBC was directed to file its next long term resource plan by June 30, 2016 and to include in it a "fulsome portfolio analysis".[5]

9. The filing date for the LTERP was subsequently extended to November 30, 2016 by Commission Order G-43-16.

10. The LTERP has undergone a thorough review in this proceeding. This has included FBC's responses to two rounds of information requests (**IRs**) from Commission staff and registered interveners, as well as responses to a round of IRs from the Commission panel. In addition, intervener evidence was filed by Mr. Andy Shadrack and the British Columbia Sustainable Energy Association and Sierra Club of BC (**BCSEA**) and was subjected to IRs from Commission staff, FBC, and other participants.

11. On September 15, 2017, FBC filed an errata to the LTERP, which is marked Exhibit B-1-1 in this proceeding (the **Errata**). As explained in more detail in FBC's covering letter with the Errata, corrections were required to both the LTERP and LT DSM Plan, as well as various IR responses, because of two errors in the assumptions supporting the British Columbia Conservation Potential Review (**CPR**) for the FBC service territory.

12. The corrections provided in the Errata, which involved the discount rate used for the CPR analysis and the treatment of line losses for the purposes of forecast DSM savings and costs, had a relatively small net impact overall. While the costs of the DSM scenarios and the resource portfolios in the Errata are different than contemplated in the original filing of the LTERP and LT DSM Plan, the actual DSM savings remain the same. The incremental supply resources included in the various portfolios FBC considered, and their associated costs and other attributes, likewise remain the same. Most importantly, FBC's determination of the preferred DSM

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[4] 2012-13 RRA/ISP Decision, p. 148-149.
[5] Ibid., p. 149.

scenario and the preferred resource portfolio and their timing are the same as when the LTERP was originally filed.

13. For the purposes of this Final Argument, unless otherwise stated all references are to the corrected version of the LTERP filings provided with the Errata (Exhibit B-1-1).

D. Contents of this Final Argument

14. FBC's Final Argument will proceed to address the following matters:

- Part Two discusses the legal and regulatory framework for the Commission's review of the LTERP;
- Part Three, explains how the LTERP satisfies the statutory requirements under section 44.1(2) of the *UCA*;
- Part Four, explains how the considerations enumerated under section 44.1(8) of the *UCA* support acceptance of the LTERP and how the LTERP is otherwise in the public interest;
- Part Five addresses additional issues raised in this proceeding by the Commission's staff and interveners; and
- Part Six provides a conclusion statement.

PART 2 - LEGAL AND REGULATORY FRAMEWORK

A. Requirements under section 44.1(2) of the *UCA*

15. Section 44.1(2) of the *UCA* requires a public utility such as FBC to file a long term resource plan in the form and at the times the Commission requires. A long term resource plan filed pursuant to this provision must include all of the following:

- An estimate of the demand for energy the public utility would expect to serve if it does not take new DSM measures during the period addressed by the plan (s. 44.1(2)(a));

- A plan of how the public utility intends to reduce its demand by taking cost-effective DSM measures and an estimate of the demand for energy that the public utility expects to serve after it has taken those measures (ss. 44.1(2)(b) and (c));

- A description of the facilities that the public utility intends to construct or extend, and information regarding the energy purchases from other persons the public utility intends to make, to serve demand after cost-effective DSM measures are taken (ss. 44.1(2)(d) and (e));

- An explanation as to why the facilities the utility intends to construct or extend and energy purchases the utility intends to make are not planned to be replaced with more DSM (s. 44.1(2)(f)); and

- Any other information required by the Commission (ss. 44.1(2)(g)). In practice, the final requirement under s. 44.1(2)(g) generally takes the form of Commission directives to the public utility on the review of a prior resource plan, in this case the 2012 LTRP, or other applications.

16. The Commission panel that reviewed the 2014 Long Term Resource Plan of the FortisBC Energy Utilities (**FEU 2014 LTRP**), described the requirements of section 44.1(2) as "minimum elements of a resource plan" that must be included in order for the plan to be adequate, as an "objective measure" for the purposes of Commission acceptance:

> Adequacy refers to compliance with the minimum elements of a resource plan, in accordance with section 44.1(2). Adequacy is an objective measure that suggests all of the basic elements have been filed. Quality of the resource plan is a measure that requires the discretion of the Commission, and is exercised within the legislative framework that allows discretion, such as the public interest aspects of section 44.1(6) of the UCA.
>
> Acceptance of the LTRP requires, among other things, the element of adequacy, a Commission determination that the LTRP is in the public interest, and that the LTRP addresses the directives of the previous LTRP order.

> Commission panels may address the quality of the LTRP, if there is an issue.[6]

B. Public Interest Considerations under ss. 44.1(6) and (8) of the *UCA*

17. In addition to being adequate in the sense described by the Commission in its FEU 2014 LTRP Decision, a long term resource plan must also be in the public interest to be accepted under section 44.1(6)(a) of the *UCA*. The Commission described this requirement as follows in the same decision:

> [I]n order for an LTRP to *accepted* by the Panel, the plan must also meet section 44.1(8) of the *UCA*, ensuring that the plan is in the public interest. While it is possible that the Panel or other stakeholders may disagree with individual assumptions and may prefer an alternative action plan, the test is whether the plan as filed meets the public interest.[7]

18. Section 44.1(8) of the *UCA* provides that, "In determining under section (6) whether to accept a long-term resource, the commission must consider":

- the applicable of British Columbia's energy objectives (s. 44.1(8)(a));
- the extent to which the plan is consistent with the applicable requirements under sections 6 and 19 of the *Clean Energy Act* (s. 44.1(8)(b));
- whether the plan shows that the public utility intends to pursue adequate, cost-effective demand-side measures (s. 44.1(8)(c)); and
- the interests of persons in British Columbia who receive or may receive service from the public utility (s. 44.1(8)(d)).

19. British Columbia's "energy objectives" as referenced in s. 44.1(8)(a) of the *UCA* are set out in the *Clean Energy Act*, S.B.C. 2010, c. 22 (the ***CEA*)** at section 2. Some of the energy objectives in the *CEA* are specifically applicable to BC Hydro (i.e. the "authority" as referenced in ss. 2(b), (e), (f), and (p) of the *CEA*). A summary of the

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[6] BCUC Decision and Order G-189-14, dated December 3, 2014, In the Matter of FortisBC Energy Utilities 2014 Long Term Resource Plan (**FEU 2014 LTRP Decision**), p. 10.

[7] FEU 2014 LTRP Decision, p. 11 (italics in original).

BC energy objectives and their applicability to FBC's LTERP is provided in Table 1-3 of the LTERP.[8]

20. The second requirement under section 44.1(8) of the *UCA* references sections 6 and 19 of the *CEA*. Section 6(4) of the *CEA*, in turn, provides that a "public utility, in planning in accordance with section 44.1 of the [*UCA*] for (a) the construction or extension of generation facilities, and (b) energy purchases, must consider British Columbia's energy objective to achieve electricity self-sufficiency". Section 19 of the *CEA*, which addresses clean or renewable resources, is only applicable to "the authority" (i.e. BC Hydro) or a "prescribed public utility". FBC is not a prescribed public utility and, accordingly, section 19 of the *CEA* is not strictly applicable to it. However, as described in the LTERP, FBC has taken cognizance of this provision and its prescribed target of at least 93 percent clean or renewable resources, in the LTERP's portfolio analysis.[9]

21. Section 44.1(8)(c) provides that the Commission must also consider, for the purposes of accepting a long term resource plan under s. 44.1(6), "whether the plan shows that the public utility intends to pursue adequate, cost-effective demand-side measures" (underlining added). The meaning of each of the underlined terms is defined in the *Demand Side Measures Regulation*, B.C. Reg. 326, 2008 (the ***DSM Regulation***).

22. The *DSM Regulation* was amended pursuant to B.C. Reg. 117/2017, effective March 24, 2017. The new amendments to the *DSM Regulation* were not passed or in effect until well after the LTERP was filed on November 30, 2016.

23. Section 3 of the *DSM Regulation* provides that a DSM plan "is adequate for the purposes of section 44.1(8)(c) of the [*UCA*] only if [it] includes all of the following:

- A demand-side measure intended specifically to assist residents of low-income households reduce their energy consumption (s. 3(a));

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[8] Ex. B-1, Vol. 1, p. 8-10.
[9] Ex. B-1, Vol. 1, p. 116.

- A demand-side measure intended specifically to improve the energy efficiency of rental accommodations (s. 3(b)); and

- Education programs for students enrolled in secondary schools and post-secondary institutions the public utility's service area (ss. 3(c)-(d)).

24. The March 2017 amendments to the *DSM Regulation* added two further adequacy requirements to section 3(1), namely:

> (e) one or more demand-side measures to provide resources as set out in paragraph (e) of the definition of "specified demand-side measure", representing no less than
>
> > (i) an average of 1% of the public utility's plan portfolio's expenditures per year over the portfolio's period of expenditures, or
> >
> > (ii) an average of $2 million per year over the portfolio's period of expenditures;
>
> (f) one or more demand-side measures intended to result in the adoption by local governments and first nations of a step code or more stringent requirements within a step code.

25. The amended definition of "specified demand-side measure", in turn includes the following new paragraph (e):

> "specified demand-side measure" means
>
> […]
>
> (e) financial or other resources provided
>
> > (i) to a standards-making body to support the development of standards respecting energy conservation or the efficient use of energy, or
> >
> > (ii) to a government or regulatory body to support the development of or compliance with a specified standard or a measure respecting energy conservation or the efficient use of energy in the Province.

26. In FBC's submission, neither these two new adequacy requirements in section 3 nor any other provisions added to the *DSM Regulation* pursuant to the March 2017

amendments are applicable, as a matter of law, to the Commission's review of the LTERP. The LTERP was prepared to and did address the substantive legislative requirements that were in force at the time it was filed on November 30, 2016, which deadline was provided for in Commission Order G-43-16.

27. The amendments to the *DSM Regulation* create substantive new requirements in respect of the content of long term resource plans. Legislative changes of this nature are generally interpreted as being prospective only and not retroactive in application.[10] Absent clear legislative indication to the contrary (of which there is none in respect of the amendments to the *DSM Regulation*), when a matter is submitted for a decision, the decision maker must apply the law as it stands at the time the relevant facts or events occurred.[11] In this case, that is the filing of the LTERP. Accordingly, in our submission, the Commission's review of the LTERP should be based on the pre-amendment version of the *DSM Regulation*, as it read at the time the LTERP was filed. The participants in this regulatory proceeding appear to have conducted themselves on this basis, as no IRs were directed to the amendments or their substantive requirements.

28. How the LTERP satisfies the adequacy requirements in section 3 of the *DSM Regulation* is addressed in detail below, at paragraphs 176-178, as is FBC's plan for addressing the new requirements in its next DSM expenditure schedule filing.

29. Section 4 of the *DSM Regulation* establishes how the Commission must determine the cost effectiveness of a DSM plan portfolio for the purposes of section 44.1(8)(c) of the *UCA*. Section 4(1) gives the Commission a discretion to determine cost-effectiveness based on: (a) a review of each individual DSM measure; (b) a comparison of DSM measures in the portfolio; or, (c) the DSM portfolio as a whole. In previous processes, including in respect of FBC's 2012 LTRP, the Commission has consistently opted to

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[10] Round v. MacDonald, Dettwiler and Associates Ltd., 2012 BCCA 456 at para. 42.
[11] *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, 2007 SCC 34 at para. 119.

review the cost effectiveness of FBC's DSM measures at the portfolio level.[12] FBC submits that this approach remains appropriate for the Commission's review of the LTERP and LT DSM Plan.

30. A combination of sections 4(1.1) and (1.5) of the *DSM Regulation* establishes the tests the Commission must use in determining cost effectiveness. In effect, at least 90 percent of the DSM expenditures in the plan portfolio must pass the total resource cost test (**TRC**). [13] In addition, up to 10 percent of DSM expenditures in the portfolio are permitted to pass a modified total resource cost test (**mTRC**). The TRC is the ratio of the benefits of a DSM measure divided by the incremental costs of the measures, including the utility's program costs.[14] The benefits are FBC's "avoided costs", calculated as the present value of the following over the effective life of the various measures: (i) the energy savings, valued at the long run marginal cost (**LRMC**); and (ii) the demand savings, valued at the deferred capital expenditure (**DCE**) cost.[15] The mTRC modifies the TRC to include consideration of non-energy benefits to the utility and customers or, if no such benefits are factored in, allows for a 15 percent increase in the benefits of the DSM portfolio.[16]

31. BCSEA's expert consultant, Mr. James Grevatt of Energy Futures Group, Inc. (**EFG**) has suggested in his evidence filed in this proceeding that, as a "standard practice in DSM cost effectiveness testing", FBC should include the monetization of the environmental benefits associated with DSM.[17] Such a practice would, however, be contrary to the *DSM Regulation*. As noted, it only permits 10 percent of a utility's DSM expenditures to pass the mTRC cost-effectiveness test by including non-energy benefits.[18]

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[12] 2012-13 RRA/ISP Decision, p. 136; see also BCUC Decision and Order G-186-14, dated December 3, 2014, In the Matter of FortisBC Inc. Application for Approval of Demand Side Management Expenditures for 2015 and 2016 (**2015-16 DSM Decision**), p. 4.
[13] 2015-16 DSM Decision, p. 4.
[14] Ex. B-1, Vol. 2, p. 8.
[15] Ibid.
[16] *DSM Regulation*, ss. 4(1.1)(b) and (c).
[17] Ex. C5-5, p. 11 (underlining added).
[18] *DSM Regulation*, s. 4(1.5); 2015-16 DSM Decision, p. 4.

32. The adequacy and cost-effectiveness tests under the *DSM Regulation* are addressed in the LTERP and LT DSM Plan and will be discussed in further detail later in this Final Argument at Part 4.B.iii.

33. The final consideration for the Commission under s. 44.1(8) of the *UCA* is "the interests of persons in British Columbia who receive or may receive service from the public utility". This topic, and the reasons that the LTERP is in the interests of FBC's present and future ratepayers, is addressed in detail at Part 4.B.iv, below.

C. The Commission's Resource Planning Guidelines

34. In its decision regarding FBC's 2012 LTRP, the Commission stated that:

> The Commission's Resource Planning Guidelines set out a comprehensive process to assist utilities in the development of their resource plans and provide a basis upon which to assess the LTRP. The Commission requires that any plan submitted under subsection 44.1(2) of the *Act* be prepared in accordance with these guidelines.[19]

35. The Commission's Resource Planning Guidelines, issued December 2003 (the **RP Guidelines**) to some extent overlap with and augment the legislative requirements under s. 44.1(2) of the *UCA*. Where appropriate, specific RP Guidelines are addressed below as part of the discussion of how the LTERP satisfies the legislative requirements.

36. The RP Guidelines also mandate a process of portfolio analysis in the development of a utility's long term resource plan. The Commission summarized this process in the FEU 2014 LTRP decision as involving "the development of alternative resource portfolios, with each portfolio consisting of a different combination of supply and DSM resources. These alternative portfolios would then be evaluated against the utility's stated resource planning objectives and a preferred resource portfolio selected".[20]

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[19] 2012-13 RRA/ISP Decision, p. 143.
[20] 2014 FEU LTRP Decision, p. 25.

37. As noted above, FBC was directed to and did perform a robust portfolio analysis as part of the development of the LTERP. A more detailed discussion of the LTERP's portfolio analysis is provided below, as is a discussion of how the LTERP conforms with other RP Guidelines, such as the development of a four year "action plan".

PART 3 - THE LTERP SATISFIES THE REQUIREMENTS UNDER S. 44.1(2) OF THE *UCA*

A. Gross (pre-DSM) Demand Forecast: *UCA*, s. 44.1(2)(a)

i. Summary of FBC's Pre-DSM Load Forecasts

38. The first requirement under s. 44.1(2)(a) of the *UCA* is to provide an estimate of the demand for energy FBC expects to serve over the planning horizon of the LTERP if no new DSM measures are taken. The Commission's RP Guidelines also address the development of "gross (pre-DSM) demand forecasts" at Guideline No. 2, which provide among other things that, "More than one forecast would generally be required in order to reflect the uncertainty about the future: probabilities or qualitative statements may be used to indicate that one forecast is considered more likely than others".

39. FBC's long term, pre-DSM load forecasts are addressed in Section 3 of the LTERP (Exhibit B-1, Vol. 1). In summary:

- FBC's reference case gross load forecast anticipates an increase in gross load from 3,544 GWh in 2016 to 4,334 GWh in 2035. This represents a compound annual growth rate of 1.1 percent over the 20 year planning horizon of the LTERP.[21]

- FBC's reference case load forecast, net of losses (which are assumed to be 8 percent of gross load) anticipates an increase in net load from 3,264 GWh to 4,003

[21] Ex. B-1, Vol. 1, p. 53.

GWh over the planning horizon. This likewise represents a compound annual growth rate of 1.1 percent.[22]

- FBC's reference case winter peak demand forecast anticipates an increase from 731 MW to 885 MW over the planning horizon, which represents a compound annual growth rate of 1.0 percent.[23]

- FBC's reference case summer peak demand forecast anticipates an increase from 590 MW to 716 MW over the planning horizon, which represents a compound annual growth rate of 1.0 percent.[24]

40. A summary of the determinants of FBC's load growth forecasts is provided in Section 3.3 of the LTERP and a more detailed technical description of FBC's long term load forecasting is contained in Appendix E to the LTERP. Appendix E also contains a breakdown of the reference case load forecasts by customer class.

41. FBC notes that the long term load forecasts contained in the LTERP (and prior long term forecasts) are not used for rate setting purposes.[25] FBC forecasts load and supply annually for rate setting purposes and each annual forecast is trued up to actual. Accordingly, any perceived historical over-estimation of resource requirements in long term forecasts does not have a cumulative effect and would not impact FBC's customers.[26]

42. FBC has addressed various other IRs in this proceeding related to its long term forecasting method and the details of the long term load forecasts presented in the LTERP.[27] FBC does not understand there to be any significant issues that would call into question its long term load forecasts in a material way, but will address any issues raised by interveners in reply submissions.

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[22] Ex. B-1, Vol. 1, p. 54.
[23] Ex. B-1, Vol. 1, p. 55.
[24] Ibid.
[25] Response to CEC IR 2.37.3 (Ex. B-14, p. 27).
[26] Responses to CEC IRs 2.37.3, 2.37.4, and 2.37.5 (Ex. B-14, p. 27-29).
[27] See Responses to BCUC IRs 1.14.1.1 and 1.14.2 (Ex. B-2, p. 47-48); Response to BCOAPO 1.12.5 (Ex. B-3, p. 20); Responses to BCUC IRs 2.56.1-2.56.6, 2.57.1, and 2.57.1.1 (Ex. B-11, p. 6-18).

ii. Monte Carlo Simulation and Alternative Load Scenarios

43. In order to address the uncertainty inherent in forecasting over a 20-year time horizon, FBC developed a Monte Carlo (**MC**) simulation to derive a range of potential high and low load forecasts around the reference case forecast, based on traditional load drivers. A detailed technical description of how the MC range was developed, as well as the MC range broken down by customer class is provided in Appendix E of the LTERP.[28] The MC range for both the gross and net long term load forecasts, as well as the long term summer peak forecast is anticipated to trend between 2 to 10 percent from the reference case forecasts.[29] The MC range for the long term winter peak forecast is anticipated to trend between 3 to 10 percent from the reference case forecast.[30]

44. In addition to the MC simulation, FBC also addressed long term load uncertainty through the development of a number of alternative "load scenarios" in which FBC's future load requirements may be increased or decreased relative to the reference case load forecast as a result of the proliferation of non-traditional load drivers. FBC engaged Navigant Consulting Ltd. (**Navigant**) in order to assist with identifying emerging trends and technologies (such as electric vehicles (**EV**), residential rooftop solar, and fuel switching) that could drive future load requirements and to develop alternative long term load scenarios based on these load drivers.[31]

45. The eight specific load drivers that were chosen for this forecasting exercise and the approach used in developing the five alternative load scenarios for the LTERP are described in Section 4 of the LTERP (Exhibit B-1, Vol. 1). A more detailed review of the development of the alternative load scenarios can be found in Navigant's Load Scenario Assessment report, which is included as Appendix G to the LTERP.

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[28] Ex. B-1, Vol. 1, Append. E, p. 19-29.
[29] Ex. B-1, Vol. 1, p. 60-61, 63.
[30] Ex. B-1, Vol. 1, p. 62.
[31] Ex. B-1, Vol. 1, p. 65.

46. The alternative load scenarios developed for the LTERP include two "boundary scenarios", which reflect major deviations from existing empirical forecasts. In these boundary scenarios, the load drivers that affect system load growth in the same direction are all assumed to proliferate over the planning horizon.[32] The other scenarios all include off-setting load drivers, some of which would be expected to increase and some to decrease load growth. The energy and peak demand impacts of these various scenarios relative to the reference case forecasts are shown in Figures 4-1 and 4-2 of Section 4 of the LTERP[33] and the resulting data tables are presented in Appendix I. In summary:

- Scenario 1 (the high boundary scenario) results in an increase in gross load of over 800 GWh per year and an increase in peak demand of nearly 200 MW by 2035 compared to the reference case load forecasts.[34]

- Scenario 5 (the low boundary scenario) results in a decrease in gross load of almost 900 GWh per year and a decrease in peak demand of approximately 80 MW by 2035 compared to the reference case load forecasts.[35]

- The other scenarios with offsetting load drivers all fall somewhere in the range between the high and low boundary scenarios.[36]

47. FBC used the reference case load forecasts, as well as the results of the alternative scenarios analysis described above in the portfolio evaluation used to develop the long term resource strategy presented in the LTERP.

48. In FBC's submission, the load forecasts presented in the LTERP are adequate to satisfy the legislative requirement found at section 44.1(2)(a) of the *UCA* and the MC range and alternative load scenarios developed for the LTERP conform with the

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[32] Ex. B-1, Vol. 1, p. 67.
[33] Ex. B-1, Vol. 1, p. 69.
[34] Ibid.
[35] Ex. B-1, Vol. 1, p. 70.
[36] Ex. B-1, Vol. 1, p. 69-70.

direction in the RP Guidelines to include multiple load forecasts in a long term resource plan to account for future load uncertainty.

iii. FBC's Load Resource Balance

49. In addition to forecasting its expected pre-DSM load over the 20-year planning horizon, FBC has also provided an estimate of its load resource balance (**LRB**) in the LTERP. The LRB is estimated by comparing the reference case long term load forecast discussed above to FBC's existing supply-side resources. FBC's existing supply-side resources are described qualitatively and quantitatively in Section 5 of the LTERP (Exhibit B-1, Vol. 1).

50. The resulting LRB for energy and capacity for the 20 year planning horizon is presented in Figures 7-1 (energy) and 7-2 (capacity) of the LTERP.[37] The LRB has been modeled both assuming that the Power Purchase Agreement with BC Hydro (**PPA**) is renewed and extends beyond its expiry date in September 2033 and assuming that the PPA is not renewed. In summary:

- Energy LRB gaps start in 2019 and increase to approximately 900 GWh per year by 2035, even if the PPA is renewed, based on the reference case forecast.[38] The MC range reflects energy gaps by 2035 of about 400 GWh per year at the low end and approximately 1,200 GWh per year at the high end if the PPA is renewed.[39]

- If the PPA is not renewed, the energy gaps are more significant after 2033, increasing to almost 2,000 GWh per year by 2035 based on the reference case forecast. The MC range for energy gaps if the PPA is not renewed is almost 1,600 GWh per year at the low end and over 2,400 GWh at the high end in 2035.[40]

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[37] Ex. B-1, Vol. 1, p. 92 and 94.
[38] Ex. B-1, Vol. 1, p. 92-93.
[39] Ibid.
[40] Ibid.

- For capacity, minimal gaps are forecast starting in 2028 based on the reference case and increase to approximately 100 MW by 2035 if the PPA is renewed.[41] At the low end of the MC range, there are no capacity gaps for the entire 20-year planning horizon if the PPA is renewed and the gaps are less than 200 MW at the high end of the MC range in this circumstance.[42]

- If the PPA is not renewed, then capacity gaps are more significant, on the order of 300 MW in 2035 based on the reference case and almost 400 MW at the high end of the MC range.[43] The capacity gaps are approximately 200 MW in 2035 at the low end of the MC range.[44]

51. Because the LRB forecast is based on FBC's existing and committed resources, it is the means through which FBC can analyse its needs for new supply and demand resources over the 20 year planning horizon. Consistent with the approach set out in the RP Guidelines, one of the criteria for FBC's evaluation of alternative resource portfolios, as described in Section 9 of the LTERP (and discussed in detail below), is their ability to meet forecast energy and capacity gaps in the LRB.

B. FBC's LT DSM Plan and Load Forecast Net of DSM Savings: *UCA*, ss. 44.1(2)(b)-(c)

i. Summary of FBC's LT DSM Plan

52. Section 44.1(2)(b) of the *UCA* requires the LTERP to include FBC's plan of how it intends to reduce its forecast load over the planning horizon with cost-effective DSM measures. In conformity with this requirement, FBC's LT DSM Plan was filed as Volume 2 of the LTERP. A summary of the LT DSM Plan is also provided in Section 8 of the LTERP itself (Exhibit B-1, Vol. 1), which discusses resource options generally.

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[41] Ex. B-1, Vol. 1, p. 94.
[42] Ibid.
[43] Ibid.
[44] Ibid.

53. FBC's goal for DSM is to offer its customers a range of programs within a cost-effective portfolio of measures that address the majority of end uses for each major customer sector.[45] The key objective of the LT DSM Plan is to determine the appropriate level of cost-effective DSM resource acquisition to meet FBC's resource needs over the LTERP's 20 year planning horizon.[46]

54. FBC developed the LT DSM Plan in conjunction with its participation in the province-wide, dual-fuel BC CPR, which was a collaboration with BC Hydro, FortisBC Energy Inc. (**FEI**) and Pacific Northern Gas. As part of this process, FBC received a report from Navigant (the **FBC CPR Report**) providing specific results and analysis of the conservation potential in FBC's service area over the planning horizon of the LTERP.

55. As described above at paragraphs 11-12 of this Final Argument, FBC filed an Errata in respect of certain assumptions that were used in the CPR analysis for FBC's service territory. The Errata included a corrected version of the FBC CPR Report (see Exhibit B-1-1). Further references below are to the corrected version of that report and to the corrected DSM costs and other data provided in the Errata.

56. Based on the FBC CPR Report and the Company's other resource planning considerations and objectives, four different DSM "scenarios" were developed and evaluated as part of the LT DSM Plan. These four scenarios would incorporate different levels of DSM resources, based on different targets for DSM savings or "load growth offset". Long term DSM planning using load growth offset targets is consistent with BC energy policy as reflected in, among other things, the *CEA*.[47]

57. The "Low" DSM scenario would include demand side resources sufficient to offset 50 percent of FBC's forecast load growth over the planning horizon, which is the equivalent of the DSM savings target the Commission accepted for the 2012 LTRP.[48] The "Base" scenario reflects a load growth offset of 66 percent. This is the same level

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[45] Ex. B-1, Vol. 2, p. 1.
[46] Ibid.
[47] Ex. B-1, Vol. 2, p. 11.
[48] Ibid.

of target savings approved in respect of FBC's 2017 DSM expenditure schedule application.[49] The "High" scenario involves an initial DSM target of 66 percent load growth offset and then, beginning in 2021, a ramp up to an 80 percent load growth offset target; accordingly, over the 20 year planning horizon of the LTERP, the High scenario averages a 77 percent load growth offset annually.[50] The "Max" scenario uses an equivalent ramp up mechanism, but with a target of 100 percent load growth offset thereafter, which results in an average annual DSM offset of 89 percent over the planning horizon.[51]

58. Each of the DSM scenarios FBC considered for the LT DSM Plan is based on the energy savings and measure costs estimated in, and draws from a portfolio of measures sourced from, the FBC CPR Report.[52] Although the final phase of the BC CPR remains on-going, FBC submits that the results and analysis contained in the FBC CPR Report from Navigant (which is over 100 pages in length) are more than adequate for the purposes of developing the LT DSM Plan.

59. The BC CPR conducted to date has included an extensive review of over 200 demand side measures, including updating the measure costs and TRC.[53] Navigant described the technical and economic potential savings results contained in the initial FBC CPR Report as the "fundamental phase of the broader CPR".[54] An interim estimate of market potential has also been used to calculate resource costs using reasonable assumptions applied to the existing CPR results.[55] This is sufficient to inform the LTERP and LT DSM Plan as to the magnitude of the energy savings available through conservation measures and to cost out the DSM scenarios under consideration.

60. As shown in Figure 3-2 of the LT DSM Plan, the incremental cost of each DSM scenario increases as higher cost DSM resources are required to achieve a higher

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[49] BCUC Order and Decision G-9-17, dated January 25, 2017.
[50] Ex. B-1, Vol. 2, p. 11 and Response to BCSEA IR 1.7.7 (Ex. B-4, p. 14-15).
[51] Ibid.
[52] Response to BCUC IR 1.41.2 (Ex. B-2, p. 148); Ex. B-1, Vol. 2, p. 8.
[53] Response to BCUC IR 2.79.3 (Ex. B-11, p. 100).
[54] Ex. B-1-1, LT DSM Plan, App. A (corrected version), Executive Summary, p. xii).
[55] Response to BCUC IR 1.41.4 (Ex. B-2, p. 150).

percentage of load growth offset.[56] Set out below is Table 3-1 (corrected version) from the LT DSM Plan, which summarizes the key DSM scenario data:

Category	DSM Scenario			
	Low	Base	High	Max
Annual Savings, GWh				
Average per annum ('18-'35)	20	26	31	36
% of load growth ('18-'35)	50%	66%	77%	89%
Total (2016 to 2035)	407	523	602	686
% of achievable potential	52%	66%	76%	87%

61. As discussed in more detail in connection with the legislative requirement under section 44.1(2)(f) of the *UCA*, FBC ultimately selected the High DSM scenario as its preferred scenario in the LT DSM Plan.[57]

62. In addition to describing and analysing the four DSM scenarios noted above, the LT DSM Plan also includes a review of the DSM programs FBC offers and expects to offer to target key end uses by customer sector, recognizing that various program offers and naming conventions will likely change over the 20-year planning horizon of the LTERP.[58] As discussed further below, the program offerings described in the LT DSM include programs sufficient to satisfy the "adequacy" requirement defined in the *DSM Regulation* at the time the LTERP was filed.

63. The LT DSM Plan also includes information on the annual energy savings that would be targeted as well as pro forma annual budget figures under the High scenario.[59] FBC has provided a wide range of other DSM data in response to Commission and intervener information requests.[60] FBC stresses that the LT DSM Plan is not itself, and does not include, an expenditure schedule and that the pro-forma budgets it contains are based on general expectations as to the mix of measures to be included, the incentive levels, and administration and other costs, which will be further refined

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[56] Ex. B-1-1, LT DSM Plan, p. 13 (corrected version); see also Response to BCUC IR 1.41.2 (Ex. B-2, p. 148).
[57] Ex. B-1-1, LT DSM Plan (corrected version), p. 15.
[58] Ex. B-1, Vol. 2, p. 17-22.
[59] Ex. B-1, Vol. 2, p. 16.
[60] See e.g. Revised Responses to IRs from BCUC, BCOAPO, BCSEA, CEC, and Shadrack provided with the Errata, Ex. B-1-1.

when actual DSM expenditure schedules are filed, starting later this year.[61] Note that the pro-forma budget amounts provided in the LT DSM Plan and in responses to various IRs are the same following the Errata. The utility cost of the DSM scenarios remains almost unchanged (less than 1 percent) after the corrections to the CPR analysis because it is calibrated to current expenditure levels.[62]

64. Further matters related to the LT DSM Plan are addressed below in connection with FBC's explanation for why the supply-side resources contemplated to meet load growth over the planning horizon are not planned to be replaced with DSM measures. For the purposes of the requirement in section 44.1(2)(b) of the *UCA*, FBC submits that the LT DSM Plan is clearly sufficient to satisfy the adequacy standard employed by the Commission.

ii. Eligibility of Self-Generation Customers for DSM Programs and Incentives

65. In its decision regarding FBC's Self-Generation Policy (**SGP**) Stage I Application, the Commission encouraged FBC to address DSM programs for self-generation customers as part of its next resource plan.[63] FBC currently has only two customers served under its Large General Service tariff schedules (RS 30 and 31) with self-generation that are affected by this issue.[64]

66. FBC addressed its intended approach to the eligibility of self-generator customers for DSM programs and incentives in Section 5.2 of the LT DSM Plan. In particular, self-generator customers will be eligible for DSM incentives (subject to other program qualification criteria and terms and conditions) in proportion to the share of potential energy savings FBC derives from the DSM measure being implemented.[65] FBC will evaluate each DSM measure proposed by self-generator customers independently to

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[61] Response to BCUC IR 2.55.1(b)(Ex. B-11, p. 4).
[62] Ex. B-1-1, FBC letter to BCUC, dated Sept. 15, 2017, p. 3.
[63] BCUC Decision and Order G-27-16, dated March 4, 2016, p. 50.
[64] Response to BCUC IR 1.52.1 (Ex. B-2, p. 187).
[65] Ex. B-1, Vol. 2, p. 24.

determine how much of the project's energy savings accrue to the Company and will prorate the applicable incentive accordingly.[66]

67. This approach is consistent with the scheme of the *UCA* and the *DSM Regulation*, under which the cost effectiveness of DSM is based on a utility's avoided costs. The TRC and Utility Cost tests[67] both use the present value of the avoided costs from a measure – i.e. the utility's energy savings from a measure valued using LRMC, plus avoided infrastructure costs using the DCE – to determine cost effectiveness.[68] Accordingly, paying DSM incentives to self-generator customers in proportion to FBC's avoided costs that result from a measure is supported by the governing legislation and, we respectfully submit, a reasonable approach.

68. The Industrial Customers Group (**ICG**) submitted evidence from Jetson Consulting Engineers Limited (Ex. C7-4) that purports to compare the incentives available from BC Hydro and FBC for a DSM opportunity at Zellstoff Celgar's pulp mill in Castlegar, BC. This evidence is problematic in that, based on the details of the project initially filed, it does not appear to be eligible for BC Hydro's incentives, which require savings of at least 300 MWh annually.[69] The evidence was also based on a 15-year project life, whereas BC Hydro's incentives use a maximum effective measure life of 10 years, so the incentive value calculated in the evidence originally filed (if the project is assumed to qualify for BC Hydro incentives) appears to have been inflated.[70]

69. In any event, the Commission has repeatedly confirmed that the DSM programs and incentive offers by BC Hydro and FBC are not required to be the same. For example, in the 2012-13 RRA/ISP Decision, the Commission stated that, "BC Hydro and FortisBC are different utilities, operating in different contexts. The Commission Panel is not prepared to direct FortisBC to implement the same DSM programs as BC

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[66] Response to ICG IR 2.9.2 (Ex. B-16, p. 11).
[67] See *DSM Regulation* ss. 4(1.1) and (1.8), respectively.
[68] Response to BCUC IR 1.52.2 (Ex. B-2, p. 187).
[69] ICG Response to FBC IR 1.1.1 (Ex. C7-9, p. 1).
[70] ICG Response to FBC IR 1.2.1 (Ex. C7-9, p. 1).

Hydro, particularly in the industrial sector where the customer base is very different".[71]

70. Accordingly, ICG's evidence, even if it were not problematic for the reasons described above, does not demonstrate that FBC's approach to DSM eligibility for self-generator customers or its industrial incentive levels should be any different than proposed in the LTERP and LT DSM Plan.

iii. Fuel Switching

71. Pursuant to a prior Commission directive in respect of FBC's 2015-2016 DSM Plan, FBC investigated the cost effectiveness of a gas-to-electricity fuel switching measure for the purposes of the LT DSM Plan.[72] Navigant performed the applicable benefit/cost analysis in the course of the CPR process and its finding was that the fuel switching measure failed the TRC test.[73] In particular, Navigant's analysis found that the higher commodity cost of electricity compared to natural gas results in a net cost, rather than a benefit (i.e. an avoided cost of supplying electricity) under the TRC test.[74] This is consistent with the fact that fuel switching is inherently a load building activity that would increase FBC's power purchase and other costs, thereby negating the benefits of such a measure in the governing TRC test.[75] Accordingly, FBC did not propose to include a gas-to-electric fuel switching measure or program as part of the LT DSM Plan.[76]

72. On March 1, 2017, subsequent to the filing of the LTERP and LT DSM Plan and after the first round of IRs had been delivered to FBC in this proceeding, the BC government amended the *Greenhouse Gas Reduction (Clean Energy) Regulation*, B.C. Reg. 102/2012 (***GGRR***), pursuant to O.I.C. 101/2017, to include a new prescribed undertaking regarding electrification. Such prescribed undertakings are enacted under

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[71] 2012-13 RRA/ISP Decision, p. 139; see also 2015-16 DSM Decision, p. 28.
[72] 2015-16 DSM Decision, p. 14.
[73] Ex. B-1, Vol. 2, App. C.
[74] Response to BCUC IR 1.9.2 (Ex. B-2, p. 25).
[75] Response to BCUC IR 1.9.4 (Ex. B-2, p. 26).
[76] Ex. B-1, Vol. 2, p. 24.

section 18 of the *CEA*, which describes them as projects, programs, contracts or expenditures "prescribed for the purpose of reducing greenhouse gas emissions in British Columbia". Section 18(2) of the *CEA* provides that the Commission "must set rates that allow the public utility to collect sufficient revenue in each fiscal year to enable it to recover its costs incurred with respect to the prescribed undertaking".

73. The new "electrification" undertaking prescribed in section 4 of the amended *GGRR* refers to programs, projects or expenditures to encourage or enable the use of electricity instead of other sources of energy that produce more GHG emissions. On this basis, a low-carbon gas-to-electricity fuel switching program could meet the criteria of a prescribed electrification undertaking.[77] The enactment of the *GGRR* also demonstrates that fuel-switching electrification initiatives are not DSM measures. The definition of "demand-side measure" in section 1 of the *CEA* expressly "does not include" "(e) any rate, measure, action or program prescribed" (underlining added). Now that electrification is a prescribed undertaking pursuant to section 18 of the *CEA* and section 4 of the *GGRR*, we submit that it no longer meets the legal definition of a DSM measure. This is consistent with the separate rate treatment for prescribed undertakings under section 18(2) of the *CEA* and the separate definition of "cost-effective" in section 4(1) of the *GGRR*, which establishes a significantly different methodology than the cost-effectiveness test provided for DSM measures under the *DSM Regulation*.[78]

74. FBC has had limited opportunity to evaluate the potential for electrification/fuel-switching that may now be encompassed by the amended *GGRR*. The additional scope services, which are on-going in the second phase of the BC CPR process, include a more comprehensive review of fuel-switching and will help inform FBC's further evaluation of the potential for such programs.[79] The nature of future

[77] Response to BCSEA IRs 2.29.3 (Ex. B-13, p. 11).
[78] Response to BCSEA IR 2.29.8 (Ex. B-13, p. 13).
[79] Response to BCSEA IR 2.29.9 (Ex. B-13, p. 14).

applications regarding electrification and the approach FBC takes to rate recovery have not been developed at this time.[80]

75. On the other hand, any electrification/fuel-switching programs or initiatives would not be part of FBC's DSM expenditure schedules, given the above-described legislative provisions, and so fuel-switching need not be considered for the specific purposes of FBC's LT DSM Plan. Fuel-switching has nonetheless been considered in the LTERP as a potential future load driver and the load forecasting and portfolio analysis has addressed its potential proliferation over the course of the planning horizon.[81]

iv. Average versus Marginal Line Losses

76. The cost estimates and associated cost effectiveness results reported in the LT DSM are based on the use of average line loss values. BCSEA, pursuant to the report of its consultant EFG, suggests that marginal loss values should be used instead in DSM cost effectiveness analysis to better reflect the capacity benefits of DSM measures during times of peak demand.[82]

77. In response to an IR from Commission staff, BCSEA candidly acknowledges that use of marginal rather than average line losses "is not typical industry practice in other jurisdictions".[83] BCSEA nonetheless makes the assertion that use of marginal line losses "is considered to be industry best practice". However, it provides no evidence to support that statement. BCSEA identifies Illinois and New Jersey as jurisdictions that use marginal line losses, but in our respectful submission that is far from compelling evidence of an "industry best practice". It is telling that BCSEA provides no support for this practice in Canadian utility regulation.

78. It is also telling that BCSEA does not provide any explanation for why, if it is a best practice, marginal line losses are not used in conservation planning in more than two jurisdictions in North America. We submit that in the absence of a strong and

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[80] Response to BCUC IR 2.71.1 (Ex. B-11, p. 62-63).
[81] Ex. B-1, Vol. 1, p. 66 and App. G (Navigant Load Scenario Assessment), p. 13.
[82] Ex. C5-5, p. 12.
[83] BCSEA Response to BCUC IR 1.3.1 (Ex. C5-8, p. 6).

compelling empirical and analytical justification, which neither BCSEA nor EFG have provided, FBC should not be made to be effectively a "test case" on a planning matter of this nature. As BCSEA's responses to other IRs demonstrate, using marginal line losses would entail significant technical analysis to develop and implement in FBC's DSM planning processes and significant associated regulatory burden on the Commission and its participants.[84] In the end, this would simply substitute one form of estimate for another.

79. Furthermore, FBC, in general, has sufficient capacity over the LTERP's planning horizon as reflected in the LRB forecasts (discussed in detail in the following section of this Final Argument).[85] There is, accordingly, little practical benefit to be expected from adjusting the line loss calculations in a manner that is purported to provide increased capacity benefits for DSM measures in the cost effectiveness analysis.

v. Load Forecast Net of DSM Savings

80. Section 44.1(2)(c) of the *UCA* requires the LTERP to include FBC's estimate of "the demand for energy [it] expects to serve after it has taken cost effective demand-side measures". Under the High DSM scenario, which averages an off-set of 77 percent of load growth over the entire planning horizon, DSM savings would offset a total of 602 GWh of forecast gross load growth during this period. The reference case load forecast would therefore be reduced from 4,334 GWh in 2035 (i.e. without DSM savings) to 3,732 GWh under the High DSM scenario, which represents a compound annual growth rate of approximately 0.26 percent (compared to 1.1 percent without DSM).[86]

81. With respect to peak demand, the High DSM scenario would offset approximately 56 percent of forecast peak load growth over the 20 year planning horizon.[87] Under this scenario, the reference case peak load forecast of 885 MW in 2035 without DSM

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[84] BCSEA Response to CEC IR 1.3.1 (Ex. C5-10, p. 10-11); BCSEA Response to BCOAPO IRs 6.1 and 6.2 (Ex. C5-9, p. 5-7).
[85] Response to BCSEA IR 1.18.9 (Ex. B-4, p. 42); Ex. B-1, Vol. 1, p. 102 (Fig. 8-4).
[86] Ex. B-1, Vol. 1, p. 53.
[87] Ex. B-1, Vol. 1, p. 102.

would be reduced to 798.8 MW with the High level of DSM savings. This reflects a compound annual growth rate of 0.44 percent (compared to 1 percent without DSM).[88]

82. Additionally, in Section 8.1.2 of the LTERP, FBC has presented the forecast LRB, net of DSM savings under the High scenario. Figure 8-3 provides the gross energy LRB after DSM savings from the High scenario and Figure 8-4 provides the capacity LRB balance after DSM.[89]

83. These LRB figures show that there are no energy gaps out to 2024 based on the reference case forecast and the High level of DSM savings; thereafter, slight gaps start in 2025 and increase to approximately 200 GWh by 2035 if the PPA is renewed or 1,200 GWh if the PPA is not renewed in 2033.[90] At the low end of the MC range, there are no gaps and no new resources are required after savings from the High DSM scenario if the PPA is renewed, whereas at the high end of the MC range, the energy gaps are about 600 GWh in 2035.[91]

84. Under the High DSM scenario, there would be a surplus of capacity for most years of the planning horizon in the reference case if the PPA is assumed to provide its full peak supply of 200 MW.[92] If the PPA is not renewed, then capacity gaps of approximately 200 MW are forecast for the period from 2033-2035.[93]

85. FBC has also forecast the LRB, net of DSM savings, on a per month basis in 2035, to determine if there could be capacity gaps in periods other than the winter peak. Figure 8-5 of the LTERP shows that there will be surplus capacity in most months, with slight gaps of approximately 1 MW in each of June and July.[94]

86. These post-DSM LRB estimates are the primary forecast for evaluation of resource options under the LTERP based on the scheme of section 44.1(2) of the *UCA*. Sub-

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[88] Ex. B-1, Vol. 1, p. 55.
[89] Ex. B-1, Vol. 1, p. 101 and 102.
[90] Ex. B-1, Vol. 1, p. 101.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ex. B-1-1, LTERP (corrected version), p. 103.

sections 44.1(2)(d) and (e), discussed immediately below, require FBC to address the facilities it intends to construct or energy purchases it intends to make over the course of the planning horizon to meet the load forecast, net of DSM savings (as estimated pursuant to section 44.1(2)(c)). The key topics arising pursuant to the legislative criteria are, therefore, the mix of new or incremental supply resources selected to meet the forecast LRB gaps, net of DSM, and why those supply resources have been selected for planning purposes rather than additional DSM measures.

C. New Supply Side Resources and Facilities: *UCA*, ss. 40.1(2)(d)-(e)

i. The Commission's Portfolio Analysis Guidelines

87. Under the Commission's RP Guidelines, the legislative requirements to describe and provide information regarding the facilities a utility intends to construct or energy purchases it intends to make over the course of the planning horizon are largely fulfilled through a description of the outcome of the utility's resource portfolio analysis. Put another way, the preferred resource portfolio reflects the new incremental resources FBC intends to construct or acquire.

88. The main components of the portfolio analysis under the Commission's RP Guidelines are:

- Identification of feasible individual resources, both committed and potential (Guideline No. 3);
- Measurement of the identified resources against the long term resource planning objectives, including utility and customer costs, associated risks, lost opportunities, and performance against social and environmental objectives (Guideline No. 4);
- Development of multiple plausible resource portfolios consisting of different combinations of resources needed to meet the gross demand forecast (Guideline No. 5); and

- Evaluation and selection of the preferred resource portfolio by assessing the plausible portfolios against the resource planning objectives and analysis of the trade-offs between portfolios and how they perform under uncertainty (Guideline No. 6).

89. The portfolio analysis FBC conducted and described in Section 9 of the LTERP conforms with these RP Guidelines and is, accordingly, sufficient to satisfy the legislative requirements under sections 44.1(2)(d) and (e) of the *UCA*.

ii. Resource Options

90. The potential resource options that formed the basis of the portfolio analysis are, in conformity with Guideline No. 3, summarized in Section 8 of the LTERP. A more detailed description is provided in Appendix J (the LTERP Supply-Side Resource Options Report).

91. FBC's committed supply-side resources are described in Section 5 of the LTERP. It is notable that, by far, the majority of forecast load over the planning horizon will be met through existing long term power supply contracts and FBC-owned generation facilities.[95]

92. As summarized in Section 8.2 of the LTERP, FBC evaluated a variety of new supply-side resource options for the purposes of the portfolio analysis. These resources were considered for inclusion in FBC's long term resource portfolio based on technical, financial, environmental, and socio-economic attributes. Table 8-3 lists the supply-side resources that were evaluated, and includes a summary of the dependable capacity, annual energy, as well as environmental and socio-economic attributes of each resource.[96] Table 8-4 provides the unit energy cost (**UEC**) and unit capacity cost (**UCC**) for each resource option that was considered.[97]

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[95] Response to BCUC IR 1.32.2 (Ex. B-2, p. 115).
[96] Ex. B-1, Vol. 1, p. 108.
[97] Ex. B-1, Vol. 1, p. 109.

93. In summary, based on the resource option evaluation FBC conducted:[98]

- As a result of the decline in natural gas prices over the last few years, natural gas-fired generation is one of the most cost-effective generation options and can provide both energy and capacity for FBC;
- Of the available clean or renewable resources, biogas, biomass, run-of-river and wind are the lowest cost options; and
- Based on current market price forecasts and PPA rate scenarios, market purchases and PPA power are the lowest cost resources available to FBC in the short to medium term.

94. Cost alone is not the only consideration for potential future resource acquisition. The portfolio analysis addressed further below is used to determine the optimal mix of resources to meet future LRB gaps, while balancing the importance of environmental and socio-economic benefits of the potential resources and FBC's general resource planning objectives.

iii. Distributed Generation

95. Not every conceivable resource option was given the same evaluation for inclusion in the preferred long term resource portfolio. FBC pre-screened a number of resources that are not yet viable technologically or cost effective, as well as those that are inconsistent with government policy.[99] In addition, FBC did not include power supply from Distributed Generation (**DG**) or purchases from Self-Generating customers (as those terms are defined and used in the LTERP[100]) as resource options to be considered in the portfolio analysis.

96. With respect to DG, there are a number of reasons for this approach. First of all, the availability of DG supply is not within FBC's control to operate or call upon on

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[98] Ex. B-1, Vol. 1, p. 114.
[99] Ex. B-1, App. J, p. 44-46.
[100] Ex. B-1, App. J, p. 40-41 (DG) and 43 (SG).

demand when needed or in the appropriate location on FBC's system.[101] As such, DG is inherently unpredictable and FBC does not consider it to be a secure or reliable firm resource for long term planning purposes. Solar photovoltaic (**PV**) installations, which are one of the primary sources of customer DG, also provide virtually no capacity during peak winter demand periods and their proliferation could lead to oversupply issues in the spring and summer periods.[102] This is reflected in Mr. Shadrack's response to an FBC IR, where he confirms that so far as he is aware his solar panels do not produce any energy during the expected time of FBC's winter peak.[103]

97. DG also presents cost and rate design challenges. Under FBC's current net metering (**NM**) program, customers that produce their own generation and are inter-connected to FBC's system receive full retail value for energy transfers to FBC. Also, because NM customers can reduce their energy consumption charges to zero or even negative and because FBC's volumetric rates include recovery of fixed costs, these customers are effectively subsidized by the rest of FBC's ratepayers for a portion of their contribution to the fixed costs of the utility system they use and rely upon.[104] This presents issues of inequity between customers that will become more pronounced if DG does proliferate to the point of materially reducing load.

98. Mr. Shadrack appears, based on his evidentiary filing, to be advocating for the inclusion of small-scale DG as a viable long-term resource option. He has filed evidence stating the UEC and UCC values of four solar PV installations in Kaslo, BC; however, based on his responses to FBC IRs, it appears that his estimates do not included any operations and maintenance (**O&M**), interest, or financing costs or use of discount rates.[105] Accordingly, his evidence does not provide comparable values to measure against the UECs and UCCs of resource options provided by FBC in the LTERP.

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[101] Ex. B-1, p. 96 and App. J, p. 41.
[102] Ex. B-1, p. 113 and App. J, p. 41.
[103] Shadrack Response to FBC IR 1.3.2 (Ex. C10-8, p. 17).
[104] Response to BCUC IR 2.70.1 (Ex. B-2, p. 60).
[105] Shadrack Response to FBC IR 1.1.1 (Ex. C10-8, p. 11-13).

99. We also note, in this regard, BCSEA's response to an IR from Mr. Shadrack that its expert consultant, EFG "is not aware of utilities that are incorporating net metering as an element of their long-term demand side and supply side resource options".[106]

100. The foregoing is not to say that FBC is discouraging DG. As noted, FBC facilitates customers undertaking DG activities through the NM program established in 2009 pursuant to **RS** 95. Customer participation in the NM Program has been trending upwards over the last few years.[107] FBC submits that its neutral approach to an expanded DG program, under which DG is evaluated from the same perspective as any other potential long term planning option that provides supply to FBC, is entirely appropriate in the circumstances.[108]

101. Furthermore, the LTERP does reflect and has accounted for the potential future proliferation of DG as a load reducing driver within the alternative load scenarios described above and in Section 4 and Appendix G of the LTERP.[109]

102. The Commission has also directed amendments to RS 95 that are intended to curb persistent generation by NM customers that is in excess of their own consumption requirements – i.e. net excess generation (**NEG**).[110] Accordingly, at least based on the present regulatory treatment, DG is not a supply-side resource option and is more appropriately evaluated, for the purposes of long term planning, based on its potential to reduce customer demand. The current approach to the treatment of NEG and the NM program generally would have to be revisited before this could change, which in FBC's submission is not appropriate given the current state of DG in FBC's service territory and the general lack of need for additional resources until later in the LTERP's planning horizon.

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[106] BCSEA Response to Shadrack IR 1.8i (Ex. C5-12, p. 5).
[107] Ex. B-1, Vol. 1, p. 27.
[108] Response to BCUC IR 1.10.2 Ex. B-2, p. 30-31).
[109] Ex. B-1, Vol. 1, p. 66 and 112-113.
[110] BCUC Order and Decision G-199-16, dated December 29, 2016, p. 19.

iv. Self-Generator Supply

103. Supply from self-generator customers, which is the term used in the LTERP to describe larger, industrial customers that can provide electricity to FBC, was also not included in the portfolio analysis because FBC does not have any information at present regarding available energy, capacity, timing or cost of this supply.[111]

104. FBC is not seeking additional sources of supply at this time, but would consider opportunities to purchase from self-generator customers in the future if the cost is lower than the alternatives, and the supply is otherwise consistent with the Company's planning objectives and BC energy and environmental policies.[112] In addition, we note that the outcome of FBC's current SGP Stage II Application is unlikely to impact the LRB forecast in the LTERP or to affect the outcome of the portfolio analysis discussed below.[113]

105. On a related note, FBC could also consider acquiring supply from Independent Power Producers (**IPPs**) whose current electricity purchase agreements (**EPAs**) with BC Hydro expire and are not renewed over the course of the LTERP's planning horizon. These opportunities would be evaluated the same as any other energy procurement opportunity for FBC based on a variety of considerations.[114] However, it is not practically possible to evaluate the cost effectiveness of such a resource option in the present circumstances.[115]

v. Solar Generation

106. FBC has also considered utility-scale solar PV as a potential resource option for the purposes of the LTERP, as outlined in detail in Section 3.3 of the Resource Options Report.[116] This involved assessing the financial and other attributes of three projects identified in southern BC with 5 MW of installed capacity each. Ultimately, the

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[111] Ex. B-1, Vol. 1, p. 96.
[112] Ex. B-1, Vol. 1, p. 113.
[113] Response to BCUC IR 1.27.2 (Ex. B-2, p. 95).
[114] Response to BCUC IR 1.26.4 (Ex. B-1, p. 93).
[115] Response to BCUC IR 1.26.2 (Ex. B-1, p. 91).
[116] Ex. B-1, Vol. 1, App. J, p. 34-39.

preferred long term resource portfolio selected pursuant to the portfolio analysis described in Section 9 of the LTERP did not include any solar generation.

107. In addition, FBC has considered the potential development of community solar projects within its service territory as part of its review and discussion of the planning environment for the LTERP in Section 2.3.3.1. FBC has, since the LTERP was finalized, filed an application with the Commission on April 26, 2017, for approval of its Community Solar Pilot Project (**CSPP**).

108. The CSPP is, as its name suggests, a pilot project being undertaken in response to customer demand and which will provide FBC with first-hand knowledge and experience regarding community solar generation within its system.[117] The proposed CSPP is of a particularly small-scale (0.24 MW of capacity and 0.29 GWh of annual energy) and even if successful it is difficult for FBC to envision a scenario in which it would build even 5 MW of community solar over the next five to ten years.[118] Community solar is not likely to be a significant component of the FBC resource portfolio on this time horizon and the development of the CSPP does not have any material impact on the current LTERP. As with all potential resource options, the viability of community solar as a long term resource will be assessed again at the time of FBC's next long term resource plan at which time the benefit of some experience under the CSPP (if approved) will assist the evaluation.

vi. Development of Alternative Resource Portfolios

109. For the purposes of the portfolio analysis performed pursuant to the RP Guidelines and described in Section 9 of the LTERP, FBC developed a number of alternative portfolios consisting of different mixes of supply and demand resources. The portfolios were designed to meet the LRB gaps on a monthly and annual basis based on the reference case load forecast and the boundary load scenarios, and were also subject to sensitivity analysis to determine how they perform under potentially

[117] Response to BCUC Panel IR 1.1.4 (Ex. B-25, p. 5).
[118] Response to BCUC Panel IR 1.1.2 (Ex. B-25, p. 2).

changing conditions in the future.[119] The comparison of these alternative resource portfolios shows the trade-offs between portfolios with different attributes in relation to the LTERP's objectives, such as reliability, cost-effectiveness, and consistency with BC energy policy.[120]

110. FBC applied a number of different base characteristics to the resource portfolios it designed for the LTERP and then explored sensitivities around them. The base characteristics and sensitivities used in the portfolio analysis were as follows:[121]

- *Different levels of DSM* (with the proposed High level of DSM as the base case and the Max, Low, and No DSM scenarios as sensitivity cases);
- *Market reliance versus self-sufficiency* (with market reliance for the next ten years and self-sufficiency thereafter as the base case and longer and shorter periods of market reliance, as well as high market and carbon prices as sensitivity cases);
- *Percentage of clean or renewable resources* (with at least 93 percent clean or renewable resources as the base case and portfolios including close to or 100 percent clean or renewable resources as the sensitivity cases);
- *Varying load requirements* (with the reference case load forecast as the base case and the load indicated under the high and low boundary scenarios presented in Section 4 of the LTERP as the sensitivity cases); and
- *Renewal of the PPA versus non-renewal* (the base assumption is the renewal of the PPA prior to its expiry in 2033, the sensitivity case is expiry in 2033 without renewal).

111. The actual process by which component resources were selected for incorporation into the various alternative resource portfolios is described in detail in response to CEC IR

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[119] Ex. B-1, Vol. 1, p. 115.
[120] Ibid.
[121] Ex. B-1, Vol. 1, p. 116-117.

1.23.2. The process involves an optimization routine known as a "Mixed Integer Linear Programming model" that is designed to find the lowest present value cost of satisfying the forecast load requirements given a set of constraints.[122] Notably, the timing of resource acquisition, the extent different resources are utilized, and the performance profile and variable energy costs of the included resources are specific to each resource portfolio FBC developed; as a result, each portfolio must be considered as a whole and it is not possible for the purposes of analysis and evaluation to simply substitute different resource components based on different costs or other attributes.[123]

vii. LRMC Estimates

112. The analysis of the various resource portfolios FBC designed based on the characteristics and sensitivities outlined above is described in detail at Section 9.3 of the LTERP. FBC's analysis included the determination of the LRMC of each portfolio it considered. These LRMC values reflect the average cost of satisfying the incremental forecast load requirements over the planning horizon.[124] The approach FBC used to estimate the LRMC values of the different resource portfolios is summarized in Section 9.2 of the LTERP and a more detailed technical explanation is provided in Appendix K. A simplified numerical example of the calculation of the LRMC values in the LTERP is provided in the response to BCOAPO IR 2.61.1.[125]

113. The key components that make up the LRMC estimate for each portfolio include incremental DSM (compared to the cost of the Low DSM scenario), PPA power, new resource(s), market purchases, and surplus sales.[126] The LRMC values also include the costs of interconnecting new generation resources to FBC's system, fixed operating costs, variable energy costs, and losses to the end customer.[127] Delivery was

[122] Response to CEC IR 1.23.2 (Ex. B-5, p. 70).
[123] Response to BCUC IR 2.61.2.1 (Ex. B-11, p. 28); Response to BCOAPO IR 2.74.1 (Ex. B-12, p. 41).
[124] Ex. B-1, Vol. 1, p. 118.
[125] Ex. B-12, p. 16.
[126] Response to BCUC IR 2.76.2 (Ex. B-11, p. 85).
[127] Response to BCUC IR 1.34.1.2 (Ex. B-2, p. 124).

assumed to be at transmission voltage level for the purposes of determining portfolio costs.[128]

114. Because the composition of each portfolio is different in terms of the cost and weighting of each resource component, which is in turn a result of the different base characteristics and sensitivities modeled, the LRMC value necessarily changes for each portfolio.[129]

115. The LRMC estimates for the various resource portfolios were derived using an assumed "base" PPA scenario of 1 percent rate increases per year in real terms.[130] FBC submits that this is a reasonable assumption for planning purposes given the experience of recent BC Hydro rate increases and the target (capped) rate increases out to F2024.[131] If the high PPA rate scenario (3 percent rate increases in real terms) was used instead, the LRMC values of the set of four portfolios FBC selected for consideration as the preferred portfolio increase by 4 to 8 percent.[132] The preferred portfolio FBC ultimately selected (portfolio A4) remains the same under a high PPA rate scenario and has the smallest increase in LRMC as a result of higher PPA rates.[133]

116. The LRMC estimates also generally reflect the base market price forecast for electricity presented in Section 2.5 of the LTERP. FBC's methodology for developing the long term market forecasts used in the LTERP, which is based on the Mid-C electricity price forecast, is described in detail in response to BCUC IR 1.18.3.[134] FBC's long term market forecast for electricity is quite comparable to the forecast BC Hydro presented in its 2013 Integrated Resource Plan (**IRP**).[135] In addition, FBC modelled a portfolio using high market and carbon prices based on the forecasts and scenarios discussed in Section 2.5 of the LTERP. The estimated LRMC for this

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[128] Response to BCUC IR 2.76.3 (Ex. B-11, p. 89).
[129] Response to BCUC IR 2.76.2 (Ex. B-11, p. 85).
[130] Ex. B-1, Vol. 1, p. 47; (Response to BCUC IR 2.62.1 (Ex. B-11, p. 29).
[131] Ex. B-1, Vol. 1, p. 47; Response to BCUC IR 1.6.2 (Ex. B-2, p. 17).
[132] Response to BCUC IR 2.62.1.1 (Ex. B-11, p. 29-30).
[133] Response to BCUC IR 2.62.1.1.1 (Ex. B-11, p. 30).
[134] Ex. B-2, p. 66.
[135] Response to CEC IR 1.19.2 (Ex. B-5, p. 57-58).

portfolio was $5 per MWh higher than the comparable portfolio using base case market prices.[136]

viii. The Selection of the Preferred Portfolio

117. As described in detail in Section 9.3 of the LTERP, FBC evaluated numerous different portfolios based on: varying levels of DSM, different market access strategies and timing, different percentages of clean or renewable energy, different long term load scenarios, and renewal vs. non-renewal of the PPA. Based on this analysis, FBC derived a smaller set of resource portfolios for further evaluation and consideration as the preferred portfolio. This is consistent with the approach the Commission described in its decision regarding the FEU 2014 LTRP, noted above, that alternative portfolios are to be "evaluated against the utility's stated resource planning objectives and a preferred resource portfolio selected".[137]

118. The four alternative portfolios FBC determined to best meet the LTERP's objectives and considered for selection as the preferred resource portfolio were:[138]

- *Portfolio A1*, a market supply portfolio (97 percent market, 3 percent biogas) with an LRMC of $75/MWh based on an assumption that FBC would not pursue electricity self-sufficiency during the 20 year planning horizon.

- *Portfolio C1*, a portfolio that would meet the at least 93 percent clean or renewable target through new supply-side resources comprised of market supply (51 percent), a combined cycle gas turbine (**CCGT**) (48 percent), and biogas (1 percent). The LRMC of this portfolio is estimated to be $90/MWh.

- *Portfolio A4*, another portfolio that would meet the at least 93 percent clean or renewable target, but through a combination of market supply (31 percent), wind (65 percent), biogas (3 percent), and a simple cycle gas turbine (**SCGT**) as new

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[136] Ex. B-1-1, LTERP (corrected version), p. 120, Fig. 9-2.
[137] 2014 FEU LTRP Decision, p. 25.
[138] Ex. B-1-1, LTERP (corrected version), p. 124-125.

supply resources to be acquired over the planning horizon. The LRMC of this portfolio is $96/MWh.

- *Portfolio C4*, a portfolio that would meet a clean or renewable BC resources energy target of 100 percent through new supply resources comprised of market supply (31 percent), wind (65 percent), biogas (3 percent), and biomass/solar (1 percent). The LRMC of this portfolio is estimated to be $97/MWh.

119. Each of these four portfolios also includes the High DSM Scenario and power from the PPA, on the assumption that it will be renewed prior to 2033.[139] For each of portfolios C1, A4, and C4, market purchases are selected until 2025, which FBC intends to target for achieving full electricity self-sufficiency.[140]

120. FBC's evaluation of the trade-offs among these four resource portfolios in relation to its resource planning objectives for the LTERP are summarized at Section 9.3.6 (see also Table 9-2).[141] Ultimately, portfolio A4 was determined to best meet the LTERP objectives in terms of balancing cost, reliability, socio-economic benefits, geographic resource diversity, as well as BC's energy objectives and so was selected as the preferred resource portfolio for the LTERP.[142] The UECs of the resources included in portfolio A4 are provided in response to CEC IR 1.23.1.[143]

121. Under the preferred portfolio (and based on the planning circumstances generally), FBC does not require new incremental generation resources until 2026 and market supply and PPA Tranche 1 energy will continue to be optimized in the short to medium term.[144] Notably, if the LRB forecast does not change, FBC would not actually need to consider whether to build or acquire new generation resources until 2021, at the time of its next anticipated long term resource plan.[145]

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[139] Ex. B-1-1, LTERP (corrected version), p. 125.
[140] Ibid.
[141] Ex. B-1-1, LTERP (corrected version), p. 124-127 (see corrected version at Ex. B-1-1).
[142] Ex. B-1-1, LTERP (corrected version).
[143] Ex. B-1-1, Revised Responses to CEC IR No. 1, p. 2.
[144] Ex. B-1, Vol. 1, p. 129.
[145] Response to CEC IR 1.26.2.1 (Ex. B-5, p. 79).

122. Selection of the preferred portfolio also provides FBC with good flexibility for contingency planning in the event that market prices are higher than forecast or load increases; the inclusion of the SCGT allows short-term flexibility to handle new large loads that arise as well as backing up the uncertain nature of wind generation, as the resource can meet both energy and capacity needs.[146] Increased reliance upon wind generation would mitigate against increased market prices. The preferred portfolio also satisfies planning reserve margin (**PRM**) requirements, based on the industry standard Loss-of-Load-Expectation (**LOLE**) test, without incremental resource requirements or additional costs.[147]

123. In addition to conforming with the Commission's RP Guidelines and providing a thorough and reasoned basis for FBC's long term resource acquisition strategy, the portfolio analysis performed for, and described in, the LTERP is more than adequate to satisfy the legislative requirements in subsections 44.1(2)(d) and (e) of the *UCA*.

ix. Transmission System Reinforcements

124. In addition to incremental generation resources FBC plans to construct or acquire over the planning horizon, the LTERP also addresses anticipated transmission system reinforcement projects. Section 6 of the LTERP discusses generally FBC's transmission and distribution system, recent system upgrades and expenditures, and the planning criteria and practices FBC follows in this regard. As described at Section 6.1.3, FBC has undertaken a number of significant transmission projects in the last five years. At present, only two additional transmission system reinforcement projects have been identified within the 20 year planning horizon. As described in more detail in Section 6.3 and Table 6-3 of the LTERP, these are:[148]

- The Grand Forks Terminal Transformer addition, anticipated in the 2018-2020 timeframe; and

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[146] Ex. B-1, Vol.1, p. 128-129.
[147] Ex. B-1-1, LTERP (corrected version), p. 128; Response to BCUC IR 1.29.2 (Ex. B-2, p. 100) (; see also LTERP, Vol. 1, App. L (2016 Planning Reserve Margin Report).
[148] Ex. B-1, Vol. 1, p. 87-88.

- The Kelowna Bulk Transformer Capacity Addition, anticipated in the 2019-2020 timeframe.

125. FBC has provided additional detail on why these transmission reinforcement projects are needed to serve the forecast demand over the planning horizon in response to BCUC IR 1.22.3.[149] Both projects are expected to be the subject of future applications for certificates of public convenience and necessity (**CPCN**), where they would be subject to a more detailed Commission review based on more defined project scope and specifications.[150]

126. For the purposes of the requirement in subsection 44.1(2)(d) of the *UCA*, we submit that the foregoing provides an adequate description of transmission "facilities that [FBC] intends to construct" during the period covered by the LTERP.

D. Why New Supply Resources are not being Replaced with DSM: *UCA*, s. 44.1(2)(f)

i. The Proper Legislative Context

127. In order to address this issue, it is necessary to consider the full legislative context. The specific statutory requirement, as noted, is an explanation for why the new supply-side resources FBC proposes to construct or energy purchases it intends to make are not planned to be replaced by additional DSM measures.

128. One legal point to note at the outset is that, as the Commission explained in its decision regarding the FEU 2014 LTRP, quoted above at paragraph 16, the requirement in section 44.1(2)(f) of the *UCA* is satisfied by a bare description of why additional DSM measures are not planned to further reduce demand satisfies the adequacy standard.[151] The "quality" of the explanation (as with the other section 44.1(2)(f) requirements) goes to the public interest aspect of the Commission's review pursuant to sub-sections 44.1(6) and (8) of the *UCA* (which is returned to below at Part 4 of this Final Argument).

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[149] Ex. B-2, p. 76.
[150] Ex. B-1, Vol. 1, p. 87.
[151] FEU 2014 LTRP Decision, p. 11.

129. With respect to the content of the explanation, we emphasize the narrowness of the issue given the legislative scheme. The explanation must only address why DSM is not being relied upon instead of new facilities or energy purchases to meet customer demand that is estimated to exceed existing resources (i.e. forecast LRB gaps, net of planned DSM savings).

130. We also emphasize that there is no legislative provision that specifies the level of DSM spending or savings FBC must pursue in a long term resource plan or otherwise. As will be addressed further below, the public interest considerations enumerated in section 44.1(8) of the *UCA* include an express provision regarding DSM; however, this provision (section 44.1(8)(c)) only requires consideration of whether the plan "shows that the public utility intends to pursue adequate, cost-effective demand-side measures". "Adequate" in this context refers, pursuant to the *DSM Regulation*, to the inclusion of specific types of DSM programs and measures, but not to the overall level of DSM being pursued. Similarly, the only BC energy objective regarding DSM in the *CEA* that is actually applicable to FBC, section 2(b), is simply "to take demand-side measures and to conserve energy". No express legislative requirement requires FBC to pursue any particular amount of DSM, much less all cost-effective DSM as some interveners seem to suggest.

131. Section 2(b) of the *CEA* does establish a DSM target applicable specifically to BC Hydro of reducing its estimated increase in demand for electricity by 66 percent by 2020. BC government policy has favoured the use of savings targets based on a percentage of load growth off-set dating back to the 2007 BC Energy Plan, which set a savings target for BC Hydro of achieving 50 percent of its incremental resource requirements through conservation.[152] This was updated to the current 66 percent load growth off-set target through enactment of the *CEA* in 2010.[153] While these specific targets are made applicable only to BC Hydro, they reflect general BC government policy and we submit that they are relevant for the Commission to consider for the purposes of FBC long term DSM planning.

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[152] Ex. B-1, Vol. 2, p. 11.
[153] S.B.C. 2010, c. 22.

132. BCSEA's consultant, Mr. Grevatt of EFG has criticized defining DSM savings as a percent of load growth and has suggested that DSM initiatives should, "where ... consistent with government policy", "turn forecasted pre-DSM load growth 'flat' or even 'negative', such that sales are actually declining rather than only growing at a reduced rate".[154] However, such an approach is inconsistent with BC government policy and legislation. For the reasons stated above, BC energy policy and legislation supports the use of the load growth off-set metric, which necessarily means that some percentage of load growth will not be met through DSM. Mr. Grevatt's view of the merits of that policy and legislation does not mean that it can be simply disregarded.

ii. FBC's Explanation is Reasonable and Should be Accepted

133. FBC's explanation for why new supply-side resources are needed instead of more DSM is provided in Section 8.1.3 of the LTERP and Section 3.2 of the LT DSM Plan. The explanation clearly satisfies the minimum or "adequacy" requirement under section 41.1(2)(f) of the *UCA*.

134. In terms of the "quality" of the explanation, we submit that FBC's rationale is entirely reasonable, supports the objectives of the LTERP, and should be accepted by the Commission.

135. First, in terms of cost, the high level of DSM that FBC selected for the LT DSM Plan was determined through an assessment of cost effectiveness based on the TRC so that cost impacts to both the utility and the customer are taken into account (and as per the *DSM Regulation*).[155] Supply-side resource options were then evaluated in combination with DSM through the portfolio analysis process to meet remaining LRB gaps.[156] The high level of DSM under the scenario proposed in FBC's LT DSM Plan has an average incremental cost of $98/MWh.[157] This is closely comparable to FBC's

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[154] BCSEA Response to BCUC IR 1.1.1.1 (Ex. C5-8, p. 3).
[155] Response to BCUC IR 1.48.1 (Ex. B-2, p. 171).
[156] Response to BCUC IR 1.2.1.1 (Ex. B-2, p. 7).
[157] Ex. B-1-1, LT DSM Plan (corrected version) p. 13 (Figure 3-2) and p. 14 (Table 3-1).

LRMC for BC clean or renewable resources (approximately $100/MWh) that is used in the cost-effectiveness test under the *DSM Regulation.*

136. When considered in conjunction with the other resource scenarios FBC has evaluated and selected for the preferred resource portfolio, the cost associated with the High level of DSM is a reasonable compromise. For example, the High DSM scenario involves a ramp-up, beginning in 2021, from the Base level of DSM (66 percent load growth offset) to a full 80 percent load growth offset in order to optimize FBC's use, and its rate-payers' benefit from, lower cost tranche 1 energy under the PPA in the short term.[158] This strategy improves the overall cost-effectiveness of the targeted High level of DSM and mitigates the rate impact.[159] FBC considers rate impacts of DSM measures and the optimization of other low-cost resources (such as BC Hydro PPA Tranche 1 energy) to be relevant to the selection of the appropriate level of DSM for the LTERP.[160] This is consistent with the Commission's decision in respect of FBC's 2015-16 DSM Plan, where it was determined that "overall rate impacts from the DSM portfolio are best addressed in a LTRP".[161] The ramp-up strategy also allows for a reasonable transition period from current DSM levels to allow FBC to escalate customer awareness, expand program offers and build market capacity to achieve higher levels of DSM savings.[162]

137. Implementing even higher levels of DSM (i.e. the Max scenario), on the other hand, would require higher-cost DSM measures with marginal costs averaging $108/MWh.[163] This is significantly more than the cost of the proposed DSM scenario. It is also materially higher than the $100/MWh LRMC of BC clean or renewable resources, and would result in rate increases for customers if implemented.[164] The cumulative rate impact of the Max DSM scenario is approximately 2 percent higher

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[158] Ex. B-1, Vol. 2, p. 11.
[159] Ibid.
[160] Response to BCUC IR 1.48.2 (Ex. B-2, p. 173).
[161] 2015-16 DSM Plan Decision, p. 17.
[162] Response to BCUC IR 1.39.3 (Ex. B-1-1, Revised Responses to BCUC IR No. 1, p. 10).
[163] Ex. B-1-1, LT DSM Plan (corrected version),p. 14; Response to BCUC IR 1.48.1 (Ex. B-1-1, Revised Responses to BCUC IR No. 1, p. 18-19.
[164] Ex. B-1-1, LTERP (corrected version), p. 103.

than the High DSM scenario and the average residential customer's bill would increase by approximately $30 more under the Max DSM scenario than the High scenario over the course of the planning horizon.[165]

138. FBC considered the higher levels of DSM under the Max scenario to be sub-optimal for a number of other reasons, including the inherently non-firm, non-dispatchable nature of DSM savings compared to supply side options. DSM requires voluntary participation by customers and the Max scenario therefore creates risks in managing the LRB if DSM program uptake does not materialize as planned.[166] The Max scenario also increases the risk of incurring higher costs if load growth falls short of expectations.[167] In this regard, we note that at the low end of the MC range for the reference case load forecast, there are no energy gaps and no new resources are required after savings from the High DSM scenario, assuming the PPA is renewed.[168]

139. It must also be emphasized that the High DSM scenario is planned to ramp-up to an 80 percent load-growth off-set target and averages 77 percent load-growth off-set over the full length of the LTERP's 20-year planning horizon. This is substantially higher than the 66 percent load growth off-set target that is applicable to BC Hydro under the *CEA*. Accordingly, the High DSM scenario is consistent with current BC government policy and legislation regarding electricity conservation targets. Given that the High level of DSM in fact exceeds the legislated target applicable to BC Hydro and given that FBC has a valid and reasonable explanation for preferring supply-side resources over using even more DSM, we submit that the Commission should accept the explanation as justifying FBC's proposed DSM scenario in all of the circumstances.

140. Also notable, in our submission, is that the High DSM scenario developed out of the stakeholder consultation process. As described in section 3 of the LT DSM Plan, the High scenario originated from the final LTERP Resource Planning Advisory Group (**RPAG**) meeting in October 2016 where a midpoint scenario, between the Base and

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[165] Response to BCUC IR 1.49.1 (Ex. B-1-1, Revised Responses to BCUC IR No. 1, p. 20).
[166] Ex. B-1, Vol. 1, p. 104; Ex. B-1-1, LT DSM Plan (corrected version), p. 15.
[167] Ex. B-1-1, LT DSM Plan (corrected version), p. 15.
[168] Ex. B-1, Vol. 1, p. 101; See also above, para. 83.

Max levels of DSM, was requested by meeting participants and subsequently modelled and adopted by FBC for the LTERP.[169] This demonstrates stakeholder participation in and support for the selection of the High DSM scenario.

iii. Jurisdictional Comparison

141. BCSEA's consultant, Mr. Grevatt has provided evidence of energy conservation practices in the U.S. in response to what he says is FBC's "claim that high DSM savings targets are too risky".[170] First of all, this statement is not an accurate description of FBC's position. FBC's view, as reflected in the choices made for the LT DSM Plan and the LTERP, is that DSM levels beyond the High DSM scenario involve certain risks that, when combined with cost-related factors, justify FBC's decision to pursue the supply-side resource options selected for the preferred resource portfolio. It is telling in this regard that when Mr. Grevatt quotes from the LT DSM Plan at page 4 of his evidence, he only provides an excerpt that mentions the risk of insufficient customer participation. The full text from the relevant passage of the LT DSM Plan is as follows, with the underlining indicating the text Mr. Grevatt chose to exclude from the excerpt he quoted:

> The Max scenario was not chosen for a number of reasons including the voluntary nature of DSM participation and the inherently non-dispatchable nature of DSM savings compared to supply-side resources. The Max scenario presents:
>
> - higher risks of:
>
> - insufficient customer participation; or
>
> - incurring higher costs if load growth falls short of expectations;
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> - gaps in DSM monthly savings profile vs. load resource needs (see section 8.1.3 of the LTERP); and

[169] Ex. B-1, Vol. 2, p. 11.
[170] Ex. C5-5, p. 4.

- a higher cost ($108/MWh) of the Maximum tranche compared to the LRMC of $100.[171]

142. The jurisdictional comparison Mr. Grevatt provides in his report does not, in any event, support his conclusion that "there is ample evidence that even Fortis' proposed Max scenario is well below the level that effective programs can be expected to achieve".[172] He relies for this statement on a single metric (conservation savings as a percentage of energy sales) from a single report, *The 2016 State Energy Efficiency Scorecard* from the American Council for an Energy-Efficient Economy (**ACEEE**). The ACEEE report itself shows that the total conservation savings as a percentage of energy sales in the United States was 0.71 percent and the median U.S. state achieved 0.61 percent during the time period covered by the report.[173] Comparatively, under the High DSM scenario, FBC's energy savings reach 0.8 percent of sales in most years of the planning horizon, which compares favourably to the majority of U.S. jurisdictions.[174]

143. The percent of energy sales metric in the ACEEE report also does not account or adjust for variations in cost-effectiveness requirements or variations in avoided costs of energy within the different U.S. jurisdictions sampled. The report itself warns that, "All states have cost-effectiveness requirements for energy efficiency programs. However the wide diversity of measurement approaches makes comparison less than straightforward".[175] For this and other reasons, jurisdictional comparisons of the nature relied upon by Mr. Grevatt should be approached with significant caution.[176]

144. Furthermore, the jurisdictional data that Mr. Grevatt says is "ample evidence" that FBC's DSM proposals fall "well below" the level of "effective" conservation programs does not include any comparison to other Canadian utilities or jurisdictions. Just with respect to British Columbia, we note that BC Hydro's DSM program

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[171] Ex. B-1, Vol. 2, p. 15 (note that the corrected resource cost for the Max DSM scenario, $108/MWh, as provided in the Errata is included in the quoted passage above).
[172] Ex. C5-5, p. 5.
[173] ACEEE Report, p. 28; BCSEA Response to FBC IRs 1.1.2 and 1.1.3 (Ex. C5-11, p.1-2).
[174] Response to BCUC IR 1.47.1 (Ex. B-1-1, Revised Responses to BCUC IR No. 1, p. 17).
[175] ACEEE Report, p. 21; see also BCSEA Response to FBC IR 1.1 (Ex. C5-11, p. 1).
[176] Response to BCUC IR 1.47.1.1 (Ex. B-2, p. 170).

savings, as a percent of retail sales is 0.7 percent for F2014-2016 and 0.6 percent for F2017-2019.[177] FBC's planned savings that reach 0.8 percent of sales in most years of the LTERP compare favourably to BC Hydro's practices.

145. In addition, Mr. Grevatt does not, in his evidence, mention any of the other metrics contained within the ACEEE report. In particular, ACEEE also evaluates conservation based on energy savings as a percentage of revenue. The 2016 ACEEE report cited in Mr. Grevatt's evidence shows that the median U.S. state reported spending of 1.2 percent of revenue on energy conservation.[178] FBC's proposed High level of DSM, on the other hand, is projected to involve spending that averages 2.2 percent of FBC's estimated revenue annually from 2017 to 2035.[179] This would place FBC in the top 15 of U.S. jurisdictions on this metric.[180]

146. The foregoing demonstrates that, to the extent the comparison can be given any weight, FBC's proposed level of DSM spending and savings is quite reasonable when compared to the experience in the U.S. Consistent with this conclusion, Mr. Grevatt did not actually perform any analysis to determine if there are DSM measures commonly offered in those U.S. states with high savings percentages that are applicable to but not offered by FBC.[181]

147. It is also noteworthy that, while Mr. Grevatt challenges the notion that high levels of DSM are "risky", he does not provide any evidence with respect to the cost or rate implications of increasing DSM to the levels of the top U.S. jurisdictions. In response to a BCUC staff IR asking whether FBC could reasonably be expected to achieve savings that equal 1 percent, 1.5 percent, or 2 percent of sales, BCSEA stated that "EFG has not conducted the analyses required to support quantified conclusions".[182] We note that when BCSEA proposed that FBC should increase its DSM spending to a level necessary to achieve 2 percent of sales during the 2012 LTRP proceeding, the

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[177] Ibid.
[178] ACEEE Report, p. 34 (Table 13).
[179] Response to BCUC IR 1.47.1 (Ex. B-1-1, Revised Responses to BCUC IR No. 1, p. 16-17).
[180] See ACEEE Report, p. 34 (Table 13).
[181] BCSEA Response to BCOAPO IR 1.1.6 (Ex. C5-9, p. 2).
[182] BCSEA Response to BCUC IR 1.1.2 (Ex. C5-8, p. 4).

evidence from its expert consultant was that doing so would cost FBC $32,290,000 annually.[183] While this figure would be different if re-calculated for the purposes of the 2016 LTERP, there is no evidence or reason to believe the order of magnitude would be significantly different. It perhaps goes without saying that such a dramatic DSM spending increase would increase customer rates and would not, in FBC's submission, be in the public interest.

iv. DSM Reliability Issues

148. In any event, of the foregoing discussion, the jurisdictional comparison referenced by Mr. Grevatt in his report is not actually evidence of the point he purports to make. The fact that some U.S. jurisdictions may pursue higher levels of energy conservation than FBC proposes does not mean that high levels of DSM do not entail certain risks when compared to supply side resources. There can be no doubt that DSM measures rely on voluntary participation by customers. Mr. Grevatt seems to acknowledge this in his report when he accepts that "it may be true that 'there is no guarantee that actual DSM program uptake will materialize'" as a result of DSM spending.[184]

149. We note in this regard, that in response to an IR from BCOAPO, Mr. Grevatt declined an opportunity to comment on particular tools FBC could, but does not employ, that would enhance customer participation in DSM programs.[185] While indicating that this was beyond the scope of Mr. Grevatt and EFG's engagement, BCSEA also stated that such a topic would be more suitable for a DSM expenditure schedule proceeding.[186]

150. In our submission, this position demonstrates the limited utility of Mr. Grevatt's evidence. While seeming to criticize FBC for not developing "thoughtful strategies to ensure that enough customers participate in the programs", he has not apparently reviewed FBC's existing practices or presented any concrete evidence to demonstrate that the reliability risks FBC has considered would be reduced or eliminated through

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[183] FBC 2012 LTRP proceeding: Ex. C6-4 (BCSEA evidence), p. 16 and T5, p. 934, II. 7-24.
[184] Ex. C5-5, p. 4.
[185] BCSEA Responses to BCOAPO IRs 1.1.7 and 1.1.8 (Ex. C5-9, p. 2-3).
[186] Ibid.

specific alternative strategies that are not being employed. Further, if the topic of BCOAPO's IR is considered to be beyond the scope of the LTERP, then Mr. Grevatt's evidence on which the IR was based, and his related criticisms, cannot be relevant to the LTERP either.

151. There can also be no doubt that DSM measures are not dispatchable in the same way and are less firm than comparable supply-side resources, a point that Mr. Grevatt does not seem to contest in his evidence.

152. Accordingly, the general reliability concerns with DSM above the High scenario are and were appropriate for FBC to consider in developing the LTERP and in selecting the incremental supply resources in the preferred portfolio instead of additional levels of DSM.

v. DSM versus System Reinforcement

153. Mr. Grevatt's evidence also addresses the possibility of using DSM as an alternative to future system reinforcement projects.

154. FBC is not, in principle, opposed to studying the possible integration of "non-wires" alternatives (to use Mr. Grevatt's terminology) into its transmission system planning processes in the future. The on-going CPR additional scope services, which as Mr. Grevatt correctly notes includes review of demand response measures, will assist in evaluating the potential future application of DSM as part of FBC's system planning practices.

155. FBC does note that, as Mr. Grevatt seems to acknowledge, DSM will not be a feasible alternative for <u>all</u> system reinforcement projects and, where it is feasible, would require significant lead-time and planning to potentially defer the need for infrastructure spending. Further, FBC's network planning is based on actual load growth trajectory for specific lines and substation equipment; significant new developments and associated increases in load in specific geographic locations will

generally outpace the impact of DSM savings in the same area.[187] Accordingly, the impact of future DSM measures and savings on forecast peak load for specific system infrastructure is uncertain and system upgrades will be necessary to ensure service quality and reliability standards are met after certain planning thresholds are crossed.[188]

156. In addition, FBC is moving away from a period of significant investment in system infrastructure. The LTERP only contemplates two relatively modest transmission upgrade projects over the planning horizon, so opportunities to implement DSM alternatives in this area may be practically limited. FBC does not, for example, take Mr. Grevatt's evidence or BCSEA's position to be that either the Grand Forks Terminal Transformer Addition or the Kelowna Bulk Transformer Capacity Addition could be avoided through the use of DSM.

157. Concerns regarding inequity among customers of the same rate class would also need to be considered and addressed if DSM measures and incentives are targeted to specific geographic areas for the purposes of deferring future system infrastructure upgrades.[189] The *UCA* broadly prohibits rate discrimination or preference, as well as the extending of "a form of agreement, a rule or a facility or privilege" to a person unless it is "regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description" (see sections 59(1)(a) and (2)(b)). On their face, these provisions would limit FBC's ability to direct specific DSM measures and incentives to customers in specific geographic areas.

158. For these reasons, FBC's explanation and rationale for the limited transmission facilities it intends to construct over the course of the planning horizon is more than adequate to justify their inclusion in the LTERP rather than DSM measures.

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[187] Response to BCOAPO IR 2.58.2.1 (Ex. B-12, p. 11).
[188] Ibid.
[189] Response to BCUC IR 1.23.2.1 (Ex. B-2, p. 78).

E. Other Information Required by the Commission: *UCA*, s. 44.1(2)(g)

159. The final adequacy requirement for a long term resource plan under s. 44.1(2) of the *UCA* is to provide any other information required by the Commission. Typically, this arises through directions in the Commission's decision regarding a previous resource plan or other applications.

160. FBC has satisfied this legislative requirement as summarized at Sections 1.5.2 and 1.5.3 of the LTERP.[190]

PART 4 - PUBLIC INTEREST CONSIDERATIONS

A. *UCA*, s. 44.1(6) & (8)

161. Under section 44.1(6) of the *UCA*, the Commission must accept the LTERP if it determines that carrying it out would be in the public interest. Section 44.1(8), in turn, enumerates matters that the Commission "must consider" in determining whether to accept a long term resource plan "under subsection (6)". It follows that, in effect, section 44.1(8) defines the criteria on which the Commission's public interest determination must be based.

162. While not intending to suggest the Commission does not have residual jurisdiction to consider matters beyond those described in s. 44.1(8) in assessing the public interest, we do submit that it should be a rare case in which the s. 44.1(8) criteria are satisfied or otherwise support acceptance, but the Commission nonetheless decides that a long term resource plan is not in the public interest and refuses to accept it under s. 44.1(6).

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[190] Ex. B-1, Vol. 1, p. 12-14.

B. The Section 44.1(8) Criteria Support Acceptance of the LTERP

i. Applicable BC Energy Objectives: UCA, s. 44.1(8)(a)

163. The first criteria the Commission must consider under section 44.1(8) is the applicable of BC's energy objectives, which as summarized above at paragraph 19, are set out in the *CEA*.

164. Table 1-3 in Section 1.4.2 outlines how the LTERP furthers BC's energy objectives (some of which are only applicable to BC Hydro pursuant to section 2 of the *CEA*).

165. The LTERP has, as one of its planning objectives, ensuring consistency with provincial energy objectives and, in our submission, the LTERP is supportive of all applicable energy objectives enumerated in section 2 of the *CEA*.

166. One of the energy objectives under the *CEA* that has received particular attention in this process is "to encourage the switching from one kind of energy source or use to another that decreases greenhouse gas emissions in British Columbia" (s. 2(h)). The potential for gas to electricity fuel switching programs was discussed above in respect of the LT DSM Plan and BC's recent legislative changes regarding electrification undertakings (see paragraphs 72-75). In our submission, FBC's on-going evaluation of such potential programs is entirely reasonable and appropriate in the circumstances, particularly since the measure examined to date failed the TRC test and given the new cost effectiveness methodology for electrification programs directed under the recently amended *GGRR*.

167. Fuel switching has been addressed in the LTERP in other respects as well. In particular, the LTERP contemplates that FBC will continue to support government direct current (**DC**) fast charging programs for EVs, as well as its own initiatives for expanding EV charging infrastructure in FBC's service territory.[191] This is consistent with and facilitates increased consumer demand for EVs instead of gas powered vehicles. FBC has also tailored the alternative load scenarios considered in Section 4

[191] Ex. B-1, Vol. 1, p. 25-26.

of the LTERP to address various levels of EV market penetration to determine potential impacts on FBC's system and long term load forecasts.[192]

ii. Requirements under ss. 6 and 19 of the CEA: UCA, s. 44.1(8)(b)

168. Section 44.1(8)(b) of the *UCA* requires the Commission to consider the extent to which the LTERP is consistent with the requirements in sections 6 and 19 of the *CEA*. Section 6 of the *CEA* provides that a utility must consider British Columbia's energy objective to achieve electricity self-sufficiency in planning for the construction of generation facilities and energy purchases in a long term resource plan. The objective of "electricity self-sufficiency" is described in section 6(2) of the *CEA* as holding "the rights to an amount of electricity that meets the electricity supply obligations solely from electricity generating facilities within the Province".

169. The LTERP is consistent with and supports this objective. As described above at paragraphs 118-120 in respect of the LTERP's portfolio analysis, three out of the four alternative portfolios FBC considered for the preferred portfolio and the portfolio it ultimately selected are predicated on achieving electricity self-sufficiency by 2025, after which time incremental supply will come from FBC's own generation and/or energy purchases from BC suppliers. The percentage of energy in the preferred portfolio that meets the *CEA* description of electricity self-sufficiency will also ramp up from 92.1 percent in 2016 to 96.8 percent in 2025.[193]

170. FBC evaluated achieving electricity self-sufficiency in the shorter term, i.e. by 2020; however this would result in a significantly higher LRMC and would require incremental resources to be secured within the next few years.[194] A self-sufficiency target of 2026 is, in FBC's submission, a more balanced approach that allows additional time to assess market conditions and any changes in the LRB forecast,

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[192] Ex. B-1, Vol. 1, p. 67-68.
[193] Response to BCUC IR 1.30.1 (Ex. B-2, p. 103).
[194] Ex. B-1, Vol. 1, p. 120.

while also allowing FBC and its rate payers to take advantage of lower cost market purchases in the short term.[195]

171. With respect to section 19 of the *CEA*, as discussed above at paragraph 20, this provision is not applicable to FBC. FBC is not a prescribed public utility under section 19(2)(b), nor are there are any regulations under the *CEA* prescribing "targets in relation to clean or renewable resources". The LTERP is nonetheless consistent with the energy objective in section 2(c) of the *CEA* to generate at least 93 percent of the electricity in BC from clean or renewable resources. The preferred resource portfolio FBC selected for the LTERP is specifically designed to achieve that target and would in fact increase from 95.8 percent clean or renewable in 2016 to 97.9 percent clean or renewable by 2025.[196]

172. FBC also addressed the BC government's recent commitment in the Climate Leadership Plan (**CLP**), released August 2016, that BC Hydro will acquire 100 percent of its supply of electricity from clean or renewable sources going forward (except where concerns regarding reliability or costs are present).[197] While this commitment only applies to BC Hydro, FBC developed and evaluated resource portfolios to meet the 100 percent clean or renewable target as described in Section 9.3.3 of the LTERP.[198]

173. In our submission, the LTERP is, for these reasons, entirely consistent with the requirements under sections 6 and 19 of the *CEA*.

iii. Adequate and Cost Effective DSM Measures: UCA, s. 44.1(8)(c)

174. As described above, the Commission's consideration of whether the LTERP shows that FBC intends to pursue "adequate" and "cost-effective" DSM measures under section 44.1(8)(c) of the *UCA* is based on the statutory meanings ascribed to those terms in the *DSM Regulation.* In that legislative context "adequacy" does not reflect

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[195] Ex. B-1, Vol. 1, p. 120, 125.
[196] Response to BCUC IR 1.31.1 (Ex. B-2, p. 111).
[197] Ex. B-1, Vol. 1, App. B, p. 28.
[198] Ex. B-1, Vol. 1, p. 121-122.

the amount of DSM spending a utility intends to make or savings it proposes to target. Rather, "adequacy" refers to the inclusion of particular DSM measures or programs specified in section 3 of the *DSM Regulation.* At the time the LTERP was filed, which for the reasons stated above at paragraphs 26-27 is the relevant time to determine the applicable legislative requirements, a plan was "adequate" for purposes of section 44.1(8)(c) of the *UCA* if it included DSM measures: intended to assist low-income households and to improve the energy efficiency of rental accommodations, as well as to educate students in schools and post-secondary institutions in the utility's service area about energy efficiency and conservation.

175. As summarized in Sections 4.1.7, 4.1.8, and 4.4.4 of the LT DSM Plan, FBC has provided and intends to continue to provide a number of DSM programs targeted at low-income customers, rental accommodation, and student education.[199] The "adequacy" requirement under section 44.1(8)(c) is accordingly satisfied for the purposes of the LTERP.

176. The amendments to the *DSM Regulation* that went into effect on March 24, 2017, after the LTERP was filed, include additional types of measures under the "adequacy" definition. As described above, at paragraphs 24-25 of this Final Argument, these involve measures to support codes and standards respecting energy conservation (s. 3(1)(e)) and measures to support the adoption of a "step code", which is newly defined in section 1, or more stringent requirements within a step code (s. 3(1)(f)).

177. The LTERP was developed and then filed before the amendments to the *DSM Regulation* added these adequacy requirements and accordingly the LT DSM Plan does not (nor should it be expected to) address the specifics of the new requirements in sections 3(1)(e)-(f) of the regulation. The LT DSM Plan does, nonetheless, include high level description of DSM initiatives FBC intends to pursue in each of the areas addressed by the new requirements. In particular:

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[199] Ex. B-1, Vol. 2, p. 19, 23.

- The LT DSM Plan, at Section 4.4.5, discusses FBC's support of codes and standards policy development and research through in-kind and financial co-funding arrangements.[200]

- The LT DSM Plan, at Section 4.1.4, describes FBC's New Home program, which "will provide incentives to encourage a higher level of whole home energy efficiency via a performance path (i.e. ENERGY STAR® for New Homes (ESNH)) to exceed the baseline requirements of the BC building code".[201] This DSM initiative does indirectly support the adoption of step codes within FBC's service territory.

178. Further, FBC will be addressing the specifics and necessary funding level for the new adequacy requirements starting with its next DSM expenditure schedule to be filed pursuant to section 44.2 of the *UCA*. It will include more details about specific DSM measures FBC will be implementing in response to the amended section 3 of the *DSM Regulation*.

179. The cost effectiveness test prescribed under section 4 of the *DSM Regulation* is described above at paragraphs 29-30 of this Final Argument. For the purposes of section 4(1.1)(b) of the *DSM Regulation*, FBC has calculated the avoided electricity cost of the LT DSM Plan portfolio using:[202]

- A deferred capital expenditure (**DCE**) value of $79.85/kW-yr, consistent with the updated DCE value developed for and approved in respect of FBC's 2017 DSM Plan, as its avoided capacity cost; and

- A LRMC of $100.45/MWh for acquiring electricity generated from clean or renewable resources in BC.

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[200] Ex. B-1, Vol. 2, p. 23.
[201] Ex. B-1, Vol. 2, p. 18.
[202] Ex. B-1, Vol. 2, p. 3.

180. The LRMC of $100.45/MWh for DSM purposes was estimated as part of the portfolio analysis FBC conducted for the LTERP. It reflects the LRMC of a portfolio of resources without any DSM: Portfolio B1, which includes wind, biomass, biogas, run-of-river, and market purchases out to 2025.[203]

181. All measures included in the High DSM scenario FBC selected pursuant to the LT DSM Plan and included in the preferred portfolio for the LTERP are cost-effective within the meaning the *DSM Regulation.*[204] The High level of DSM is targeted to achieve total savings of 602 GWh[205] over the 20 year planning horizon at a TRC benefit/cost ratio of 2.2.[206] This clearly demonstrates that FBC intends to pursue cost effective DSM measures pursuant to the LTERP in conformity with section 41.1(8)(c) of the *UCA.*

182. While the High DSM scenario does in fact include the majority of cost-effective DSM from an LRMC perspective,[207] we submit that it is significant that the public interest consideration in section 41.1(8) of the *UCA* that is expressly related to DSM measures does not, in any way, reflect the level of DSM spending or savings a utility proposes to pursue in a long term resource plan. Similarly, the only BC energy objective under the *CEA* that is actually applicable to FBC, section 2(b), is simply "to take demand-side measure[s] and to conserve energy". As discussed in detail above, at paragraph 130 of this Final Argument, there is no express legislative requirement on FBC to pursue any particular amount of DSM, much less all cost-effective DSM as some interveners seem to suggest through their IRs and evidentiary filings.

iv. The Interests of FBC's Present and Future Rate Payers

183. Without purporting to be exhaustive, the following is a list of some of the important aspects of the LTERP that demonstrate it is in the interests of rate payers who receive or may receive service from FBC:

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[203] Ex. B-1, Vol. 1, p. 116, 119; Response to BCSEA IR 1.4.1 (Ex. B-4, p. 5).
[204] Response to BCOAPO IR 1.4.4 (Ex. B-3, p. 5).
[205] Ex. B-1-1, LT DSM Plan (corrected version), p. 14 (Table 3-1).
[206] Ex. B-1-1, FBC letter to BCUC, dated Sept. 15, 2017, p. 3.
[207] Ex. B-1-1, LT DSM Plan (corrected version), p. 15.

184. The LTERP and LT DSM Plan are the result of a thorough internal planning process at FBC. The process has included, among other things,

(i) A detailed assessment of the planning environment and potential developments in energy policy and practices over the 20-year period covered by the LTERP;

(ii) Engaging an expert consultant, Navigant, to develop a Load Scenario Assessment Report[208] to ensure that the load forecasts to be addressed in the LTERP covered non-traditional load drivers that could proliferate over the planning environment;

(iii) Collaborating with BC Hydro on a comprehensive Supply-Side Resource Options Report[209] that evaluated financial and other attributes of potential supply resources and their associated costs;

(iv) FBC's participation in the province-wide dual-fuel CPR process and the commissioning of the FBC CPR Report, which provides specific findings on the energy savings potential in FBC's service territory;

(v) A complex and detailed portfolio analysis of available resource options to determine FBC's preferred resource acquisition strategy for the 20-year planning horizon; and

(vi) A detailed review and update of the Company's approach to LRMC and PRM.[210]

(b) FBC has also engaged in a robust process of customer and stakeholder consultation with respect to the LTERP. As described in detail in Section 10 of the LTERP, this consultation included five workshops with the RPAG, seven Community Consultation workshops for interested individuals from communities

[208] Ex. B-1, Vol. 1, App. G.
[209] Ex. B-1, Vol. 1, App. J.
[210] Ex. B-1, Vol. 1, App. K, L.

within FBC's service area, engaging Sentis Research to survey customers through an on-line discussion board process, specific dialogue and engagement with First Nations, and three in-person meetings with Commission staff. The customer and stakeholder engagement process proved invaluable to the development of the LTERP. For example, as described above, the High DSM scenario originated in the final meeting of the RPAG where participants requested a mid-point between the Base and Max DSM scenarios, which FBC modelled and ultimately adopted in the LT DSM Plan.[211]

(c) The LTERP and LT DSM Plan demonstrate that FBC takes seriously and intends to promote a wide range of cost-effective DSM programs that will provide customers across all sectors and including hard-to-reach customers with ample opportunities to conserve and reduce their demand for energy.

(d) The LTERP demonstrates that FBC will meet future customer demand through a prudent strategy for resource acquisition that utilizes low cost resource options where appropriate while managing market risk and other contingencies and balancing other energy policy objectives. Current and potential future customers can feel confident that, if implemented, the LTERP will help ensure that they are provided with secure and reliable service in a cost-effective manner.

C. The LTERP and LT DSM Plan are in the Public Interest

185. In summary:

- FBC's 2016 LTRP satisfies all of the statutory requirements for filing set out in section 44.1(2) of the *UCA*;
- The LTERP conforms with the Commission's RP Guidelines;
- All of the public interest considerations described in section 44.1(8) of the *UCA* support acceptance of the LTERP; and

[211] Ex. B-1, Vol. 2, p. 11.

- The preferred resource portfolio selected pursuant to the LTERP provides a reasonable balance among planning priorities and objectives and will ensure delivery to FBC's customers of secure, reliable, and cost-effective services in a manner that is consistent with BC energy policy and objectives.

186. For these reasons, carrying out the LTERP is in the public interest.

D. Partial Acceptance of the LTERP is Not Appropriate or Warranted

187. In BCUC IR 2.80.1, staff raised a hypothetical scenario in which the LT DSM Plan portion of the LTERP is rejected. The preamble to this IR and BCUC IR 2.80.1.1 suggest that such a hypothetical may be premised on FBC filing an updated LT DSM Plan following the completion of the BC CPR additional scope services.

188. As described in the response to BCUC IR 2.80.1, a hypothetical situation in which the LT DSM Plan is rejected but the balance of the LTERP accepted is not a plausible outcome given the interrelationship between the selection of the High DSM scenario in the LT DSM Plan and the portfolio analysis in the LTERP. If the LT DSM Plan is not accepted, then this would necessarily entail a revised portfolio analysis and potentially changes to FBC's overall resource acquisition strategy and its preferred resource portfolio presented in the LTERP.[212]

189. We note again the Commission's previous statement in respect of FEU's 2014 LTRP: "While it is possible that the Panel or other stakeholders may disagree with individual assumptions and may prefer an alternative action plan, the test is whether the plan as filed meets the public interest". We also note that the *UCA* is silent on what occurs if a long term resource plan is rejected. Even if a part of the plan is rejected under section 44.1(7), there is no mandatory requirement for a utility to re-submit the rejected part of the plan: section 44.1(7)(a) uses permissive language (the utility "may resubmit" the rejected part of the plan).

[212] Response to BCUC IR 2.80.1 (Ex. B-11, p. 103-104).

190. Notwithstanding this legal discussion, we submit that there is no substantive reason for the Commission to reject the LT DSM Plan, or any other part of the LTERP. The BC CPR results, which include the economic conservation potential in FBC's service area, provide the foundation for the LT DSM Plan without further input.[213] The additional scope services for the CPR will inform FBC's future DSM expenditure schedule applications; however, this will not provide any additional information that would change the preferred DSM scenario selected for the LT DSM Plan and LTERP.[214]

PART 5 - OTHER ISSUES RAISED IN THE PROCEEDING

A. Adequacy of the Action Plan

191. A number of IRs from Commission staff question why certain short-term activities referenced in the LTERP were not included in the "Action Plan" provided in Section 11.

192. In FBC's view, the Action Plan conforms with the Commission's RP Guidelines. Guideline No. 7 regarding "Development of an action plan" is stated as follows:

> The selection process in Guideline No. 6 provides the components for the action plan. The action plan consists of the detailed acquisition steps for those resources (from the selected resource portfolio) which need to be initiated over the next four years in order to meet the most likely gross demand forecast. [...]

193. Guideline No. 6 describes the process by which alternative resource portfolios are evaluated and the preferred portfolio selected. As stated in Guideline No. 5, the alternative resource portfolios each consist "of a combination of supply and demand resources needed to meet the gross demand forecast". Accordingly, FBC has interpreted Guideline No. 7 as suggesting that only activities and actions specific to the acquisition of new DSM and energy and capacity resources (i.e. electricity

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[213] Response to BCUC IR 2.80.1.1 (Ex. B-11, p. 104).
[214] Ibid.

generation resources) that are included in the preferred portfolio should be addressed in the Action Plan.

194. None of the actions or activities highlighted in Commission staff's IRs meets these criteria. In particular:

- The CSPP (see BCUC IR 1.11.6(iii)) is not a supply or demand resource that is included in the preferred resource portfolio and is not being relied upon to meet FBC's long term load forecast;[215]

- FBC's existing arrangement for purchasing unplanned deliveries from a self-generating customer (see BCUC IR 1.12.4.2) does not involve new resource acquisition;[216]

- FBC does not consider that the extension of an existing power supply agreement (i.e. the Brilliant Power Purchase Agreement) or the refurbishment of an existing generation plant at Upper Bonnington (see BCUC IR 1.20.1) constitute new resource acquisition;[217] and

- FBC does not consider the transmission reinforcement projects described in the LTERP (see BCUC IRs 1.22.2 and 2.59.3.3) to be new energy and capacity resources within the meaning of RP Guideline No. 7 in that they do not provide additional generation to meet the long term load forecast or otherwise reduce the demand for energy FBC must serve over the planning horizon.[218]

195. FBC has, in any event, described each of the above projects and activities in detail in the LTERP. They will also be subject to review in future regulatory filings and BCUC processes.

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[215] Ex. B-2, p. 37-38.
[216] Ex. B-2, p. 43.
[217] Ex. B-2, p. 71.
[218] Ex. B-2, p. 76; Ex. B-11, p. 21-22.

B. Timing of FBC's Next Long Term Resource Plan

196. Given that FBC requires no new supply-side resources in the next 10 years, it expects that it would file its next long term resource plan in 2021, approximately five years from the filing of the present LTERP.[219] This is consistent with the five year interval the Commission directed following acceptance of FBC's 2012 LTRP.

C. Rescinding RS 90

197. As an ancillary matter, FBC is also seeking in this proceeding the Commission's consent to rescind RS 90 pursuant to section 61(2) of the *UCA*.

198. RS 90, regarding Energy Management Services was introduced in 1990 through Commission Order G-47-89. Its original purpose was to describe and provide terms and conditions in respect of each of the Company's specific energy conservation programs. As described in detail in Section 5.3 of the LT DSM Plan, that purpose is now redundant as the DSM terms and conditions are provided under individual programs where they have greater customer visibility and mandatory sign-off.[220] Parts of RS 90 also conflict with or limit flexibility in FBC's DSM program design and practices. Notably, FBC is the only utility in BC with a DSM specific tariff schedule and such a tariff schedule is virtually unknown in other North American jurisdictions.[221]

199. For the reasons stated in Section 5.3 of the LT DSM Plan, we submit that rescinding RS 90 is appropriate and that consent for FBC to do so should be provided in the Commission order made in this proceeding.

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[219] Ex. B-1, Vol. 1, p. 141; Response to CEC IR 1.24.2.1 (Ex. B-5, p. 74).
[220] Ex. B-1, Vol. 2, p. 25.
[221] Ibid.

PART 6 - CONCLUSION

200. For the reasons stated above and in FBC's filings in this proceeding, we submit that carrying out the LTERP, including the LT DSM Plan, would be in the public interest and should be accepted by the BCUC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 20, 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.'s 2016 Long Term Electric Resource Plan and
2016 Long Term Demand Side Management Plan

BOOK OF AUTHORITIES OF FORTISBC INC. - FINAL ARGUMENT

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Union des consommateurs and Olivier Dumoulin *Respondents*

and

Canadian Internet Policy and Public Interest Clinic, Public Interest Advocacy Centre, ADR Chambers Inc., ADR Institute of Canada and London Court of International Arbitration *Interveners*

INDEXED AS: DELL COMPUTER CORP. *v.* UNION DES CONSOMMATEURS

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Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Private international law — Jurisdiction of Quebec courts — Arbitration — Sale of computer equipment over Internet — Arbitration clause contained in terms and conditions of sale — Consumer instituting class action against seller — Article of book of Civil Code on private international law providing that Quebec authority has jurisdiction to hear action involving consumer contract if consumer has domicile or residence in Quebec, and that waiver of that jurisdiction by consumer may not be set up against consumer — Whether arbitration clause can be set up against consumer — Whether arbitration clause contains foreign element that renders rules on international jurisdiction of Quebec authorities applicable — Civil Code of Québec, S.Q. 1991, c. 64, art. 3149.

Arbitration — Review of application to refer dispute to arbitration — Whether arbitrator or court has jurisdiction to rule first on parties' arguments on validity or

Dell Computer Corporation *Appelante*

c.

Union des consommateurs et Olivier Dumoulin *Intimés*

et

Clinique d'intérêt public et de politique d'Internet du Canada, Centre pour la défense de l'intérêt public, ADR Chambers Inc., ADR Institute of Canada et Cour d'arbitrage international de Londres *Intervenants*

RÉPERTORIÉ : DELL COMPUTER CORP. *c.* UNION DES CONSOMMATEURS

Référence neutre : 2007 CSC 34.

N° du greffe : 31067.

2006 : 13 décembre; 2007 : 13 juillet.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron et Rothstein.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit international privé — Compétence des tribunaux québécois — Arbitrage — Vente de matériel informatique par Internet — Clause d'arbitrage faisant partie des conditions de vente — Consommateur intentant un recours collectif contre le vendeur — Disposition du livre du Code civil traitant du droit international privé prévoyant que les autorités québécoises sont compétentes pour connaître d'une action fondée sur un contrat de consommation si le consommateur a son domicile ou sa résidence au Québec et que la renonciation du consommateur à cette compétence ne peut lui être opposée — La clause d'arbitrage est-elle opposable au consommateur? — La clause d'arbitrage comporte-t-elle un élément d'extranéité faisant jouer les règles sur la compétence internationale des autorités québécoises? — Code civil du Québec, L.Q. 1991, ch. 64, art. 3149.

Arbitrage — Examen d'une demande de renvoi à l'arbitrage — Qui de l'arbitre ou du tribunal judiciaire a compétence pour statuer, en premier, sur les arguments

applicability of arbitration clause — Limits of intervention by court in case involving arbitration clause — Code of Civil Procedure, R.S.Q., c. C-25, arts. 940.1, 943.

Contracts — Consumer contract or contract of adhesion — External clause — Electronic commerce — Validity of arbitration clause — Whether arbitration clause that can be accessed by means of hyperlink in contract entered into via Internet is external clause — Civil Code of Québec, S.Q. 1991, c. 64, art. 1435.

The Dell company sells computer equipment retail over the Internet. It has its Canadian head office in Toronto and a place of business in Montreal. On April 4, 2003, the order pages on its English-language Web site indicated prices of $89 rather than $379 and of $118 rather than $549 for two models of handheld computers. On April 5, on being informed of the errors, Dell blocked access to the erroneous order pages through the usual address. D, circumventing the measures taken by Dell by using a deep link that enabled him to access the order pages without following the usual route, ordered a computer at the lower price indicated there. Dell then posted a price correction notice and at the same time announced that it would not process orders for computers at the prices of $89 and $118. When Dell refused to honour D's order at the lower price, the Union des consommateurs and D filed a motion for authorization to institute a class action against Dell. Dell applied for referral of D's claim to arbitration pursuant to an arbitration clause contained in the terms and conditions of sale, and dismissal of the motion for authorization to institute a class action. The Superior Court and the Court of Appeal held, for different reasons, that the arbitration clause could not be set up against D.

Held (Bastarache, LeBel and Fish JJ. dissenting): The appeal should be allowed. D's claim should be referred to arbitration and the motion for authorization to institute a class action should be dismissed.

Per McLachlin C.J. and Binnie, Deschamps, Abella, Charron and Rothstein JJ.: To ensure the internal consistency of the *Civil Code of Québec*, it is necessary to adopt a contextual interpretation that limits the scope of the provisions of the title on the international jurisdiction of Quebec authorities to situations with a relevant foreign element. Since the prohibition in art. 3149 C.C.Q. against waiving the jurisdiction of Quebec authorities is found in that title, it applies only to situations with such an element. The foreign element must be a point of contact that is legally relevant to a foreign

soulevés par les parties concernant la validité ou l'applicabilité d'une clause d'arbitrage? — Paramètres à l'intérieur desquels l'intervention judiciaire peut être exercée en présence d'une clause d'arbitrage — Code de procédure civile, L.R.Q., ch. C-25, art. 940.1, 943.

Contrats — Contrat de consommation ou d'adhésion — Clause externe — Commerce électronique — Validité de la clause d'arbitrage — La clause d'arbitrage accessible au moyen d'un hyperlien figurant dans un contrat conclu par Internet constitue-t-elle une clause externe? — Code civil du Québec, L.Q. 1991, ch. 64, art. 1435.

La société Dell vend au détail, par Internet, du matériel informatique. Elle a son siège canadien à Toronto ainsi qu'un établissement à Montréal. Le 4 avril 2003, les pages de commande de son site Internet anglais indiquent le prix de 89 $ au lieu de 379 $ et le prix de 118 $ au lieu de 549 $ pour deux modèles d'ordinateur de poche. Le 5 avril, Dell est informée des erreurs et bloque l'accès aux pages de commande erronées par l'adresse usuelle. Contournant les mesures prises par Dell en empruntant un lien profond qui lui permet d'accéder aux pages de commande sans passer par la voie usuelle, D commande un ordinateur au prix inférieur indiqué. Dell publie ensuite un avis de correction de prix et annonce simultanément son refus de donner suite aux commandes d'ordinateurs aux prix de 89 $ et 118 $. Devant le refus de Dell d'honorer la commande de D au prix inférieur, l'Union des consommateurs et D déposent une requête en autorisation d'exercer un recours collectif contre Dell. Dell demande le renvoi de la demande de D à l'arbitrage en vertu de la clause d'arbitrage faisant partie des conditions de vente et le rejet de la requête pour autorisation d'exercer un recours collectif. La Cour supérieure et la Cour d'appel concluent, pour des motifs différents, que la clause d'arbitrage est inopposable à D.

Arrêt (les juges Bastarache, LeBel et Fish sont dissidents) : Le pourvoi est accueilli. La demande de D est renvoyée à l'arbitrage et la requête pour autorisation d'exercer un recours collectif est rejetée.

La juge en chef McLachlin et les juges Binnie, Deschamps, Abella, Charron et Rothstein : Le respect de la cohérence interne du *Code civil du Québec* commande une interprétation contextuelle ayant pour effet de limiter aux situations comportant un élément d'extranéité pertinent la portée des dispositions du titre traitant de la compétence internationale des autorités du Québec. Puisque la prohibition visant la renonciation à la compétence des autorités québécoises prévue par l'art. 3149 C.c.Q. fait partie de ce titre, elle ne s'applique qu'aux situations comportant un tel élément. Il

country, which means that the contact must be sufficient to play a role in determining whether a court has jurisdiction. An arbitration clause is not in itself a foreign element warranting the application of the rules of Quebec private international law. The neutrality of arbitration as an institution is one of the fundamental characteristics of this alternative dispute resolution mechanism. Unlike the foreign element, which suggests a possible connection with a foreign state, arbitration is an institution without a forum and without a geographic basis. The parties to an arbitration agreement are free, subject to any mandatory provisions by which they are bound, to choose any place, form and procedures they consider appropriate. The choice of procedure does not alter the institution of arbitration. The rules become those of the parties, regardless of where they are taken from. As a result, an arbitration that contains no foreign element in the true sense of the word is a domestic arbitration. In the instant case, the facts that the applicable rules of the American arbitration organization provide that arbitrations will be governed by a U.S. statute and that English will be the language used in the proceedings are not relevant foreign elements for purposes of the application of Quebec private international law. [3] [26] [50-53] [56-58]

In a case involving an arbitration agreement, any challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator in accordance with the competence-competence principle, which has been incorporated into art. 943 C.C.P. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception, which is authorized by art. 940.1 C.C.P., is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record. Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. In the case at bar, the parties have raised questions of law relating to the application

doit s'agir d'un point de contact juridiquement pertinent avec un État étranger, c'est-à-dire un contact suffisant pour jouer un rôle dans la détermination de la juridiction compétente. Le seul fait de stipuler une clause d'arbitrage ne constitue pas en lui-même un élément d'extranéité justifiant l'application des règles du droit international privé québécois. La neutralité de l'arbitrage comme institution est en fait l'une des caractéristiques fondamentales de ce mode amiable de règlement des conflits. Contrairement à l'extranéité, qui signale la possibilité d'un rattachement avec un État étranger, l'arbitrage est une institution sans for et sans assise géographique. Les parties à une convention d'arbitrage sont libres, sous réserve des dispositions impératives qui les lient, de choisir le lieu, la forme et les modalités qui leur conviennent. La procédure choisie n'a pas d'incidence sur l'institution de l'arbitrage. Les règles deviennent celles des parties, peu importe leur origine. Par conséquent, une situation d'arbitrage qui ne comporte aucun élément d'extranéité au sens véritable du mot est un arbitrage interne. En l'espèce, le fait que les règles applicables de l'organisme arbitral américain prévoient que l'arbitrage sera régi par une loi américaine et que l'anglais sera la langue utilisée dans les procédures ne constituent pas des éléments d'extranéité pertinents pour l'application du droit international privé québécois. [3] [26] [50-53] [56-58]

En présence d'une convention d'arbitrage, toute contestation de la compétence de l'arbitre doit d'abord être tranchée par ce dernier conformément au principe de compétence-compétence incorporé à l'art. 943 C.p.c. Le tribunal ne devrait déroger à la règle du renvoi systématique à l'arbitrage que dans les cas où la contestation de la compétence arbitrale repose exclusivement sur une question de droit. Cette dérogation, permise par l'art. 940.1 C.p.c., se justifie par l'expertise des tribunaux sur ces questions, par le fait que le tribunal judiciaire est le premier forum auquel les parties s'adressent lorsqu'elles demandent le renvoi et par la règle voulant que la décision de l'arbitre sur sa compétence puisse faire l'objet d'une révision complète par le tribunal judiciaire. Si la contestation requiert l'administration et l'examen d'une preuve factuelle, le tribunal devra normalement renvoyer l'affaire à l'arbitre qui, en ce domaine, dispose des mêmes ressources et de la même expertise que les tribunaux judiciaires. Pour les questions mixtes de droit et de fait, le tribunal devra favoriser le renvoi, sauf si les questions de fait n'impliquent qu'un examen superficiel de la preuve documentaire au dossier. Avant de déroger à la règle générale du renvoi, le tribunal doit être convaincu que la contestation de la compétence arbitrale n'est pas une tactique dilatoire et ne préjudiciera pas indûment le déroulement de l'arbitrage. En l'espèce, les parties ont soulevé des questions de droit portant

of the provisions on Quebec private international law and to whether the class action is of public order. There are a number of other arguments, however, that require an analysis of the facts in order to apply the law to this case, such as those relating to the existence of a foreign element and to the external nature of the arbitration clause. Consequently, the matter should have been referred to arbitration. [84-88]

The arbitration clause in issue, which could be accessed by means of a hyperlink in a contract entered into via the Internet, is not an external one within the meaning of art. 1435 C.C.Q. and is valid. Analogously to paper documents, some Web documents contain several pages that can be accessed only by means of hyperlinks, whereas others can be viewed by scrolling down them on the computer's screen. The traditional test of physical separation, which is applied to determine whether contractual stipulations in paper documents are external, cannot be transposed without qualification to the context of electronic commerce. To determine whether clauses on the Internet are external clauses, therefore, it is necessary to consider another rule that is implied by art. 1435 C.C.Q.: the precondition of accessibility. This precondition is a useful tool for the analysis of an electronic document. Thus, a clause that requires operations of such complexity that its text is not reasonably accessible cannot be regarded as an integral part of the contract. Likewise, a clause contained in a document on the Internet to which a contract on the Internet refers, but for which no hyperlink is provided, will be an external clause. It is clear from the interpretation of art. 1435 C.C.Q. and from the principle of functional equivalence that underlies the *Act to establish a legal framework for information technology* that access to the clause in electronic format must be no more difficult than access to its equivalent on paper. In the instant case, the evidence shows that the consumer could access the page of Dell's Web site containing the arbitration clause directly by clicking on the highlighted hyperlink entitled "Terms and Conditions of Sale". This link reappeared on every page the consumer accessed. When the consumer clicked on the link, a page containing the terms and conditions of sale, including the arbitration clause, appeared on the screen. From this point of view, the clause was no more difficult for the consumer to access than would have been the case had he or she been given a paper copy of the entire contract on which the terms and conditions of sale appeared on the back of the first page. [94] [96-97] [99-101]

Although the class action is of public interest, it is a procedure, and its purpose is not to create a new right. The mere fact that D decided to bring the matter

sur l'application des dispositions du droit international privé québécois et le caractère d'ordre public du recours collectif. Plusieurs autres moyens requéraient cependant une analyse des faits pour déterminer l'application à l'espèce des règles de droit, tels que la recherche de l'élément d'extranéité et le caractère externe de la clause d'arbitrage. En conséquence, l'affaire aurait dû être renvoyée à l'arbitrage. [84-88]

La clause d'arbitrage en litige, qui est accessible au moyen d'un hyperlien figurant dans un contrat conclu par Internet, ne constitue pas une clause externe au sens de l'art. 1435 C.c.Q. et est valide. À l'image des documents papier, certains textes Web comportent plusieurs pages, accessibles seulement au moyen d'un hyperlien, alors que d'autres documents peuvent être déroulés sur l'écran de l'ordinateur. Le critère traditionnel de séparation physique, qui permet de reconnaître le caractère externe des stipulations contractuelles sur support papier, ne peut être transposé sans nuance dans le contexte du commerce électronique. La détermination du caractère externe des clauses sur Internet requiert donc de prendre en considération une autre règle qui est implicite à l'art. 1435 C.c.Q. : la condition préalable d'accessibilité. Cette condition s'avère un instrument utile pour l'analyse d'un document informatique. Ainsi, une clause qui requiert des manœuvres d'une complexité telle que son texte n'est pas raisonnablement accessible ne pourra pas être considérée comme faisant partie intégrante du contrat. De même, la clause contenue dans un document sur Internet et à laquelle un contrat sur Internet renvoie, mais pour laquelle aucun lien n'est fourni, sera une clause externe. Il ressort de l'interprétation de l'art. 1435 C.c.Q. et du principe d'équivalence fonctionnelle qui sous-tend la *Loi concernant le cadre juridique des technologies de l'information* que l'accès à la clause sur support électronique ne doit pas être plus difficile que l'accès à son équivalent sur support papier. Dans le présent cas, la preuve démontre que le consommateur peut accéder directement à la page du site Internet de Dell où figure la clause d'arbitrage en cliquant sur l'hyperlien en surbrillance intitulé « Conditions de vente ». Ce lien est reproduit à chaque page à laquelle le consommateur accède. Dès que le consommateur active le lien, la page contenant les conditions de vente, dont la clause d'arbitrage, apparaît sur son écran. En ce sens, cette clause n'est pas plus difficile d'accès pour le consommateur que si on lui avait remis une copie papier de l'ensemble du contrat comportant des conditions de vente inscrites à l'endos de la première page du document. [94] [96-97] [99-101]

Bien que le recours collectif soit un régime d'intérêt public, ce recours est une procédure qui n'a pas pour objet de créer un nouveau droit. Le seul fait que

before the courts by means of a class action rather than an individual action does not affect the admissibility of his action. An argument based on the class action being of public order cannot therefore be advanced to prevent the court hearing the action from referring the parties to arbitration. [105-106] [108]

Since the facts triggering the application of the arbitration clause occurred before the coming into force of s. 11.1 of the *Consumer Protection Act*, which prohibits any stipulation that obliges a consumer to refer a dispute to arbitration, that provision does not apply to the facts of this case. [111] [120]

Per Bastarache, LeBel and Fish JJ. (dissenting): One should not attach any significance to the structure of the *Civil Code of Québec* or the *Code of Civil Procedure* when interpreting the substantive provisions under review here. The coherence of the regime is not dependent on the particular Book of the C.C.P. that deals with arbitrations, or the particular title and Book of the C.C.Q. containing art. 3149. The C.C.Q. itself constitutes an ensemble which is not meant to be parcelled out into chapters and sections that are not interrelated. [141]

Quebec's acceptance of jurisdiction clauses is rooted in the principle of primacy of the autonomy of the parties. Both art. 3148, para. 2 C.C.Q. and art. 940.1 C.P.C. can be interpreted as giving practical effect to that principle and are consistent with the international movement towards harmonizing the rules of jurisdiction. On that point, art. 940.1 C.C.P. seems clear: if the parties have an agreement to arbitrate on the matter of the dispute, on the application of either of the parties, the court "shall" refer the parties to arbitration, unless the case has been inscribed on the roll or the court finds the agreement to be null. The reference to the nullity of the agreement is clearly also meant to cover the situation where the arbitration agreement, without being null, cannot be set up against the applicant. By using the term "shall", the legislator has indicated that the court has no discretion to refuse, on the application of either of the parties, to refer the case to arbitration when the appropriate conditions are met. [142] [144] [149]

The courts below were correct to fully consider D's challenge to the validity of the arbitration agreement based on the application of art. 3149 C.C.Q. Although art. 940.1 C.C.P. is not clear regarding the extent of the analysis the court should undertake, a discretionary approach favouring resort to the arbitrator in most instances would best serve the legislator's clear intention

D ait décidé de s'adresser aux tribunaux au moyen de la procédure de recours collectif, au lieu d'un recours individuel, n'a pas pour effet de modifier la recevabilité de son action. Le caractère d'ordre public du recours collectif ne saurait donc être invoqué pour s'opposer à ce que le tribunal judiciaire saisi de l'action renvoie les parties à l'arbitrage. [105-106] [108]

Comme les faits entraînant la mise en œuvre de la clause d'arbitrage se sont produits avant la date d'entrée en vigueur de l'art. 11.1 de la *Loi sur la protection du consommateur*, qui interdit une stipulation ayant pour effet d'imposer au consommateur l'obligation de soumettre un litige éventuel à l'arbitrage, cette disposition ne s'applique pas aux faits de l'espèce. [111] [120]

Les juges Bastarache, LeBel et Fish (dissidents) : Il ne faudrait attacher aucune importance à la structure du *Code civil du Québec* ou du *Code de procédure civile* pour interpréter les dispositions substantielles à l'étude dans le présent pourvoi. La cohérence du régime ne tient pas au livre du C.p.c. qui traite en particulier de l'arbitrage, ni au titre ou livre du C.c.Q. où se trouve l'art. 3149. Le C.c.Q. constitue en soi un ensemble qui ne doit pas être morcelé en chapitres et en dispositions dépourvus de tout lien entre eux. [141]

L'acceptation par le Québec des clauses de juridiction repose sur le principe de la primauté de l'autonomie de la volonté des parties. L'article 3148, al. 2 C.c.Q. et l'art. 940.1 C.p.c. peuvent tous deux s'interpréter de manière à donner réellement effet à ce principe et s'inscrivent dans l'évolution internationale vers l'harmonisation des règles de compétence. Sur ce point, l'art. 940.1 C.p.c. semble clair : si les parties ont conclu une convention d'arbitrage sur la question en litige, le tribunal « renvoie » les parties à l'arbitrage, à la demande de l'une d'elles, à moins que la cause n'ait été inscrite ou que le tribunal ne constate la nullité de la convention. Il semble évident que la mention de la nullité de la convention vise également le cas où la convention d'arbitrage ne peut, sans être nulle, être opposée au demandeur. En employant le verbe « renvoie » au présent de l'indicatif, le législateur a signalé que le tribunal n'a aucun pouvoir discrétionnaire de refuser de renvoyer l'affaire à l'arbitrage, à la demande de l'une des parties, lorsque les conditions requises sont remplies. [142] [144] [149]

Les juridictions inférieures ont eu raison d'examiner pleinement la contestation de D quant à la validité de la convention d'arbitrage, compte tenu de l'art. 3149 C.c.Q. Bien que l'art. 940.1 C.p.c. manque de précision quant à l'étendue de l'examen auquel devrait se livrer le tribunal, une méthode discrétionnaire préconisant le recours à l'arbitre dans la plupart des cas servirait mieux l'intention

to promote the arbitral process and its efficiency, while preserving the core supervisory jurisdiction of the Superior Court. When seized with a declinatory exception, a court should rule on the validity of the arbitration agreement only if it is possible to do so on the basis of documents and pleadings filed by the parties without having to hear evidence or make findings about its relevance and reliability. That said, courts may still exercise some discretion when faced with a challenge to the validity of an arbitration agreement regarding the extent of the review they choose to undertake. In some circumstances, particularly in those that truly merit the label "international commercial arbitration", it may be more efficient to submit all questions regarding jurisdiction for the arbitrator to hear at first instance. In other circumstances, such as in the present case where provisions of the C.C.Q. must be interpreted, it would seem preferable for the court to fully entertain the challenge to the arbitration agreement's validity. [176] [178]

The arbitration agreement at issue here cannot be set up against D because it constitutes a waiver of the jurisdiction of the Quebec authorities under art. 3149 C.C.Q. In determining whether art. 3149 applies, it is necessary to ask whether the jurisdiction chosen in the contract through a forum selection or arbitration clause is a "Québec authority". If that jurisdiction is not a "Québec authority", art. 3149 comes into play to permit the consumer or worker to bring his or her dispute before a "Québec authority". An arbitration clause is itself sufficient to trigger the application of art. 3148, para. 2, and hence the exceptions that apply to it, including art. 3149. Forum selection and arbitration clauses constitute on their own the requisite foreign element for these rules of private international law to be engaged. A contractual arbitrator cannot be a "Québec authority" for the purposes of art. 3149. A "Québec authority" must mean a decision-maker situated in Quebec holding its authority from Quebec law. No arbitrator who is bound by U.S. law could be a "Québec authority". Moreover, one would think a "Québec authority" would be required to provide arbitration services in French, whereas here, the American arbitration body's code of procedure provides that all arbitrations will be in English. Finally, it seems completely incongruous that in order to begin the process attributing to the purported "Québec authority" power to hear the dispute, the consumer must first contact an American institution, located in the U.S., that is in charge of organizing the arbitration. [152] [184] [200] [204] [212-216]

claire du législateur de favoriser le processus arbitral et son efficacité, tout en préservant le pouvoir fondamental de surveillance de la Cour supérieure. Lorsqu'il est saisi d'un moyen déclinatoire, le tribunal judiciaire ne devrait statuer sur la validité de l'arbitrage que s'il peut le faire sur la foi des documents et des actes de procédure produits par les parties, sans devoir entendre la preuve ni tirer de conclusions sur la pertinence et la fiabilité de celle-ci. Cela dit, les tribunaux peuvent toujours exercer un certain pouvoir discrétionnaire quant à l'étendue de l'examen qu'ils choisissent de faire lorsque la validité d'une convention d'arbitrage est contestée. Dans certaines circonstances, et en particulier dans celles qui méritent vraiment d'être qualifiées d'« arbitrage commercial international », il peut être plus avantageux que l'arbitre soit saisi en première instance de toutes les questions de compétence. Dans d'autres circonstances, telles qu'en l'espèce où il faut interpréter certaines dispositions du C.c.Q., il semblerait préférable que le tribunal entende au complet la contestation relative à la validité de la convention d'arbitrage. [176] [178]

La convention d'arbitrage en cause ne saurait être opposée à D parce qu'elle constitue une renonciation à la compétence des autorités québécoises au sens de l'art. 3149 C.c.Q. Pour déterminer si l'art. 3149 s'applique, il est nécessaire de se demander si la juridiction choisie dans le contrat au moyen d'une clause d'élection de for ou d'arbitrage est une « autorité québécoise ». Si cette juridiction n'est pas une « autorité québécoise », l'art. 3149 entre en jeu et permet au consommateur ou au travailleur de soumettre son litige à une « autorité québécoise ». La clause d'arbitrage suffit en soi à déclencher l'application de l'art. 3148, al. 2, et par le fait même, de ses exceptions, notamment l'art. 3149. Les clauses d'élection du for et d'arbitrage constituent en soi l'« élément d'extranéité » requis pour que ces règles de droit international privé s'appliquent. Un arbitre consensuel ne saurait être qualifié d'« autorité québécoise » pour l'application de l'art. 3149. Une « autorité québécoise » doit s'entendre du décideur situé au Québec qui tient sa compétence du droit québécois. Aucun arbitre lié par le droit américain ne saurait être qualifié d'« autorité québécoise ». En outre, on pourrait penser qu'une « autorité québécoise » serait tenue d'offrir ses services d'arbitrage en français alors qu'en l'espèce, le code de procédure de l'organisme d'arbitrage américain stipule que tous les arbitrages se dérouleront en anglais. Enfin, il semble tout à fait incongru que le consommateur doive d'abord communiquer avec une institution américaine, située aux États-Unis et responsable de l'organisation de l'arbitrage, afin d'entamer le processus visant à attribuer à la soi-disant « autorité québécoise » la compétence nécessaire pour entendre le litige. [152] [184] [200] [204] [212-216]

The argument that a consumer dispute could never be arbitrated because it would constitute an arbitration over a matter of public order must be rejected. Article 2639 C.C.Q. deals with the kind of disputes that cannot be submitted to arbitration, namely "[d]isputes over the status and capacity of persons, family matters or other matters of public order". A consumer dispute does not constitute another matter of public order. Furthermore, the fact that certain *Consumer Protection Act* rules to be applied by the arbitrator are in the nature of public order does not constitute a bar for the hearing of the case by an arbitral tribunal. Finally, the fact that the *Consumer Protection Act* and the C.C.Q. are silent as to the arbitrability of a consumer dispute suggests its permissibility. An act should only be interpreted as excluding the possibility of arbitration if it is clear from it that this is what the legislator intended. No provisions of the *Consumer Protection Act* or the C.C.Q. indicate that this is the case for consumer disputes. [218-221]

Il faut rejeter l'argument voulant qu'un litige de consommation ne pourrait jamais être soumis à l'arbitrage parce qu'il s'agirait d'un arbitrage sur une question qui intéresse l'ordre public. L'article 2639 C.c.Q. traite du genre de différend qui ne peut être soumis à l'arbitrage, soit le « différend portant sur l'état et la capacité des personnes, sur les matières familiales ou sur les autres questions qui intéressent l'ordre public ». Un litige de consommation ne constitue pas une de ces autres questions qui intéressent l'ordre public. En outre, le fait que certaines des règles de la *Loi sur la protection du consommateur* que l'arbitre devrait appliquer présentent un caractère d'ordre public n'empêche en rien un tribunal arbitral d'instruire l'affaire. Enfin, le silence de la *Loi sur la protection du consommateur* et du C.c.Q. quant à l'arbitrabilité d'un litige de consommation tend à indiquer que l'arbitrage est permis. Aucune loi ne devrait être interprétée comme excluant le recours à l'arbitrage, sauf s'il est clair que telle était l'intention du législateur. Aucune disposition de la *Loi sur la protection du consommateur* ou du C.c.Q. n'indique que c'est le cas des litiges de consommation. [218-221]

The argument that the principle of the autonomy of the parties has no bearing on this case as the arbitration clause is found in a contract of adhesion must also fail as it is based on the false assumption that an adhering party does not truly consent to be bound by the obligations contained in a contract of adhesion. Therefore, it is not sufficient for the respondents to raise the fact that the arbitration clause is found in a contract of adhesion in order to demonstrate that D should not be bound by it. Moreover, an arbitration clause cannot be said to be abusive, and therefore void, only because it is found in a consumer contract or in a contract of adhesion. [227-229]

L'argument voulant que le principe de l'autonomie de la volonté des parties n'a aucune application en l'espèce puisque la clause d'arbitrage figure dans un contrat d'adhésion doit également être rejeté puisqu'il repose sur la fausse hypothèse qu'un adhérent ne consent pas vraiment à être assujetti aux obligations énoncées dans un contrat d'adhésion. Il n'est donc pas suffisant pour les intimés de soulever le fait que la clause d'arbitrage se trouve dans un contrat d'adhésion pour démontrer que D ne devrait pas être lié par elle. En outre, une clause d'arbitrage ne saurait être abusive et, par le fait même, nulle uniquement parce qu'elle se trouve dans un contrat de consommation ou dans un contrat d'adhésion. [227-229]

The arbitration agreement is not null on the ground that it is found in an external clause that was not expressly brought to the attention of D as required under art. 1435 C.C.Q. While the hyperlink to the Terms and Conditions of Sale was in smaller print, located at the bottom of the Configurator Page, this is consistent with industry standards. It can therefore be concluded that the hyperlink was evident to D. Furthermore, the Configurator Page contained a notice that the sale was subject to the Terms and Conditions of Sale, available by hyperlink, thus bringing the Terms and Conditions expressly to D's attention. [152] [238]

La convention d'arbitrage n'est pas nulle parce qu'elle se trouve dans une clause externe qui n'a pas été portée expressément à la connaissance de D, comme l'exige l'art. 1435 C.c.Q. Même si l'hyperlien menant aux conditions de la vente était en petits caractères en plus d'être situé au bas de la page de configuration, cette pratique est conforme aux normes de l'industrie. On peut donc conclure que l'hyperlien était évident pour D. De plus, la page de configuration contenait un avis selon lequel la vente était assujettie aux conditions de vente, accessibles par hyperlien, les portant ainsi expressément à la connaissance de D. [152] [238]

The recent amendment to the *Consumer Protection Act* does not apply to this case as the arbitration agreement was concluded before the new provision came into

Les modifications récentes à la *Loi sur la protection du consommateur* ne s'appliquent pas en l'espèce puisque la convention d'arbitrage a été conclue avant l'entrée

force and the general presumption against retroactivity has not been rebutted. [162]

Cases Cited

By Deschamps J.

Followed: *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666, 2006 SCC 19; **referred to:** *Dominion Bridge Corp. v. Knai*, [1998] R.J.Q. 321; *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, 2003 SCC 17; *Quebecor Printing Memphis Inc. v. Regenair Inc.*, [2001] R.J.Q. 966; *Condominiums Mont St-Sauveur inc. v. Constructions Serge Sauvé ltée*, [1990] R.J.Q. 2783; *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, 2005 SCC 46; *Laurentienne-vie, compagnie d'assurance inc. v. Empire, compagnie d'assurance-vie*, [2000] R.J.Q. 1708; *Fondation M. v. Banque X.*, BGE 122 III 139 (1996); *C.C.I.C. Consultech International v. Silverman*, [1991] R.D.J. 500; *Banque Nationale du Canada v. Premdev inc.*, [1997] Q.J. No. 689 (QL); *Acier Leroux inc. v. Tremblay*, [2004] R.J.Q. 839; *Robertson Building Systems Ltd. v. Constructions de la Source inc.*, [2006] Q.J. No. 3118 (QL), 2006 QCCA 461; *Compagnie nationale algérienne de navigation v. Pegasus Lines Ltd. S.A.*, [1994] Q.J. No. 329 (QL); *Kingsway Financial Services Inc. v. 118997 Canada inc.*, [1999] Q.J. No. 5922 (QL); *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113; *Dalimpex Ltd. v. Janicki* (2003), 228 D.L.R. (4th) 179; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

By Bastarache and LeBel JJ. (dissenting)

Dominion Bridge Corp. v. Knai, [1998] R.J.Q. 321; *Zodiak International Productions Inc. v. Polish People's Republic*, [1983] 1 S.C.R. 529; *Masson v. Thompson*, [1994] R.J.Q. 1032; *Syndicat de Normandin Lumber Ltd. v. The "Angelic Power"*, [1971] F.C. 263; *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, 2003 SCC 17; *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, 2005 SCC 46; *La Sarre (Ville de) v. Gabriel Aubé inc.*, [1992] R.D.J. 273; *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666, 2006 SCC 19; *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1971] S.C.R. 1038; *In re Athlumney*, [1898] 2 Q.B. 547; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271; *Kingsway Financial Services Inc. v. 118997 Canada inc.*, [1999] Q.J. No. 5922 (QL); *World LLC v. Parenteau & Parenteau Int'l Inc.*, [1998] Q.J. No. 736 (QL); *Automobiles Duclos inc. v. Ford du Canada ltée*, [2001] R.J.Q. 173; *Simbol Test Systems Inc. v. Gnubi Communications Inc.*, [2002] Q.J. No.

en vigueur de la nouvelle disposition, et la présomption générale de la non-rétroactivité de la loi n'a pas été réfutée. [162]

Jurisprudence

Citée par la juge Deschamps

Arrêt suivi : *Bisaillon c. Université Concordia*, [2006] 1 R.C.S. 666, 2006 CSC 19; **arrêts mentionnés :** *Dominion Bridge Corp. c. Knai*, [1998] R.J.Q. 321; *Desputeaux c. Éditions Chouette (1987) inc.*, [2003] 1 R.C.S. 178, 2003 CSC 17; *Quebecor Printing Memphis Inc. c. Regenair Inc.*, [2001] R.J.Q. 966; *Condominiums Mont St-Sauveur inc. c. Constructions Serge Sauvé ltée*, [1990] R.J.Q. 2783; *GreCon Dimter inc. c. J.R. Normand inc.*, [2005] 2 R.C.S. 401, 2005 CSC 46; *Laurentienne-vie, compagnie d'assurance inc. c. Empire, compagnie d'assurance-vie*, [2000] R.J.Q. 1708; *Fondation M. c. Banque X.*, BGE 122 III 139 (1996); *C.C.I.C. Consultech International c. Silverman*, [1991] R.D.J. 500; *Banque Nationale du Canada c. Premdev inc.*, [1997] A.Q. nº 689 (QL); *Acier Leroux inc. c. Tremblay*, [2004] R.J.Q. 839; *Robertson Building Systems Ltd. c. Constructions de la Source inc.*, [2006] J.Q. nº 3118 (QL), 2006 QCCA 461; *Compagnie nationale algérienne de navigation c. Pegasus Lines Ltd. S.A.*, [1994] A.Q. nº 329 (QL); *Kingsway Financial Services Inc. c. 118997 Canada inc.*, [1999] J.Q. nº 5922 (QL); *Gulf Canada Resources Ltd. c. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113; *Dalimpex Ltd. c. Janicki* (2003), 228 D.L.R. (4th) 179; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712.

Citée par les juges Bastarache et LeBel (dissidents)

Dominion Bridge Corp. c. Knai, [1998] R.J.Q. 321; *Zodiak International Productions Inc. c. Polish People's Republic*, [1983] 1 R.C.S. 529; *Masson c. Thompson*, [1994] R.J.Q. 1032; *Syndicat de Normandin Lumber Ltd. c. Le Navire « Angelic Power »*, [1971] C.F. 263; *Desputeaux c. Éditions Chouette (1987) inc.*, [2003] 1 R.C.S. 178, 2003 CSC 17; *GreCon Dimter inc. c. J.R. Normand inc.*, [2005] 2 R.C.S. 401, 2005 CSC 46; *La Sarre (Ville de) c. Gabriel Aubé inc.*, [1992] R.D.J. 273; *Bisaillon c. Université Concordia*, [2006] 1 R.C.S. 666, 2006 CSC 19; *Banque Royale du Canada c. Concrete Column Clamps (1961) Ltd.*, [1971] R.C.S. 1038; *In re Athlumney*, [1898] 2 Q.B. 547; *Gustavson Drilling (1964) Ltd. c. Ministre du Revenu national*, [1977] 1 R.C.S. 271; *Kingsway Financial Services Inc. c. 118997 Canada inc.*, [1999] J.Q. nº 5922 (QL); *World LLC c. Parenteau & Parenteau Int'l Inc.*, [1998] A.Q. nº 736 (QL); *Automobiles Duclos inc. c. Ford du Canada ltée*, [2001] R.J.Q. 173; *Simbol Test Systems Inc. c. Gnubi Communications Inc.*, [2002] J.Q. nº 437 (QL); *Sonox*

Moreover, the Union's argument that the class action is a matter of public order that may not be submitted to arbitration has lost its force as a result of this Court's decision in *Desputeaux*. In that case, one of the parties had invoked the same provision, art. 2639 C.C.Q., to argue that the dispute over ownership of the copyright in a fictitious character, Caillou, was a question of public order that could not be submitted to arbitration. The Court held that the concept of public order referred to in art. 2639 C.C.Q. must be interpreted narrowly and is limited to matters analogous to those enumerated in that provision: paras. 53-55. In the case at bar, neither Mr. Dumoulin's hypothetical individual action nor the class action is a dispute over the status and capacity of persons, family law matters or analogous matters.

Par ailleurs, l'argument de l'Union suivant lequel le recours collectif est une question intéressant l'ordre public qui ne peut être assujettie à l'arbitrage a perdu de sa force à la suite de l'arrêt de notre Cour dans *Desputeaux*. Dans cette affaire, l'une des parties avait invoqué le même art. 2639 C.c.Q. pour soutenir que le différend portant sur la propriété des droits d'auteur liés au personnage fictif Caillou était une question intéressant l'ordre public, qui ne pouvait donc être soumise à l'arbitrage. La Cour a affirmé que la notion d'ordre public comprise à l'art. 2639 C.c.Q. devait recevoir une interprétation restrictive et se limitait aux seules matières analogues à celles énumérées à cette disposition : par. 53-55. En l'espèce, ni l'hypothétique action individuelle de M. Dumoulin, ni la procédure de recours collectif ne sont des différends portant sur l'état et la capacité des personnes, sur les matières familiales ou encore sur des matières analogues.

109

Consequently, the Union's argument relating to the public order nature of the class action must fail. I must now rule on the application of Bill 48, which came into force after this appeal was heard.

Par conséquent, l'argument de l'Union relatif au caractère d'ordre public de la procédure de recours collectif ne peut être retenu. Il reste maintenant à statuer sur la question de l'application de la Loi 48, laquelle est entrée en vigueur après l'audition du présent pourvoi.

110

8. Application of the *Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts*

8. Application de la *Loi modifiant la Loi sur la protection du consommateur et la Loi sur le recouvrement de certaines créances*

Bill 48 was enacted on December 14, 2006 (S.Q. 2006, c. 56). It introduces a number of measures, only one of which is relevant to the case at bar: the addition to the *Consumer Protection Act* of a provision on arbitration clauses. This provision reads as follows:

La Loi 48 a été adoptée le 14 décembre 2006 (L.Q. 2006, ch. 56). Cette loi comporte plusieurs mesures, dont une seule est pertinente en l'espèce. Il s'agit de celle qui ajoute à la *Loi sur la protection du consommateur* une disposition régissant les stipulations d'arbitrage. Cette disposition est rédigée ainsi :

111

2. The Act is amended by inserting the following section after section 11:

"**11.1.** Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.

2. Cette loi est modifiée par l'insertion, après l'article 11, du suivant :

« **11.1.** Est interdite la stipulation ayant pour effet soit d'imposer au consommateur l'obligation de soumettre un litige éventuel à l'arbitrage, soit de restreindre son droit d'ester en justice, notamment en lui interdisant d'exercer un recours collectif, soit de le priver du droit d'être membre d'un groupe visé par un tel recours.

If a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration."

The question that arises is whether this new provision applies to the facts of the instant case.

112 Pursuant to s. 18 of Bill 48, s. 2 came into force on December 14, 2006. Section 18 reads as follows:

18. The provisions of this Act come into force on 14 December 2006, except section 1, which comes into force on 1 April 2007, and sections 3, 5, 9 and 10, which come into force on the date or dates to be set by the Government, but not later than 15 December 2007.

Bill 48 has only one transitional provision, s. 17, which provides that the new ss. 54.8 to 54.16 of the *Consumer Protection Act* do not apply to contracts entered into before the coming into force of the Bill. The instant case is not one in which s. 17 is applicable. However, if ss. 17 and 18 are read together, it would seem at first glance that, aside from the provisions referred to in s. 17, Bill 48 applies to contracts entered into before its coming into force. Is this true? And is Bill 48 applicable in the case at bar?

113 Professor P.-A. Côté writes in *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 169, that "retroactive operation of a statute is highly exceptional, whereas prospective operation is the rule". He adds that "[a] statute has immediate effect when it applies to a legal situation that is ongoing at the moment of its commencement: the new statute governs the future developments of this situation" (p. 152). A legal situation is ongoing if the facts or effects are occurring at the time the law is being modified (p. 153). A statute of immediate effect can therefore modify the future effects of a fact that occurred before the statute came into force without affecting the prior legal situation of that fact.

114 To make it clear what is meant by an ongoing situation and one whose facts and effects have occurred in their entirety, it will be helpful to consider the example of the obligation to warrant against latent

Le consommateur peut, s'il survient un litige après la conclusion du contrat, convenir alors de soumettre ce litige à l'arbitrage. »

La question qui se pose est de savoir si cette nouvelle disposition s'applique aux faits de l'espèce.

Par l'effet de l'art. 18 de la Loi 48, l'art. 2 est entré en vigueur le 14 décembre 2006. Voici le texte de l'art. 18 :

18. La présente loi entre en vigueur le 14 décembre 2006, à l'exception de l'article 1, qui entrera en vigueur le 1er avril 2007, et des articles 3, 5, 9 et 10, qui entreront en vigueur à la date ou aux dates fixées par le gouvernement, mais au plus tard le 15 décembre 2007.

La Loi 48 comporte une seule disposition transitoire, l'art. 17, lequel prévoit que les contrats conclus avant l'entrée en vigueur de la loi sont exclus de l'application des nouveaux art. 54.8 à 54.16 de la *Loi sur la protection du consommateur*. Ce n'est pas le cas en l'espèce. Cependant si l'on fait une lecture corrélative des art. 17 et 18, il semble à première vue que, sauf les dispositions visées à l'art. 17, la Loi 48 s'applique aux contrats conclus avant son entrée en vigueur. Est-ce le cas? Et qu'en est-il de l'application de la Loi 48 à l'instance en cours?

Comme l'a écrit le professeur P.-A. Côté, *Interprétation des lois* (3e éd. 1999), p. 213, « l'effet de la loi dans le passé est tout à fait exceptionnel, alors que l'effet immédiat dans le présent est normal ». « Il y a effet immédiat de la loi nouvelle lorsque celle-ci s'applique à l'égard d'une situation juridique en cours au moment où elle prend effet : la loi nouvelle gouvernera alors le déroulement futur de cette situation » (p. 191). Une situation juridique est en cours lorsque les faits ou les effets sont en cours de déroulement au moment de la modification du droit (p. 192). Une loi d'application immédiate peut donc modifier les effets à venir d'un fait survenu avant l'entrée en vigueur de cette loi, sans remettre en cause le régime juridique antérieur en vigueur lorsque ce fait est survenu.

Pour aider à bien comprendre ce qu'est une situation en cours et une situation entièrement survenue, il est utile de reprendre l'exemple de l'obligation de garantie contre les vices cachés utilisée par les

defects cited by professors P.-A. Côté and D. Jutras in *Le droit transitoire civil: Sources annotées* (loose-leaf), at p. 2-36. This obligation comes into existence upon the conclusion of the sale, but the warranty clause does not produce tangible effects unless a problem arises with the property sold. The warranty comes into play either when the vendor is put in default or when a claim is made. Once all the effects of the warranty have occurred, the situation is no longer ongoing and the new legislation will not apply to the situation unless it is retroactive.

professeurs P.-A. Côté et D. Jutras, *Le droit transitoire civil : Sources annotées* (feuilles mobiles), p. 2-36. L'obligation de garantie existe dès la conclusion de la vente, mais la stipulation de garantie ne produit d'effets concrets que lorsqu'un problème relié au bien vendu se manifeste. La garantie entre en action soit lors de la mise en demeure, soit lors de la réclamation. Lorsque les effets de la garantie se sont entièrement produits, il ne s'agit plus d'une situation en cours et la loi nouvelle ne s'applique pas à cette situation à moins que cette loi ne soit rétroactive.

Can the facts of the case at bar be characterized as those of an ongoing legal situation? If they can, the new legislation applies. If all the effects of the situation have occurred, the new legislation will not apply to the facts.

115 Les faits de l'espèce peuvent-ils être qualifiés de situation juridique en cours? Si c'est le cas, la loi nouvelle s'applique. Si la situation est entièrement survenue, la loi nouvelle ne s'appliquera pas aux faits.

The only condition for application of Dell's arbitration clause is that a claim against Dell, or a dispute or controversy between the customer and Dell, must arise (clause 13C of the Terms and Conditions of Sale). All the facts of the legal situation had therefore occurred once Mr. Dumoulin notified Dell of his claim. Thus, all the facts giving rise to the application of the binding arbitration clause had occurred in their entirety before Bill 48 came into force.

116 La seule condition de mise en œuvre de la clause d'arbitrage de Dell est la naissance d'une réclamation, d'un conflit ou d'une controverse contre Dell (clause 13C des Conditions de vente). La situation juridique est donc entièrement survenue lorsque M. Dumoulin a communiqué sa réclamation à Dell. Ainsi, tous les faits donnant lieu à l'application de la clause d'arbitrage obligatoire se sont entièrement produits avant l'entrée en vigueur de la Loi 48.

Since there is nothing in Bill 48 that might lead to the conclusion that it applies retroactively, there is no reason to give it such a scope.

117 Comme la Loi 48 ne comporte aucune indication permettant de conclure qu'elle s'applique de façon rétroactive, il n'y a pas lieu de lui donner une telle portée.

Moreover, to interpret Bill 48 as having retroactive effect would be problematic. First, retroactive operation is exceptional: Côté, at pp. 114-15; R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 553-54. Where a law is ambiguous and admits of two possible interpretations, an interpretation according to which it does not have retroactive effect will be preferred: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 742-45.

118 D'ailleurs, une interprétation rétroactive de la Loi 48 serait problématique. Premièrement, la rétroactivité demeure l'exception : Côté, p. 142-143; R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 553-554. Dans la mesure où une loi est ambiguë et donne lieu à deux interprétations possibles, on favorisera une interprétation non rétroactive de la loi : *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712, p. 742-745.

Second, I find it highly unlikely that the legislature intended that s. 2 should apply to *all* arbitration

119 Deuxièmement, il m'apparaît fort improbable que le législateur ait voulu que l'art. 2 s'applique

clauses in force before December 14, 2006. For example, neither a consumer who is a party to an arbitration that is under way nor a consumer whose claims have already been rejected by an arbitrator should be able to rely on s. 2 and argue that the arbitration clause binding him or her and the merchant is invalid in order to request a stay of proceedings or to have the unfavourable arbitration award set aside. Failing a clear indication to the contrary, when a dispute is submitted for a decision, the decision maker must apply the law as it stands at the time the facts giving rise to the right occurred.

120 I accordingly conclude that since the facts triggering the application of the arbitration clause had already occurred before s. 2 of Bill 48 came into force, this provision does not apply to the facts of the case at bar.

9. Disposition

121 For these reasons, I would allow the appeal, reverse the Court of Appeal's judgment, refer Mr. Dumoulin's claim to arbitration and dismiss the motion for authorization to institute a class action, with costs.

The reasons of Bastarache, LeBel and Fish JJ. were delivered by

BASTARACHE AND LEBEL JJ. (dissenting) —

I. Introduction

122 In this appeal, our Court must decide whether an arbitration clause in an Internet consumer contract bars access to a class action procedure in the province of Quebec. For the reasons which follow, we hold that the clause at issue is of no effect and cannot be set up against the consumer who seeks the authorization to initiate a class action. As a result, we would dismiss the appeal.

à *toutes* les clauses d'arbitrage en vigueur avant le 14 décembre 2006. Par exemple, un consommateur qui serait partie à un arbitrage en cours ou même un consommateur dont les prétentions n'auraient pas été retenues par l'arbitre ne devrait pas être fondé à invoquer l'art. 2 et à prétendre que la clause d'arbitrage le liant au commerçant est invalide, et ainsi à réclamer l'arrêt de l'instance ou obtenir l'annulation de la sentence arbitrale qui lui serait défavorable. À moins d'indication claire à l'effet contraire, lorsqu'un litige est soumis pour décision, le décideur doit se reporter à la loi en vigueur au moment où les faits générateurs de droit se sont produits.

Par conséquent, j'arrive à la conclusion que, comme les faits entraînant la mise en œuvre de la clause d'arbitrage s'étaient déjà produits avant la date d'entrée en vigueur de l'art. 2 de la Loi 48, cette disposition ne s'applique pas aux faits de l'espèce.

9. Dispositif

Pour ces motifs, je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel, de renvoyer la demande de M. Dumoulin à l'arbitrage et de rejeter la requête pour autorisation d'exercer un recours collectif, le tout avec dépens.

Version française des motifs des juges Bastarache, LeBel et Fish rendus par

LES JUGES BASTARACHE ET LEBEL (dissidents) —

I. Introduction

Dans le présent pourvoi, notre Cour doit décider si une clause d'arbitrage contenue dans un contrat de consommation électronique fait obstacle à l'exercice d'un recours collectif dans la province de Québec. Pour les motifs qui suivent, nous concluons que la clause en litige est inopérante et inopposable au consommateur sollicitant l'autorisation d'exercer un recours collectif. En conséquence, nous sommes d'avis de rejeter le pourvoi.

Round v. MacDonald, Dettwiler and Associates Ltd., 2012 BCCA 456 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Round v. MacDonald, Dettwiler and Associate s Ltd.,* 2012 BCCA 456

Date: 20121102
Docket: CA039489

Between:

Lesley Round

Appellant
(Petitioner)

And

MacDonald, Dettwiler and Associates Ltd., Daniel Friedmann, Magued Iskander, Peter Louis, Robert Phillips, Terrance W. Piche, Marshall Prentice, Gordon D. Thiessen, Martin Willard, and Anil Wirasekara

Resopndents
(Respondents)

Before: The Honourable Mr. Justice Low
The Honourable Mr. Justice Groberman
The Honourable Madam Justice A. MacKenzie

On appeal from Supreme Court of British Columbia, October 21, 2011
(*Round v. MacDonald, Dettwiler and Associates Ltd.*, 2011 BCSC 1416 (CanLII),
Victoria Registry 10-4687

Oral Reasons for Judgment

Counsel for the Appellant:	E.F.A. Merchant, Q.C. A.A. Tibbs
Counsel for the Respondent:	R.S. Anderson, Q.C. T.M. Tomchak N.T. Hooge
Place and Date of Hearing:	Vancouver, British Columbia November 2, 2012
Place and Date of Judgment:	Vancouver, British Columbia November 2, 2012

[1] **A. MACKENZIE J.A.**: This is an appeal from an order of a Supreme Court chambers judge dismissing the appellant, Lesley Round's, application pursuant to Part 16.1 of the *Securities Act*, R.S.B.C. 1996, c. 418 (the "*Act*") for leave to commence an action for damages for misrepresentation of material facts and failure to disclose material changes.

[2] As the chambers judge noted, these new statutory causes of action came into force in British Columbia on July 4, 2008, and were created in favour of "a person who acquires or disposes" of shares during the period between the breach and its correction. The statutory causes of action form part of the secondary market liability provisions of the *Act*. The secondary market is the market in a company's shares after the shares have been issued or distributed by the company and are trading publicly.

[3] The legislation requires that an intended plaintiff obtain leave of the court before a secondary market liability claim can be commenced. She must establish the claim is brought in good faith and there is a "reasonable possibility" that if leave is granted, the claim will be resolved in her favour at trial (section 140.8(2) of the *Act*).

[4] The chambers judge dismissed the application on two essential grounds. Specifically, he found there was no possibility Ms. Round could succeed at trial because 1) the material facts upon which Ms. Round relied all occurred before the statutory cause of action in Part 16.1 of the *Act* existed and the legislation does not apply retrospectively; and 2) Ms. Round has no cause of action because she did not acquire or dispose of her shares on the secondary market, but instead acquired the shares from MDA's treasury through her voluntary participation in an Employee Share Purchase Plan.

[5] For the reasons that follow, I find the chambers judge was correct on both grounds: Part 16.1 does not apply retrospectively, and Ms. Round did not meet the statutorily required condition of having acquired or disposed of her shares on the secondary market. Therefore, I find the judge properly exercised his discretion to refuse leave to commence the proposed action. Accordingly, I would dismiss this appeal.

[6] Furthermore, I would not interfere with the exercise of the judge's discretion in awarding costs to the Respondents.

Background Facts

[7] Between October 2002 and December 2008, Ms. Round worked for the respondent company, MacDonald, Dettwiler and Associates Ltd. ("MDA"). During this time, she received an entitlement to a total of 195 common shares of MDA under a voluntary Employee Share Purchase Plan. Under this plan, automatic payroll deductions were made on a monthly basis, the funds accumulated in the employee's account, and the administrator of the plan periodically bought shares from MDA's treasury. The shares were held by the administrator until the employee withdrew them.

[8] During three periods in 2008 – January 1 to January 8, April 8 to April 10, and May 8 to May 12 – no shares were allotted to Ms. Round's employee account. In December 2008, Ms. Round filed an election to withdraw shares from her employee account. These shares were delivered to her and there is no evidence she disposed of them.

[9] On November 17, 2010, Ms. Round sought leave by petition in the Supreme Court to begin a secondary market liability claim under Part 16.1 of the *Act* against MDA and certain directors, officers, and employees of MDA (collectively, the "Respondents"). Ms. Round alleged that MDA had failed to disclose and misrepresented facts about a proposed sale of one of its divisions to Alliant Techsystems Inc. ("ATK"). Specifically, Ms. Round alleged that MDA wrongfully failed to disclose the fact that it was in negotiation before the sale to sell a division, and the fact that the sale was subject to approval by the Minister under the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.).

[10] Ms. Round also alleged that MDA misrepresented the status of the agreement. Ultimately, on May 9, 2008, the Minister responsible for administering the *Investment Canada Act* refused to approve the sale. Ms. Round further alleged that MDA failed to make timely disclosure of the Minister's decisions, as MDA did not disclose the conditional refusal dated April 8, 2008, until April 10, 2008, and did not disclose the final rejection of the sale by the Minister on May 9, 2008, until May 12, 2008.

[11] Ms. Round intended to bring a class action if she were granted leave under Part 16.1 of the *Act*.

Chambers Judgment

[12] The chambers judge refused Ms. Round's application for leave to commence the proposed action under Part 16.1 of the *Act* for several reasons.

[13] First, the judge found that Part 16.1 of the *Act* came into force after the alleged misrepresentations and failures to disclose and it does not have retroactive application. The judge noted that Part 16. 1 of the *Act* came into force on July 4, 2008, and all the events material to the existence of a cause of action and their legal consequences were complete by no later than May 23, 2008, when the price of MDA shares traded higher than immediately before the Minister announced his final decision to reject the sale transaction.

[14] The judge further held statutes are presumed to apply prospectively and there is nothing in the *Act* to indicate the Legislature intended the statutory causes of action to operate retroactively.

[15] Ms. Round argued that MDA's non-disclosure and misrepresentations were not completed by July 4, 2008. She submitted that MDA had failed to make a filing with SEDAR by July 4, 2008, and the events were therefore ongoing after the date the *Act* came into force. In rejecting this argument, the judge held MDA's news release, issued on May 9, 2008, was sufficient disclosure to the public to comply with MDA's substantive disclosure obligations. Furthermore, the critical fact that the Minister had rejected the proposed sale was filed with SEDAR before July 4, 2008. The judge also held that even if MDA was technically in breach of an obligation to file a Material Change Report on SEDAR, that breach had no effect on the market price of MDA's shares.

[16] The judge also rejected Ms. Round's argument that she was entitled to rely on parallel secondary market liability provisions in Ontario legislation that was in force at the relevant times, as Ontario law was not pleaded.

[17] Second, the judge held Ms. Round did not have a right to bring an action under Part 16.1 of the *Act*, as the secondary market liability provisions do not confer a cause of action on a person who acquired shares from a treasury and did not acquire or dispose of the shares on the secondary market.

[18] The judge also rejected Ms. Round's argument that she need not have a personal cause of action in order to be able to advance the claim on behalf of others who do. The judge found that s. 140.3 of the *Act* clearly states that the cause of action resides with "a person who acquires or disposes" of shares during the periods of breach and s. 140.8 of the *Act* stipulates that the Court may only grant leave where it is satisfied that "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff" (emphasis added). The judge held these provisions clearly indicate an action can only be brought by a person who has a personal cause of action.

[19] The judge concluded that these two grounds were sufficient to dispose of the application, as Ms. Round had not demonstrated she would have any prospect of succeeding at trial.

[20] However, the judge went on to address other arguments made by the parties. In response to Ms. Round's argument that the test to be applied on applications for leave under Part 16.1 of the *Act* should be a low threshold, favouring the party seeking leave, the judge made the following comments:

> [72] Much of this argument neglects the plain wording of the statute. It will be recalled, first, that the test for leave involves the court being satisfied that there is "a reasonable possibility that the action will be resolved at trial in favour of the plaintiff": s. 140.8(2)(b). Additionally, section 140.8(3) states:
>
> > Upon an application under this section, the plaintiff and each defendant must serve and file with the court one or more affidavits setting forth the material facts upon which each intends to rely.

> [73] Taken together, several propositions emerge from these sections. First, the leave application involves a review of evidence. Each side is required to provide evidence of material facts upon which each intends to rely. Secondly, the analysis must involve a weighing and balancing of the evidence of each side. It is not sufficient for the court simply to rely on material filed by the plaintiff. Thirdly, the test involves an assessment of the merits of the proposed action on the evidence. The court must analyze the evidence to decide whether it is satisfied that the "reasonable possibility" test is satisfied. ...

[21] The judge rejected Ms. Round's argument that the bar for granting leave should be set lower than the test on certification for a class action. The judge held that the test for granting leave is distinct from the test involved in the certification of class actions; unlike the test for leave, the test for certifying class actions is not a merits test and the court does not analyze or weigh the likelihood of success at trial in deciding whether to certify the action.

[22] The judge also dismissed Ms. Round's argument that s. 140.8(3) of the *Act* requires each respondent to swear, file, and serve a personal affidavit and if the respondents fail to do so, leave should be automatically granted. The judge held that s. 140.8(3) only requires each party to file evidence, in affidavit form, of material facts on which it intends to rely. It does not require each defendant to swear his or her own affidavit.

[23] Finally, the judge held, apart from the issues of the applicability of Part 16.1 of the *Act* and Ms. Round's right to bring this action, the evidence did not demonstrate that Ms. Round had any prospect of succeeding at trial.

[24] The judge awarded costs to the Respondents on Scale B.

Issues on Appeal

[25] Ms. Round alleges the chambers judge erred by:

1. concluding Ms. Round should not automatically have been granted leave to proceed against the nine defendants who failed to file evidence, as required by s. 140.8(3) of the *Act*;
2. concluding Ms. Round does not have a reasonable possibility of succeeding at trial; and
3. awarding costs to the respondents.

Discussion

[26] I will first address Ms. Round's application to adduce fresh evidence, and then address Ms. Round's second ground of appeal.

Application to adduce fresh evidence

[27] Ms. Round seeks an order, pursuant to Rule 31(1) of the *Court of Appeal Rules*, for leave to adduce further evidence. Specifically, she seeks to adduce the Affidavit of Dawn Hunter ("Hunter Affidavit"), sworn October 11, 2011, and the Affidavit of Lesley Round ("Round Affidavit"), sworn February 3, 2012.

[28] The test for the admissibility of fresh evidence is set out in *R. v. Palmer*, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759 at 775-76:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief;
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[29] Ms. Round says the fresh evidence consists of information which has always been known to the Respondents. She submits that the information contained in the Hunter Affidavit was not known to her until days before Mr. Justice Harris released his decision and she did not recognize the significance of the information contained in the Round Affidavit until after the release of Harris J.'s decision.

[30] Ms. Round urges the Court to consider that nine of the ten Respondents failed to file affidavits, therefore hampering Ms. Round's ability to present the true facts of the case. Ms Round says this factor weighs in favour of granting the application for leave to introduce further evidence.

[31] Ms. Round also submits the fresh evidence is very relevant and credible. She says the Hunter Affidavit shows MDA learned that the Minister disallowed the sale transaction a full month before publicly disclosing this material fact. She further says the Round Affidavit demonstrates Ms. Round did in fact "acquire" shares of MDA when she was employed by MDA, contrary to the findings of Harris J.

[32] In my view, Ms. Round has failed to meet the test in *Palmer*. First, the evidence was available at the time Ms. Round made the application before the chambers judge and she has not demonstrated that the proposed evidence could not have been adduced at trial with reasonable due diligence.

[33] Secondly, in my view, the fresh evidence is not relevant to either of the issues upon which, as will be explained, I would dispose of this appeal. The alleged fact that MDA may have learned of the Minister's rejection of the sale transaction earlier is irrelevant if Part 16.1 of the *Act* did not apply at that time. In addition, evidence showing Ms. Round allegedly "acquired" shares during the relevant time period is

irrelevant, as a cause of action only arises under Part 16.1 of the *Act* if the shares were acquired on the secondary market.

[34] Accordingly, I would dismiss the application to adduce fresh evidence.

Reasonable Possibility of Succeeding at Trial

[35] The chambers judge held there was no reasonable possibility of Ms. Round succeeding at trial because 1) the relevant events occurred before the statutory cause of action in Part 16.1 of the *Act* existed and the legislation does not apply retrospectively, and 2) Ms. Round has no cause of action, as she did not acquire or dispose of her shares on the secondary market.

Issue 1: Retroactivity of Part 16.1 of the Act

[36] In finding that Part 16.1 of the *Act* does not apply to Ms. Round's intended action, the judge stated:

> [34] In my view, the evidence on the record and allegations contained in the intended action demonstrate that all of the events material to the existence of a cause of action had occurred and their legal consequences were complete before the cause of action existed. Certainly, they were completed by no later than May 23, 2008, when the price of MDA shares traded higher than immediately before the Minister announced his final decision to reject the sale transaction. By that date, any alleged misrepresentation or failure to disclose had been corrected and any effect on market price had evaporated and, with it, any continuing claim by any holder of the shares to a loss or damage as a result of the alleged breaches.
>
> [35] I agree with MDA's argument that to apply the civil liability provisions of Part 16.1 to the facts here, all of which predate the creation of the causes of action, would be to give the statute a retroactive or retrospective application. At the time of the events in issue these statutory causes of action did not exist, even if it could be anticipated that they would be brought into force sometime in the future. The proposition that statutes creating a cause of action cannot apply to events before their enactment without having a retroactive effect is sound: Côté, *supra* at 183.
>
> ...
>
> [39] In this case, there is nothing in the legislative scheme that indicates that the Legislature has turned its mind to the effects and benefits of retroactivity and determined that they outweighed the potential for disruption or unfairness.
>
> [40] I conclude, therefore, that the statutory causes of action operate prospectively and not either retroactively or retrospectively.

[37] Ms. Round advances three arguments as to why the judge erred in finding Part 16.1 of the *Act* does not apply to her proposed action.

[38] First, Ms. Round submits Part 16.1 is procedural and therefore applies retrospectively. She points to Part 23.1 of the *Ontario Security Act*, R.S.O. 1990 c. S.5 ("*OAS*"), and contends it is substantially identical to Part 16.1 of the *Act*. Ms. Round says she could have sought relief under Part 23.1 of the *OSA* and argues that the *OSA* creates substantive rights, while Part 16.1 of the *Act* simply provides a procedural scheme to facilitate the enforcement of those rights in British Columbia.

[39] Second, Ms. Round submits Part 16.1 of the *Act* was enacted to protect the public and therefore the presumption against the retroactive application of the statute does not apply. Ms. Round relies on *Brosseau v. The Alberta Securities Commission*, 1989 CanLII 121 (SCC), [1989] 1 S.C.R. 301, for this proposition.

[40] Third, Ms. Round submits her right of action arose after Part 16.1 of the *Act* came into force, as MDA still has not disclosed the Minister's final decision in the manner and at the time required under the *Act*. Ms. Round acknowledges MDA issued a news release on May 9, 2008, but says the news release was not filed, was not authorized by an executive officer, and does not disclose the nature and substance of the material change. She further says MDA contravened the *Act* by failing to file a Material Change Report on SEDAR.

[41] I would not accede to any of Ms. Round's arguments on this issue. The conclusion of the chambers judge on the applicability of the presumption against retroactive application of legislation is supported by the authority he cited that "retroactive operation of a statute is highly exceptional, whereas prospective operation is the rule": Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Scarborough: Carswell, 2000) at 169. See also *Angus v. Sun Alliance Insurance Co.*, [1998] 2 S.C.R. 256 at 262, which both the majority and the dissent endorsed in the recent decision in *R. v. Dineley*, 2012 SCC 58 (CanLII) at paras. 10 and 45. Ms. Round has not identified any error which would form a basis for interfering with the judge's conclusion.

[42] In *Dineley*, Deschamp J., for the majority, at para. 15, also approved the following statement of La Forest J. from *Angus* at 265-266:

> Normally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use. ... Alteration of a "mode" of procedure in the conduct of a defence is a very different thing from the removal of the defence entirely. [Emphasis in original.]

In the present case, the legislation creates a new obligation. It is therefore substantive and does not apply retroactively. *Dineley* makes it clear the real question on retroactivity is whether the legislation creates new consequences for completed acts or imposes new substantive obligations.

[43] The judge also correctly refused to rely on the *OSA*, as Ontario law was not pleaded in the petition; clearly, the Court could not give leave under the BC legislation to bring an action under Ontario legislation.

[44] Ms. Round also appears to raise the Ontario legislation to say the BC legislation does not attach new consequences to completed acts, because the legislation of another jurisdiction already attaches those consequences. This argument has no merit. The question of whether the *Act* is intended to be retroactive cannot depend on the existence of legislation in another jurisdiction. Therefore, even had Ms. Round pleaded the Ontario legislation, it would not have improved her prospects.

[45] Furthermore, I agree with the Respondents that *Brosseau* does not apply in the circumstances. As the Respondents point out, this Court has restricted the scope of *Brosseau*. In *B.C. Hydro & Power Authority v. British Columbia (Environmental Appeal Board)*, 2003 BCCA 436 (CanLII), 17 B.C.L.R. (4th) 210 at paras. 70-71 (overturned on a different point: 2005 SCC 1 (CanLII), [2005] 1 S.C.R. 3), Newbury J.A., stated:

> [70] L'Heureux-Dubé, J. summarized this passage of ***Brosseau*** by saying the presumption applies "only to prejudicial statutes" (p. 318), and that since the statutory amendment under consideration in ***Brosseau*** was "designed to protect the public, the presumption . . . [was] effectively rebutted" (p. 321). As noted by Professor Sullivan (*supra*, 4th ed., at 561), the latter comment of L'Heureux-Dubé J. was, with respect, perhaps misleading: the presumption is not rebutted simply by showing that the purpose of a provision is to protect the public. The emphasis is not on the intention or motivation of the Legislature, but on the consequences attached by the legislation to the past acts or conduct. Moreover, as Mr. Singleton argued, virtually every statute is designed to protect the public or the public interest in some way. Obviously, the ***Waste Management Act*** is intended to do so. But Part 4 clearly does not attach "benevolent consequences" to prior events. It attaches new liabilities to conduct (even conduct expressly authorized under permits issued by the Crown) that previously did not attract liability; and that consequence is "prejudicial" to those affected, though perhaps not "punitive" or "penal".
>
> [Emphasis added.]

[46] As in *B.C. Hydro*, the legislation in this case attaches new liabilities to conduct that previously did not attract liability and therefore imposes prejudicial consequences. The above principle in *BC Hydro* is therefore apt and I would endorse it.

[47] The chambers judge also correctly found MDA fulfilled all its disclosure obligations by May 12, 2008, after it had disclosed the Minister's rejection of the proposed sale in a news release issued on May 9, 2008, and it had disclosed the Minister's rejection in documents that were filed with SEDAR on May 12, 2008. The judge correctly concluded that the news release was sufficient disclosure to the public under the secondary market liability provisions in the *Act*. As the Respondents note, s. 140.3(4) is only available with respect to securities that have been acquired or disposed of before the "subsequent disclosure of the material change"; it does not require subsequent disclosure of the material change in the manner required by the *Act* and therefore "subsequent disclosure" does not require filing a Material Change Report with SEDAR.

[48] Finally, the chambers judge correctly found Ms. Round's cause of action is not ongoing, as no damages were incurred after May 23, 2008, at the latest. The judge found that after May 23, 2008, the market price of MDA shares had rebounded and was higher than before the Minister announced his final decision.

Issue 2: Acquired or Disposed of on the Secondary Market

[49] It was not disputed before the chambers judge that Ms. Round acquired her shares through her participation in the Employee Share Purchase Plan and that those shares were distributed from MDA's treasury. Neither she nor the plan administrator acquired them from the secondary market. In considering whether the secondary market liability provisions in the *Act* applied to Ms. Round's shares, the judge said:

> [58] The question is, therefore, whether the secondary market liability provisions can confer a cause of action on a person who acquired shares from treasury and did not acquire or dispose of them on the secondary market.
>
> [59] MDA argued that a distribution of shares from a company's treasury to an employee is exempt from Part 16.1 (the secondary market liability provisions) if the distribution is voluntary. It is not in dispute that Ms. Round received her entitlement to shares through her voluntary participation in the Employee Share Purchase Plan.
>
> [60] The basis of this argument is that Part 16.1 does not apply to the acquisition of an issuer's security pursuant to a distribution that is exempt from s. 61, unless the acquisition is within a class of prescribed acquisitions: see s. 140.2(b). In other words, the distribution must meet two conditions. It must be exempt from s. 61. If it is exempt, it must also not fall within a class of prescribed acquisitions.
>
> [61] The first question, therefore, is whether this distribution is exempt from s. 61. Section 61 provides that an issuer must not distribute a security unless a prospectus has been filed, unless an exemption applies. A distribution includes: "(a) a trade in a security of an issuer that has not been previously issued": see s. 1(1) definition of "distribution". It is not in dispute that Ms. Round's shares were a distribution within the meaning of this definition.
>
> [62] The next aspect of this question is whether this distribution is exempt from the requirement that a prospectus be filed. Section 2.24 of National Instrument 45-106 Prospectus and Registration Exemptions, B.C. Reg. 269/2005 (now replaced by B.C. Reg. 227/2009) exempts from the prospectus requirement a distribution "by an issuer of its own issue... with an employee... if participation in the distribution is voluntary". This provision applies to Ms. Round's acquisition of her shares. It follows that the distribution of shares to Ms. Round is exempt from s. 61.
>
> [63] The second question is whether, nonetheless, the "acquisition is within a class of prescribed acquisitions". If it were, Part 16.1 would apply. It is clear however that the distribution here does not fall within a class of prescribed acquisitions. The class of "prescribed acquisitions" referred to in s. 140.2 is set out in s. 185.3 of the Securities Rules, B.C. Reg. 194/97. These Rules relate to the resale of securities and takeover bids. The distribution of shares to Ms. Round does not fall within the class of "prescribed acquisitions".

> [64] In the result, the secondary market liability provisions do not apply to confer a cause of action on Ms. Round in respect of the shares she acquired through the Plan.
>
> The judge concluded:
>
> [67] Having acquired her shares as an employee through a voluntary plan from the company's treasury and neither having acquired them from the second market nor having disposed of them there, Ms. Round does not have a cause of action against the intended defendants. She is not a person who in her capacity as a plaintiff can demonstrate a reasonable possibility that the action will be resolved at trial in her favour.

[50] Ms. Round argues the judge erred in finding Ms. Round's shares were a "distribution" within the meaning of s. 140.2(b) of the *Act*. She says her shares do not fall within the definition of "distribution" in s. 1.1 of the *Act*, as there was no evidence the shares had not been "previously issued". Ms. Round also relies on the definition of "treasury shares" in the UK *Companies Act*, 2006, c. 46, to argue treasury shares are issued shares.

[51] I observe that Ms. Round has changed her position from the position she took at the hearing below. As noted by the chambers judge, at para. 61, it was not in dispute that Ms. Round's shares were a distribution within the meaning of the *Act*.

[52] Ms. Round further argues the judge erred in holding this "distribution" was exempt from s. 61 of the *Act*. She says the phrase "Unless exempted under this *Act*" in s. 61 means that any exemptions must be found in the *Act*, without reference to regulations or other sources. As the *Act* itself does not contain any exemptions, Ms. Round submits her shares are not exempt from s. 61, and therefore Part 16.1 applies to her intended action.

[53] Ms. Round's submissions fail to persuade me that the chambers judge made any error in his reasoning as to whether the secondary market liability provisions in the *Act* applied to Ms. Round's shares. In my view, the judge correctly held Ms. Round's shares were a "distribution" within the meaning of the *Act*. As the Respondents point out, the treasury shares were issued by MDA expressly for the voluntary Employee Share Purchase Plan. There is nothing in the evidence to refute the finding that they were issued expressly for this purpose.

[54] Nor would I accede to Ms. Round's argument that any exemptions from s. 61 of the *Act* must be found in the *Act* itself, not in any regulations. As the Respondents point out, s. 33(6) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, provides that "If an enactment refers to a matter 'under' a named or unnamed Act, an Act in that reference includes regulations enacted under the authority of that Act." Thus, the phrase "Unless exempted in this *Act*" in s. 61 of the *Act* refers to exemptions in the *Act* itself and in any regulations enacted under the authority of the *Act*, including National Instrument 45-106.

[55] Finally, Ms. Round argues the judge erred in holding an action under Part 16.1 of the *Act* can only be brought by a person who is properly a plaintiff. Ms. Round

relies on s. 140.9 of the *Act*, which addresses the notice requirements when leave is granted and refers to "A person that has been granted leave to commence an action under s. 140.3" (emphasis added). Ms. Round says the word "person" is broader than the word "plaintiff". The chambers judge correctly disposed of this argument as follows:

> [57] I cannot accede to this latter argument. Section 140.3 of the *Act* is explicit that the cause of action resides with "a person who acquires or disposes" of shares of an issuer during periods of breach. The leave requirement, under s. 140.8, stipulates that the court may only grant leave where it is satisfied that, "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff" (emphasis added). Jointly these provisions make it apparent that an action can only be brought by a person who has a cause of action and is, thereby, properly a plaintiff. If Ms. Round does not personally have a cause of action, leave cannot be granted to start the action.

[56] In summary, it is my view that the chambers judge was correct in finding there was no reasonable possibility of Ms. Round succeeding at trial because the legislation does not apply retroactively to the relevant events and Ms. Round has no cause of action.

[57] This conclusion is sufficient to dispose of the appeal. It is therefore unnecessary to address the arguments that her intended action has a reasonable prospect of success on the merits. I would add, however, that there is no merit to Ms. Round's argument that s. 140.8(3) of the *Act* requires each defendant to swear, file, and serve a personal affidavit and since the respondents failed to do so, leave should automatically have been granted. As the judge said, s. 140.8(3) only requires each party to file evidence, in affidavit form, of material facts on which it intends to rely. It does not require each defendant to swear his or her own affidavit.

Costs

[58] Ms. Round submits the chambers judge erred in awarding costs to the Respondents, as the no-costs regime in s. 37 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*"), governs the award of costs in this case. Ms. Round argues the large cost award defeats the purpose of class proceedings legislation and has a chilling effect upon the willingness of wronged investors to bring meritorious claims, as the risk is far greater than the possible benefit.

[59] The Respondents submit this cost award is not governed by the *CPA* as the no-costs regime in the *CPA* is not engaged before the hearing of the class action certification application. The Respondents also point to Rule 1-2(a) of the *Supreme Court Civil Rules*, which provides that the *Rules* govern every proceeding in the Supreme Court, unless an enactment otherwise provides. As the *Act* is silent on the issue of costs, the regular principles under the *Rules* apply and costs are awarded to the successful party.

[60] The Respondents also say there is no evidence to support the suggestion Ms. Round's counsel has not indemnified Ms. Round. They note that representative plaintiffs in class action proceedings often enter into retainer agreements with class counsel that provide indemnification from adverse costs awards.

[61] I agree with the Respondents' submissions that the no-costs regime in the *CPA* does not apply to these proceedings.

[62] In *Seidel v. TELUS Communications Inc.*, 2009 BCCA 383 (CanLII), 96 B.C.L.R. (4th) 24, the Court said:

> [2] We are of the view that the costs of the appeal should follow the normal course set out in s. 23 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, and be awarded to the appellant, which was successful on the appeal. The action was not certified prior to the stay, and s. 37 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, which provides for a "no costs" regime in respect of certified class actions, had not yet been engaged. The respondent is seeking financial gain on behalf of herself and others in the proposed class, and the issue in the action is not one of consequence to the community as a whole. The action is not properly characterized as public interest litigation: see *Smith v. Canada (Attorney General)*, 2006 BCCA 407 (CanLII), 56 B.C.L.R. (4th) 333.

[63] It follows that the judge properly exercised his discretion by awarding costs to the Respondents. I would not interfere with the award of costs.

Conclusion

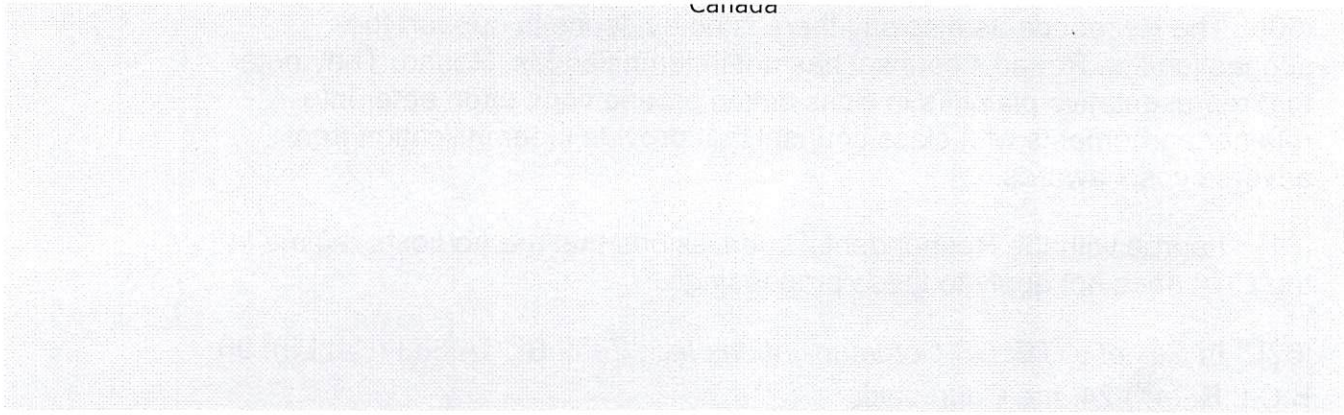
[64] I would dismiss this appeal.

[65] **LOW J.A.**: I agree.

[66] **GROBERMAN J.A.**: I agree.

[67] **LOW J.A.**: The application to adduce fresh evidence is dismissed. The appeal is dismissed.

"The Honourable Madam Justice A. MacKenzie"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