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Our File No.: 05497-0257

November 9, 2017

BY ELECTRONIC FILING

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

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

Dear Sirs/Mesdames:

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

– BCUC Project No. 3698875

Please find enclosed for filing the Reply Argument of FortisBC Inc., dated November 9, 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. Net Metering Reconsideration Application

REPLY ARGUMENT OF FORTISBC INC. – PHASE II RECONSIDERATION
November 9, 2017

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Nicholas T. Hooge

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PART 1 - INTRODUCTION

1. FBC sets out below its reply to the Final Argument filed by Interveners to this proceeding pursuant to the Regulatory Timetable established in Commission Order G-127-17. Capitalized terms used in this Reply Argument have the same meanings as defined in FBC's Final Argument, dated October 12, 2017.

2. FBC continues to rely on the Reconsideration Application (Ex. B-1), its Final Argument, and the evidence submitted in this proceeding as well as in the proceeding for FBC's 2016 NM Application. We have endeavoured to avoid repeating in this Reply Argument submissions that FBC has previously made. To the extent any points made by Interveners in their Final Argument are not specifically addressed in this Reply Argument, they should not be taken as agreed to by FBC.

3. Before describing the positions taken by Interveners in their respective written submissions, we consider it useful to reiterate the scope of this reconsideration proceeding. As the Commission determined in its Phase 1 decision, Order G-76-17, "The scope of the second phase is limited to the issues raised in FBC's Reconsideration Application".[1] FBC's Reconsideration Application raised three issues as a basis for reconsideration and variance of the Commission's 2016 NM Order:

    (a) Whether the Commission panel majority erred in its interpretation of the rights and obligations under RS 95 by determining that FBC cannot remove customers from the NM program that consistently produce annual NEG;[2]

    (b) Whether the Commission panel majority erred in rejecting the kWh Bank proposal;[3] and

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[1] BCUC Order G-76-17, Appendix A, p. 5 (underlining added)
[2] Ex. B-1, para. 2(a) and Part IV
[3] Ex. B-1, para. 2(b) and Part V

(c) Whether the Commission panel majority erred in its determination that retail rates are the appropriate price to compensate NM customers for NEG.[4]

4. The Commission reconsideration panel was persuaded that a *prima facie* case had been made that the panel majority may have erred in respect of each of these issues.[5] The scope of the Phase 2 process and of final argument is limited to these issues pursuant to the Phase 1 order. The Phase 1 order also granted FBC leave to introduce new evidence on the items filed for reconsideration.[6] No Interveners sought leave to file their own new evidence and none were granted leave to do so.

5. The following is a summary of what FBC understands the Interveners' respective positions to be in respect of the Reconsideration Application based on the submitted Final Argument:

(a) ***CEC***

- CEC generally supports the Reconsideration Application and recommends that the Commission approve it as proposed by FBC except with respect to the annual compensation price for NEG.[7]

- CEC submits that FBC should pay the BC Hydro RS 3808 Tranche 1 rate, but discounted by at least 10 percent to reflect the lower value of NM energy to the utility and ratepayers.[8]

(b) ***BCSEA***

- BCSEA supports FBC's adoption of a kWh Bank mechanism as proposed.[9]

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[4] Ex. B-1, para. 2(c) and Part VI
[5] BCUC Order G-76-17, Appendix A, p. 5
[6] BCUC Order G-76-17, para. 3
[7] CEC Final Argument, dated October 26, 2017, para. 3
[8] CEC Final Argument, paras. 4, 47
[9] BCSEA Final Argument, dated October 26, 2017, p. 3 of 8

- BCSEA also supports using the Tranche 1 price from RS 3808 as the price for annual NEG.[10] This was a change from BCSEA's position in the 2016 NM Application process. BCSEA submitted that, in light of the Commission's determination in the 2016 NM Order that the NM program is intended to limit customer generation to unanticipated annual NEG, NM customers' annual NEG cannot be considered firm supply.[11] Accordingly, BCSEA now agrees that the RS 3808 Tranche 1 rate, which is the highest price FBC pays for non-firm energy, is the appropriate price rather than FBC's LRMC.

- BCSEA opposes the concept of removal of existing NM participants from the program due to persistent annual NEG; however, if such removals do occur BCSEA supports in principle the development of options that would provide reasonable compensation for energy delivered by such customers to FBC's electrical system.[12]

(c) ***Mr. Donald Scarlett***

- Mr. Scarlett's Final Argument does not take any clear or specific position on any of the issues raised in the Reconsideration Application.

- Mr. Scarlett's Final Argument is, in counsel's respectful view, almost entirely an *ad hominem* attack that, for example, accuses FBC of "egregious behaviour" and "false claims and intimidation" and describes this Commission process as "an abuse of the public" and "a lawyer-driven travesty".[13] Apart from having nothing to do with the issues raised in this reconsideration proceeding, Mr. Scarlett does not attempt to substantiate his allegations – other than, it would seem, on the basis of FBC pursuing the 2016 NM Application and this Reconsideration Application at all. Of course, both of these regulatory proceedings are regular, transparent Commission processes authorized under

[10] BCSEA Final Argument, p. 5 of 8
[11] *Ibid.*
[12] BCSEA Final Argument, p. 8 of 8
[13] Scarlett Final Argument, dated October 26, 2017, p. 1-3

valid provincial legislation. The Commission has conducted these proceedings in accordance with the requirements of administrative law applicable pursuant to the *UCA*, the *Administrative Tribunals Act*, S.B.C., 2004, c. 45, and the common law Interveners such as Mr. Scarlett have received all applicable procedural rights.

- In any event, FBC has addressed some of Mr. Scarlett's submissions below, to the extent that they have any connection to the issues raised in this Reconsideration Application.

(d) ***Mr. Andy Shadrack***

- Mr. Shadrack's Final Argument contains a variety of submissions that are beyond the scope of this reconsideration process. Mr. Shadrack's Final Argument also makes extensive reference to evidence that he did not seek or obtain leave to file (in fact his Phase 1 submissions indicated he would not be participating further in this proceeding[14]) and which has not been subject to IRs.

- To the extent Mr. Shadrack's submissions are in-scope, FBC understands his main arguments to be as follows. With respect to the kWh Bank proposal, Mr. Shadrack opposes its adoption because he prefers the current dollar credit system based on his particular circumstances.[15] He also argues that the kWh Bank would lessen the potential benefits of time-of-use (**TOU**) rates.[16]

- Mr. Shadrack opposes FBC's proposal to compensate annual NEG at the RS 3808 Tranche 1 rate. He appears to argue that FBC charges him more for the energy he consumes than he receives as a credit for deliveries to FBC. He questions why he should not be able to offset completely the full cost of electrical service though generation he delivers to FBC's system. [17] He also

[14] Ex. C4-1, p. 6
[15] Shadrack Final Argument, dated October 26, 2017, p. 11-12
[16] Shadrack Final Argument, p. 13
[17] Shadrack Final Argument, p. 7

argues that FBC uses the NM program to arbitrage the generation it receives from NM customers and earns a profit margin he calculates, based on current billing practices, at 34.6 percent on the re-sale of this power to other customers.[18] He suggests that he and other NM customers are in fact subsidizing non-participating customers, not the other way around, and that it is not appropriate to reduce annual NEG compensation to $48 per MWh (i.e. the RS 3808 Tranche 1 rate) in these circumstances[19]

- Regarding the issue of eligibility for RS 95, Mr. Shadrack argues that FBC should not be entitled to remove customers for producing consistent annual NEG because, on his reading of the tariff, this is not one of the grounds he "can conceive of" for interrupting service or removal.[20] He also argues that FBC should not be entitled to do so because it did not previously remove a customer whose NM system increased in nameplate capacity and who continued to receive compensation for NEG.[21] He cites the legal principles of promissory estoppel and legitimate expectations in support of this argument.[22]

(e) ***BCOAPO***

- BCOAPO did not file a Final Argument, although it did participate in earlier stages of the reconsideration proceeding. In its Phase 1 Submissions, BCOAPO supported FBC's Reconsideration Application proceeding to Phase 2.[23] BCOAPO's Phase 1 Submissions indicated support for FBC's substantive position on the tariff interpretation issues and the compensation rate for NEG, although they also noted BCOAPO's prior opposition to the kWh Bank in the 2016 NM Application process.[24] In BCOAPO's last filing in this proceeding,

[18] *Ibid.*
[19] Shadrack Final Argument, p. 7, 9
[20] Shadrack Final Argument, p. 15
[21] Shadrack Final Argument, p. 17
[22] *Ibid.*
[23] Ex. C2-1
[24] *Ibid.*

an email from Ms. Leigha Worth to the Commission Secretary, dated September 7, 2017, Ms. Worth stated that, "[A]fter reviewing the Commission Staff and Intervener IR's, BCOAPO has no additional issues to canvass. As a result, we will not be filing IR's and we await FBC's responses with great interest".[25]

- In the absence of BCOAPO filing a Final Argument for Phase 2 of this process, FBC does not consider it appropriate to speculate on what BCOAPO's final position may be on the merits of the issues under reconsideration, in light of the IR responses and the Final Argument FBC subsequently filed. FBC suggests, in these circumstances, that the Commission should consider BCOAPO to have taken no formal position on the issues raised by the Reconsideration Application.

PART 2 - RECONSIDERATION SCOPE ISSUES

6. Mr. Shadrack's Final Argument contains submissions that are outside the scope of the issues approved for reconsideration in Commission Order G-76-17.

7. Pages 1-3 of Mr. Shadrack's Final Argument, under the heading "Setting a Framework for Discussion", contains a description of Mr. Shadrack's household circumstances and a discussion regarding DSM and energy conservation that do not have any clear connection or relevance to the issues in this process.

8. Pages 3-7 of Mr. Shadrack's Final Argument, under the heading "Defining Net Excess Generation" contains submissions concerning the definition or re-definition of NEG. The definition of NEG has not been a topic of discussion in this process to date. In FBC's view, there is little cause for confusion or need to redefine NEG as anything other than as clearly stated in RS 95. There, in the "Definitions" section, it is stated that "Net Excess Generation results when over a billing period, Net Generation exceeds Net Consumption." Mr. Shadrack's submissions on this issue are out-of-scope and will not be addressed further.

[25] Ex. C2-3

PART 3 - FBC REPLY SUBMISSIONS

A. kWh Bank Issues

9. As noted above, both the CEC and BCSEA support FBC's kWh Bank proposal.

10. The CEC's Final Argument states that it "concurs with FBC regarding the merits of a kWh Bank as outlined in their Final Argument and in their original application".[26] The CEC then provides the following helpful summary: "the bank creates less volatility, is cost effective, favourable to the majority of appropriately sized customers, and better reflects the intent of the tariff which is to enable customers to offset electricity purchases, rather than to use FBC resources as a means to profit".[27]

11. BCSEA likewise focuses on the merits of the kWh Bank and outlines a number of reasons that "the kWh Bank is superior to the Dollar Bank" at page 4 of its Final Argument. These reasons are generally consistent with those expressed in FBC's Final Argument at pages 16-20.

12. Mr. Scarlett does not take any clear position in his Final Argument regarding the kWh Bank proposal or provide any substantive argument against its approval.

13. Mr. Shadrack does oppose the adoption of a kWh Bank. However, he does not specifically contest any of the benefits of a kWh banking mechanism as articulated in FBC's Final Argument. In fact, he quite candidly acknowledges that, "The majority of NM customers that our household knows are ready and willing to accept that FBC should be allowed to adopt a kWh bank rather than calculate the $ value of any credit at the various rates customers now pay".[28]

14. Mr. Shadrack's main source of opposition to the proposal appears to be his belief that his household would be better off under the existing dollar credit system based on their own

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[26] CEC Final Argument, para. 21
[27] CEC Final Argument, para. 23 (internal footnotes omitted)
[28] Shadrack Final Argument, p. 11

idiosyncratic circumstances.[29] FBC does not have any particular position or view on Mr. Shadrack's household finances and budgeting practices; however, based on the information he has provided, the kWh Bank would have no negative financial consequence for Mr. Shadrack over the course of a year. His stated preference for the dollar credit system appears to be based only on *increased* bill volatility.

15. FBC structures its rates primarily in accordance with established principles of utility ratemaking, in particular cost of service, and not based on the particular preferences or circumstances of individual customers. The design of the kWh Bank proposal provides potential benefits to the majority of customers that adhere to the NM program's purpose. It is also, in conjunction with a change to the avoided cost rate for annual NEG, the most practical mechanism to mitigate against the inherent subsidy built into the NM program. In FBC's respectful submission, Mr. Shadrack's personal preferences based on his household's individual circumstance should not be determinative.

16. Furthermore, FBC disputes that a customer with Mr. Shadrack's consumption and generation profile is better off financially with the dollar credit system, when a full year of billing is considered or that other customers would share his household's particular preferences on this matter. Using the information Mr. Shadrack has provided in Appendix B of his Final Argument, the billing profile of his premises is as follows:

Billing Period (2017)	February	April	June	August	October
kWh Delivered (to customer)	538	364	445	363	373
kWh Received (from customer)	89	102	334	713	517
Net Excess Generation (NEG)	0	0	0	350	144

17. The total NEG for the first five billing periods of 2017 was therefore 494 kWh (all at Tier 1).

[29] Shadrack Final Argument, p. 11-12

18. Under the current billing calculation methodology, the value of this NEG would be 494 kWh x $0.10117 = $49.98. This dollar amount is credited to the account, reducing the amount payable in subsequent billing periods.

19. Using a kWh Bank, Mr. Shadrack's NEG would carry forward to offset Tier 1 consumption in a future billing period and would have exactly the same value. In fact, for Mr. Shadrack, even if the purchase price for the accumulated annual unused NEG were set at the avoided cost rate, the value would remain the same because in his case it is highly likely that all NEG would go to offset future consumption.

20. For example, if it is assumed that Mr. Shadrack's generation and consumption in December 2017 and February 2018 would be similar to the previous years, the final value of his NEG, and total billing for this period, based on 2017 rates, would appear as in the table below (which shows the current billing practice for the NM program, followed by billing using a kWh Bank):

Consumption/Generation (kWh)							
Billing Period (2017/18)	February	April	June	August	October	December	February
kWh Delivered (to customer)	538	364	445	363	373	542	538
kWh Received (from customer)	89	102	334	713	517	57	89
Net Excess Generation	0	0	0	350	144	0	0
Net Consumption	449	262	111	-350	-144	485	449
Current Billing ($)							
Basic Charge	32.09	32.09	32.09	32.09	32.09	32.09	32.09
Tier 1	45.43	26.51	11.23	-35.41	-14.57	49.07	45.43
Tier 2							
Total	77.52	58.60	43.32	-3.32	17.52	81.16	77.52
Cumulative Total							**$352.31**
Billing with a kWh Bank ($)							
Billed kWh	449	262	111	0	0	0	440
Basic Charge	32.09	32.09	32.09	32.09	32.09	32.09	32.09
Tier 1	45.43	26.51	11.23	0.00	0.00	0.00	44.51
Tier 2							
Total	77.52	58.60	43.32	32.09	32.09	32.09	76.60
Cumulative Total							**$352.31**

21. Under both the existing dollar credit system and using the proposed kWh Bank, the value of Mr. Shadrack's NEG is the same, and the total billing is the same. The difference is that the kWh Bank produces less variability in total bill amounts than the current billing practice. While Mr. Shadrack may express a preference for a situation that would produce pre-tax bills of -$3.32, $17.52, and $81.16 in succession from August through October rather than consistent bill amounts of $32.09 in each of the same three billing periods, FBC does not expect that this preference would be widely shared among customers.

22. Mr. Shadrack's other point about the kWh Bank proposal is that it would eliminate the incentives associated with TOU pricing mechanisms.[30]

23. Mr. Shadrack's argument in this regard does not account for the fact that FBC's kWh Bank proposal in the 2016 NM Application, as it applies to TOU customers, is for NEG to be banked in time differentiated "buckets" based on whether the generation occurs during on-peak or off-peak hours. A TOU customer could then offset on-peak consumption with banked on-peak generation credits in subsequent billing periods (and vice versa for banked off-peak NEG). Appendix A to FBC's 2016 NM Application contains a detailed description of the billing process for TOU customers under the proposed kWh Bank system.[31] The kWh Bank proposal does not, therefore, dis-incentivise TOU customers in the NM program from generating during periods of peak demand nor from reducing consumption during those periods.

24. In addition, most NM customers use solar PV systems that they cannot physically operate at increased generation capacity during peak periods when TOU rates are higher. Self-generation for these customers is inherently limited by the timing and amount of sunlight, so it is unlikely that the pricing incentive associated with TOU rates would actually lead to increased NM generation during peak periods in any event.

25. FBC also notes that its current TOU rate for residential service (RS 2A) values energy at 19.710¢ per kWh. If regular residential retail rates overvalue NEG – and FBC submits that

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[30] Shadrack Final Argument, p. 13
[31] 2016 NM Application, Ex. B-1, App. A, p. 3-4

they do – then under a dollar credit system this TOU rate provides an even higher level of over-compensation, even if it was the case that the energy is generated during peak hours.

26. FBC presently has only a single customer on a TOU rate that is participating in the NM program. The potential impact of a kWh Bank on TOU practices that Mr. Shadrack alleges, and which FBC does not believe would arise for the reasons stated, is not material in any case and could not be empirically determined given the current lack of TOU customers participating in the NM program.

27. For these reasons, in our respectful submission, Mr. Shadrack has not raised any meritorious reason to oppose the kWh Bank proposal. Indeed, CEC's and BCSEA's submissions provide further support for the proposal being adopted and the majority of NM customers that Mr. Shadrack indicates he has contacted are also receptive to the kWh Bank being implemented.

B. NEG Compensation Issues

i. BCSEA/CEC Support RS 3808 Tranche 1 to Compensate Annual NEG

28. FBC's Reconsideration Application seeks orders that would have the effect of approving the implementation of the kWh Bank and setting the BC Hydro RS 3808 Tranche 1 rate as the compensation price for accumulated NEG remaining in a customer's bank at year's end (referred to in this proceeding as "annual NEG").

29. BCSEA supports the use of the RS 3808 Tranche 1 rate as the annual NEG compensation price. BCSEA submits that, because of the Commission's decision on the 2016 NM Application limiting the NM program to self-generation not anticipated to exceed annual consumption, annual NEG cannot be considered firm supply.[32] As such, BCSEA agrees that the RS 3808 Tranche 1 rate is the appropriate reference point for the price of annual NEG as it is the highest price FBC pays for non-firm energy from IPPs.[33]

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[32] BCSEA Final Argument, p. 5 of 8
[33] *Ibid.*

30. CEC agrees with FBC that retail rates are not the appropriate price for annual NEG because they do not reflect the value or usefulness of the NEG resource to FBC and other ratepayers.[34] CEC notes that current retail rates result in FBC purchasing NEG at a price above its average sale price and above its value to the utility; further, NEG is neither firm nor long term and may not be required when delivered to FBC.[35] As FBC could readily acquire more valuable energy from for-profit vendors at lower prices, CEC submits that it is inappropriate for FBC to acquire energy at higher rates "in order to benefit an extremely limited group of customers at the expense of others".[36] Accordingly, CEC recommends that the Commission establish a compensation rate for annual NEG at a discount of at least 10 percent to the RS 3808 Tranche 1 rate.[37]

31. FBC agrees with the sentiment behind CEC's proposal for annual NEG compensation and submits that the points CEC has noted in its Final Argument on this issue have merit. Indeed, FBC's position throughout these proceedings has been that retail rates over-compensate NEG based on its resource value, the current cost of energy, and FBC's existing resource needs and that non-participating customers are subsidizing the NM program. FBC nonetheless maintains its position – consistent with the 2016 NM Application and the Reconsideration Application – that the RS 3808 Tranche 1 rate is the appropriate proxy for short term, non-firm supply and the Commission should approve it as the compensation price for annual NEG.

ii. Mr. Scarlett's Opposition

32. Mr. Scarlett does not take any clear position as to the appropriate compensation rate for NEG or annual NEG in his Final Argument. His only suggestion that bears directly on this issue is that if FBC had any "common sense" in its approach to NM it "would take advantage of the opportunity to resell Net Metering NEG at a fair price (slightly above the regular

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[34] CEC Final Argument, paras. 35-36
[35] CEC Final Argument, para. 37
[36] CEC Final Argument, para. 40
[37] CEC Final Argument, para. 47

retail rate) to environmentally conscious customers who for various reasons can't self-generate – and split the profit fairly between the Company and NEG producers".[38]

33. While this may be "common sense" to Mr. Scarlett, it is directly contrary to both the intent of the NM program as approved by the Commission and to general principles of utility ratemaking based on cost of service.

34. Mr. Scarlett also notes receiving a PowerPoint handout at an FBC open-house in 2009 that stated: "Net Excess Generation (NEG) valued at retail".[39] FBC notes that NM customers will continue to receive retail rates for billing period NEG under the proposed changes. If Mr. Scarlett's submission is that FBC must continue to compensate annual NEG at retail rates as a result, then this submission contradicts his above-noted suggestion that NM customers should receive an additional profit margin through an arbitrage process involving resale of NEG at higher than retail prices.

35. Further, the NEG compensation price is part of a rate schedule, which both FBC's Electric Tariff and the *UCA* make clear is subject to amendment from time to time with the Commission's approval.[40] NM customers are not entitled to greater certainty regarding their electricity rates than any other FBC customer.

iii. Mr. Shadrack's Opposition

36. To the extent Mr. Shadrack's submissions are within the scope of Commission Order G-76-17, his main points in opposition to FBC's proposal appear to be that:

    (a) His household pays more for the energy it consumes than it receives in credits for the generation it transfers to FBC, that FBC is profiting on the resale of NM generation, and, accordingly NM customers are actually subsidizing non-participating FBC ratepayers;[41]

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[38] Scarlett Final Argument, p. 2
[39] Scarlett Final Argument, Appendix A
[40] FBC Electric Tariff, BCUC No. 2, Second Revision TC 17, s. 6.3; *UCA*, ss. 61-63
[41] Shadrack Final Argument, p. 7, 10

(b) That his household (and presumably other NM customers) should be able to offset 100% of the Customer Charge because he is transferring a valued commodity in exchange for the infrastructure costs associated with the Customer Charge (referred to by Mr. Shadrack as the "Basic Charge");[42]

(c) That using the RS 3808 Tranche 1 rate because it is used to compensate energy deliveries from IPPs is inappropriate because NM customers generate a "completely different" kind of power;[43] and

(d) That FBC cannot argue for a NEG value of $48 per MWh while at the same time presenting an LRMC for clean or renewable resources of $100.45 per MWh in the 2016 LTERP.[44]

37. Regarding the first argument described above, we note that Mr. Shadrack relies on new evidence he has filed with his Final Argument that summarizes his household's energy consumption and generation for the period from 2005-2017. Mr. Shadrack did not seek nor obtain leave of the Commission to file new evidence as part of Phase 1 of this reconsideration process. Indeed, his Phase 1 submissions specifically stated that he "would decline to even attempt to participate" further in the proceeding.[45] As a result, his new evidence (which did not include original billing documentation) has not been subject to testing or even clarification through an IR process.

38. FBC nonetheless submits that the new evidence neither supports Mr. Shadrack's arguments nor justifies the use of retail rates to compensate NEG. If the Commission is prepared to consider Mr. Shadrack's new evidence , then FBC provides the following submissions in reply.

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[42] Shadrack Final Argument, p. 7
[43] Shadrack Final Argument, p. 9
[44] Shadrack Final Argument, p. 11
[45] Ex. C4-1, p. 6

39. First, the calculations Mr. Shadrack provides in an attempt to show that he actually pays more for energy received from FBC than the value he receives for NEG are not valid. At the bottom of page 7 of his Final Argument, Mr. Shadrack states that:

> So far in 2017 the value credited to our household for net metered energy is $101.17 per MWh, while we paid $191.52 for .328 MWh of net consumption, which is the equivalent of $583.9 per MWh (Appendix B). If we divide the amount $191.52 by the gross number of MWh purchased from the Company of 2.083, we achieve a $91.94 per MWh value. Thus the net effect of the cost of the current Basic Charge is to nearly neutralize the credit value transfer of some 1.755 MWh of net metered energy [i.e. Mr. Shadrack's cumulative total generation delivered to FBC in 2017; see para. 16, above].
>
> Given that our household, in 2017, has paid somewhere between $91.94 per MWh for the gross amount of energy purchased and $583.90 per MWh for the net amount of energy consumed, while being credited $101.17 per MWh for the energy transferred to the FBC grid, we are hard pressed to understand the claims of the Company that they and other customers are subsidizing our enrollment in the NM Program. We think it might be the other way around, and note that FBC grosses $34.64 on retail of our electricity which is a 34.6% return over purchase price.

40. FBC does not agree with the calculations Mr. Shadrack has provided. For one, it is not appropriate to calculate the value of NEG by dividing the NEG account credits by the energy delivered to FBC (resulting in the $0.10117 per kWh rate), but then to calculate the consumption rate by dividing the total billed amount, inclusive of the NEG credits and Customer Charges, by the net consumption over the period. FBC simply notes that Mr. Shadrack never consumes energy above the Tier 1 threshold and never has excess generation above the Tier 1 threshold. Mr. Shadrack pays the Tier 1 price for all net consumption and in the few instances where he has been a net generator over the course of a billing period his account has been credited at the same Tier 1 rate. It is not possible that FBC has earned a 34 percent profit, or any profit, on these transactions.

41. Mr. Shadrack bases his entire line of argument on the fallacious assumption that comparing the NEG compensation rate, in isolation, to the retail rates paid by residential customers yields a simple margin of profit to FBC. Such a comparison could be done with any of

FBC's power supply resources. It is not done because it ignores the fact that power supply costs are only one of the costs of providing service to customers.

42. As FBC explained in detail to Mr. Shadrack in response to his IRs in this reconsideration process, the rates FBC charges customers are based on the costs of service, including the cost to acquire power and to deliver it.[46] The 13.48¢ per kWh figure (or $134.80 per MWh as expressed in Mr. Shadrack's Final Argument) from which Mr. Shadrack derives his argument that FBC grosses $34.64 per MWh on the resale of his NM energy, represents the entire residential revenue requirement, inclusive of all costs of providing service to customers (not just energy).[47] The 10.11¢ per kWh rate Mr. Shadrack has calculated for his NEG credits, on the other hand, represents the value placed only on the energy FBC effectively purchased from him (the average rate for all NM customers being 12.4¢ per kWh).[48] If this energy was included in FBC's power purchase portfolio, it would be pooled and delivery costs applied on an average basis across the Company's load.[49]

43. Furthermore, in Mr. Shadrack's own calculations later at page 9 of his Written Argument (which FBC does not agree are valid), he expresses FBC's average residential revenue as being divided between "non-electric cost" of $71.31 per MWh and $62.9 per MWh for energy. An apples-to-apples comparison of the $62.9 per MWh figure he calculates for FBC's retail rate of energy and the $101.17 per MWh figure for his household's NEG shows that even his own calculations contradict the position that FBC is arbitraging NM energy at a profit.

44. Mr. Shadrack's calculations and comparisons are without merit, as is his suggestion that his NM system is subsidizing other customers.

45. The reality that NM customers are actually the beneficiaries of a subsidy paid for by other utility customers in a system that ascribes full retail value to NM generation is well

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[46] Response to Shadrack IR 1.1.i (Ex. B-11, p. 1)
[47] Response to Shadrack IR 1.3.i (Ex. B-11, p. 3)
[48] *Ibid.*
[49] Response to Shadrack IR 1.3.ii (Ex. B-11, p. 4)

established. FBC's submissions in this regard are not novel. For example, in its most recent net metering evaluation report, BC Hydro stated that:

> [Greater participation in the Net Metering program] may become a significant issue for BC Hydro, as these partially self-sufficient customers still require energy from BC Hydro on demand. Yet, under our current rate structure, they would not pay their proportionate share of the utility's infrastructure cost as BC Hydro recovers the majority of its fixed demand related costs through the variable energy rate. This means the majority of our infrastructure costs and upgrades may be borne by a declining number of non-participating customers.
>
> This is evidenced in numerous other jurisdictions, such as California, Nevada, Arizona, and Hawaii. […][50]

46. This also speaks to Mr. Shadrack's question in his Final Argument as to why his household "should ... only be allowed to offset 55% of the infrastructure costs charged to us and not 100%".[51] While we are unaware of the source of the purported 55 percent limit he expresses in this regard, the broad answer to his question is: because Mr. Shadrack, like all other NM customers, makes extensive use of FBC's electrical system even in circumstances where energy consumption and generation nets to zero (or NEG is produced) in a given month. Customers should not pay $0 while still being connected to FBC's system on a continuous basis, 24 hours a day.

47. Mr. Shadrack also questions using the RS 3808 Tranche 1 rate to compensate annual NEG on the grounds that the NEG FBC receives from NM customers and IPP generation "are two completely different kinds of power".[52] The sole explanation he provides for this statement is that IPP generation requires delivery and is therefore subject to line losses of up to 8 percent, whereas NM power "arrives at the point of re-sale without any accompanying line losses, and unless it is sold outside of the local area network where it is purchased, it never uses FBC's transmission system at all".[53]

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[50] BC Hydro Net Metering Evaluation Report No. 4, pursuant to BCUC Order G-104-14, Directive 6, dated April 26, 2017, p. 25
[51] Shadrack Final Argument, p. 7
[52] Shadrack Final Argument, p. 9
[53] *Ibid.*

48. The flaw in this argument is that it seeks to place a higher price on NEG because it can be consumed locally, but without acknowledging or accounting for the fact that FBC's electricity rates are set on the established postage-stamp basis that applies regardless of customer location.[54] FBC does not expect that Mr. Shadrack, as a resident of Kaslo, BC, would want his electricity rates to include the *actual* delivery and associated infrastructure charges for his energy consumption rather than the pooled average for all of FBC's service territory – but that is the trade-off that is intrinsic to his argument.

49. Finally, the LRMC of clean or renewable resources from FBC's 2016 LTERP that Mr. Shadrack references in his Final Argument is not relevant to the value of annual NEG because NEG is not a long term or a firm resource. The reality is that FBC has sufficient planned and committed resources to meet its customers' needs in the short to medium term and little need for the NEG produced by its NM customers (which is also typically transferred in the summer months when it is of less value to FBC from a system management perspective). The most comparable alternative resources – short-term market purchases or deliveries from IPPs – are also much lower cost.

50. In all of these circumstances, the RS 3808 Tranche 1 rate reflects the appropriate avoided cost of energy at which to value annual NEG. It should not be forgotten that, if the kWh Bank is implemented in conjunction with this compensation price, NM customers will still receive the equivalent of full retail value for monthly NEG that is banked and used to off-set consumption in subsequent billing periods.

C. RS 95 Interpretation and Eligibility Issues

51. The final issue is FBC's asserted right to remove NM customers from the program who, by virtue of producing persistent annual NEG, do not meet the eligibility requirements in RS 95.

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[54] Response to Shadrack IR 1.i (Ex. B-11, p. 1)

52. CEC agrees with FBC's interpretation of RS 95 and submits that "the right of removal is both logical and a standard concept in the electric tariff where customers do not satisfy the eligibility nor the intent of the tariff".[55] CEC further submits that, "the intent of the program has been clear since the outset, the production of persistent annual NEG should be a rare occurrence and could have adverse impacts on the FBC system or its customers".[56] Accordingly, CEC recommends the Commission rescind its 2016 NM Order as requested by FBC in this regard.[57]

53. BCSEA acknowledges that in general a utility has the authority to remove customers from a particular program where they are not in compliance with the program's eligibility criteria.[58] However, with respect to the small number of NM customers that do have the capability to produce annual NEG, BCSEA takes the position, consistent with its submissions in respect of the 2016 NM Application, that they should not be removed from the program and the focus should instead be on the compensation they receive.[59] If removals are to occur, BCSEA supports in principle the development of options, such as FBC's suggestion in its response to BCSEA IR 1.8.3.1, to provide a reasonable level of compensation for the delivery of energy by such customers to the FBC system.[60]

54. There is merit in BCSEA's focus on compensation as the more important issue. From a practical perspective, the right to remove customers from RS 95 for producing persistent annual NEG will have less significance if the Reconsideration Application is allowed on the other issues. If the kWh Bank is approved with annual NEG compensated at the RS3808 Tranche 1 rate, rather than retail, then some of the problems associated with persistent annual NEG – in particular, the extent to which it exacerbates the inherent subsidy in favour of NM customers – will be reduced (although not eliminated).

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[55] CEC Final Argument, para. 13
[56] CEC Final Argument, para. 15
[57] CEC Final Argument., para. 17
[58] BCSEA Final Argument, p. 6
[59] BCSEA Final Argument, p. 6-7
[60] BCSEA Final Argument, p. 8

55. FBC still considers that recognition of the meaning and consequences of the eligibility criteria in RS 95 is important for the reasons expressed in its Final Argument. It is more appropriate for customers that are ineligible due to their persistent annual NEG production to be removed from the NM program and compensated on some other basis for their generation transfers to FBC (like the option FBC has outlined in its response to BCSEA IR 1.8.3.1), rather than to stay in the NM Program. Such customers have more in common with IPPs than they do with regular NM customers that simply offset some or all of their load through self generation. In FBC's submission, it is appropriate that they be treated and compensated more like IPPs.

56. Mr. Scarlett and Mr. Shadrack both make similar arguments against FBC's right to remove customers. In effect, both submit that RS 95 does not express such a right with sufficient clarity to justify its enforcement by FBC.[61] With respect, this is not the standard by which the terms of a legal instrument are interpreted and delineated. Further, neither Mr. Scarlett, nor Mr. Shadrack have addressed the submissions at Part 2.A of FBC's Final Argument, which demonstrate that, properly interpreted, the plain meaning of the words used in RS 95 does support FBC's right to remove.

57. Mr. Shadrack, in addition, argues that FBC's continued service of a NM customer whose system increased in nameplate capacity from 5 kW to 20.5 kW and its continued compensation of this customer's annual NEG precludes the right of removal from being exercised.[62] He cites the legal principles of "promissory estoppel" and "legitimate expectations" in support of this argument.[63]

58. First of all, neither of these legal principles is applicable to the circumstances.

59. Promissory estoppel, among other things, requires (a) a "clear and unequivocal" representation or promise made by the party against whom the estoppel is claimed, and (b) a change in position by the party receiving the representation or promise to that party's

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[61] Scarlett Final Argument, p. 2-3; Shadrack Final Argument, p. 15-16
[62] Shadrack Final Argument, p. 17
[63] *Ibid.*

detriment.[64] FBC has not made a clear and unequivocal promise, or any promise or representation, to the customer referenced in Mr. Shadrack's Final Argument that annual NEG will continue to be compensated indefinitely. Further, this customer did not change position in reliance on anything FBC said or did. The apparent change in nameplate capacity of the NM system was made on this customer's own initiative. For promissory estoppel to apply, FBC would have had to promise this customer it would pay for all of the increased annual NEG production *before* the change in generation capacity was undertaken. That is the only way in which detrimental reliance could be established. However, there is no evidence whatsoever of any such promise or commitment by FBC.

60. "Legitimate expectations" is an administrative law principle. It is part of the doctrine of procedural fairness. It does not create substantive rights, but provides only procedural protections.[65] Accordingly, the "legitimate expectations" principle has no application to a question of rights and obligations under a utility rate schedule. These are matters of substance, not procedure.

61. In addition, FBC stated in its response to Shadrack IR 2.8 in the 2016 NM Application process that it had been unable to locate any paperwork related to this NM customer's increase in generation capacity. In the absence of such visibility, the fact of the increase would have been restricted to FBC's billing staff, who are not involved in the approval of NM systems and would not have been aware of their physical characteristics. It is not reasonable to have expected FBC to take enforcement action against this customer in the circumstances, much less to base a legal interpretation of the tariff provisions on them.

62. The circumstances of an individual NM customer are not determinative of the overall legal interpretation and broad functioning of FBC's Electric Tariff and Rate Schedules. If FBC, on further review, determined that this customer was a persistent annual NEG producer and that the circumstances justified removal from the NM program, then a complaint process would be the appropriate venue in which the Commission could decide whether the specific

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[64] *Ecobase Enterprises Inc. v. Mass Enterprise Inc.*, 2017 BCCA 29, paras. 10, 24
[65] Jones and de Villars, *Principles of Administrative Law*, 6th ed. (2014), p. 304, 306-307

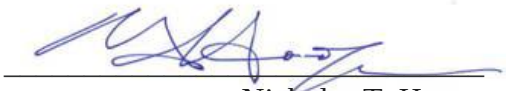
facts or applicable legal principles would, for some reason, preclude FBC from carrying-out the removal from RS 95.

PART 4 - CONCLUSION

63. For the reasons expressed above, and in FBC's Final Argument, FBC submits that the Reconsideration Application should be allowed and the orders described at paragraphs 5-7 of the Final Argument be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 9, 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. Net Metering Reconsideration Application

BOOK OF AUTHORITITES OF FORTISBC INC.

PHASE II RECONSIDERATION - REPLY ARGUMENT
November 9, 2017

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the allegations of professional misconduct are substantial in nature and the penal consequences are severe. The accused person must be able to make informed arguments with respect to penalty if the rules of fair procedure are to be followed. If he cannot do so without first knowing the findings against him, then there must be two hearings to avoid any allegation of prejudice on the part of the tribunal.

(f) Legitimate Expectations

Another issue which arises at the pre-hearing stage is the doctrine of legitimate expectations. The doctrine of legitimate expectations is part of the doctrine of fairness but it does not create substantive rights, only procedural protections. It is based on the principle that "... the 'circumstances' affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights."[180]

In *Baker*, legitimate expectations were listed as the fourth factor affecting the content of the duty of fairness.[181]

> Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Social Pol'y* 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to

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180 *Baker, supra* note 166 at para. 26. See also *Amalorpavanathan v. Ontario (Ministry of Health and Long-term Care)*, 2013 ONSC 5415 (Ont. Div. Ct.).

181 *Ibid.* at para. 26.

Most of these arguments would lead only to procedural relief – a new hearing. But the hospital sought substantive relief – a permit. The Minister argued that none of the grounds advanced entitled the hospital to substantive relief (the permit). In particular, it contended that estoppel could not be used against the Minister.

The Court rejected the hospital's arguments concerning legitimate expectations[185] on the basis that the doctrine can be used to compel only procedural – not substantive – relief. In doing so, the Supreme Court of Canada affirmed certain long-standing authorities including the principles about legitimate expectations established in *Old St. Boniface*.[186] Justice Binnie reiterated that the doctrine of legitimate expectations looks to the conduct of the delegate in the exercise of statutory power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified.[187]

Subsequent to *Mont Sinaï*, cases can be found holding that the concept of legitimate expectation as a part of procedural fairness both has and has not been made out.

(i) Moreau-Bérubé c. Nouveau-Brunswick

Although both of the lower courts[188] in *Moreau-Bérubé c. Nouveau-Brunswick* had held that the principles of natural justice had been breached when the Judicial Council had not put the provincial court judge on notice that it was considering a penalty more severe than the one recommended by the investigative panel, the Supreme Court – surprisingly, in our view – held that the requirements of procedural fairness had been complied with.[189]

After acknowledging that the requirements of procedural fairness applied to the proceedings in question, Madam Justice Arbour noted that no assessment

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185 The majority did, however, rule that the past actions of the government and the successive Ministers amounted to an actual exercise of the Minister's discretionary authority and, therefore, the majority ordered the Minister to issue the modified permit as he had failed to act in accordance with a prior exercise of discretion so the criteria for the issuance of an order of mandamus were met. See Bastarache J.'s decision at paras. 99-100.

186 *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)* (1990), [1991] 2 W.W.R. 145 (S.C.C.) where Sopinka J. stated at 177:

> The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.

187 *Centre hospitalier Mont-Sinaï, supra* note 182 at para. 29.

188 (1999), 218 N.B.R. (2d) 256, 558 A.P.R. 256, 1999 CarswellNB 622, [1999] N.B.J. No. 320 (N.B. Q.B.), affirmed 2000 NBCA 12, 233 N.B.R. (2d) 205, 601 A.P.R. 205, 194 D.L.R. (4th) 664, 2000 CarswellNB 429, [2000] N.B.J. No. 368 (N.B. C.A.), reversed [2002] 1 S.C.R. 249 (S.C.C.).

189 2002 SCC 11, 36 Admin. L.R. (3d) 1 (S.C.C.); see also *Mavi v. Canada (Attorney General)*, 2011 SCC 30 (S.C.C.); *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 (S.C.C.); *Amalorpavanathan v. Ontario (Ministry of Health and Long-term Care)*, 2013 ONSC 5415 (Ont. Div. Ct.).

of the appropriate standard of judicial review was required, beyond "fairness" in the particular situation.[190] She then rejected the argument that the judge had a reasonable expectation[191] that the Judicial Council would not impose a more serious penalty than the recommended reprimand, at least without putting her on specific notice that it was contemplating such a course of action:[192]

> The respondent argues that she had a reasonable expectation that the Council would not impose a penalty more serious than a reprimand for three main reasons:
>
> 1. The inquiry panel had recommended a reprimand, and had found that the respondent was able to continue performing her duties as a Provincial Court judge.
>
> 2. The Council, though it had the discretion to suspend her pending the inquiry's outcome, had allowed the respondent to discharge her judicial function for more than a year following her impugned comments. This, the respondent argues, created an expectation that the Council would proceed on the basis that she was able to continue performing her duties as a judge.
>
> 3. Dismissal had never been expressly contemplated or argued by any person at any level of the inquiry prior to the delivery of that sanction.
>
> Under s. 6.11(3), the respondent had the "right to make representations to [the Council] either in person or through counsel and either orally or in writing, *respecting the [panel's report]* prior to the taking of action by the Judicial Council" (emphasis added). She essentially argues that when the panel recommended something less than removal from the bench, they indirectly took away her ability to argue against that sanction, and that her representations to the Council would have been affected had she known that a recommendation for removal from the bench was being considered.
>
> I am not persuaded by any of these arguments. *The doctrine of reasonable expectations* does not create substantive rights, and does not fetter the discretion of a statutory decision-maker. Rather, it *operates as a component of procedural fairness, and finds application when a party affected by an administrative decision can establish a legitimate*

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190 *Ibid.* at para. 74.

191 In their dissent in *Mackin v. New Brunswick (Minister of Justice)*, [2002] 1 S.C.R. 405 (S.C.C.), LeBel and Binnie JJ. rejected the application of the legitimate expectation doctrine as not being applicable either to substantive rights or legislative bodies, in the context of changes to the method of remunerating supernumerary provincial court judges (paras. 162-163).

192 *Moreau-Bérubé, supra* note 188 at paras. 76-83.

expectation that a certain procedure would be followed: Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at p. 557; Baker, *supra*, at para. 26. *The doctrine can give rise to a right to make representations, a right to be consulted or perhaps, if circumstances require, more extensive procedural rights. But it does not otherwise fetter the discretion of a statutory decision-maker in order to mandate any particular result*: see D. Shapiro, *Legitimate Expectation and its Application to Canadian Immigration Law* (1992), 8 J.L. & Social Pol'y 282, at p. 297.

In the circumstances of this case, I cannot accept that the Council violated Judge Moreau-Bérubé's right to be heard by not expressly informing her that they might impose a sanction clearly open to them under the Act. The doctrine of legitimate expectations can find no application when the claimant is essentially asserting the right to a second chance to avail him- or herself of procedural rights that were always available and provided for by statute... . Regardless of the fact that the panel made a recommendation that it was not mandated to make, the Council had a clear and plain discretion to choose between three options. *I do not believe that the respondent, a judge, who had legal advice throughout, could have misapprehended the issues that were alive before the Judicial Council. She never asserted making such an error until it was raised by Angers J. on judicial review.*

The fact that a recommendation for dismissal was not discussed prior to being issued is also not relevant. The Council has no obligation to remind the respondent to read s. 6.11(4) carefully. While the Council might have opted, as a part of their procedure, to remind Judge Moreau-Bérubé that the Council would not be bound by any recommendations made by the inquiry panel, they chose not to, and that was within their discretion... .

In coming to the conclusions they did, the Court of Appeal and Angers J. relied in particular on *Michaud*, *supra*. I agree with Drapeau J.A. that *Michaud* is distinguishable. In that case, the recommended sanction was a product of a joint submission and the affected person made no representations. By contrast, *Judge Moreau-Bérubé's counsel made arguments before the tribunal to the effect that no reprimand should be administered, contrary to the recommendation of the inquiry panel. This demonstrates that the respondent was well aware that the Council was not bound by the recommendations of the inquiry panel and that it would come to its own independent decision about the sanction that was appropriate in light of the misconduct. She herself was urging the Council to disregard the recommendation of the inquiry panel.*

Ecobase Enterprises Inc. v. Mass Enterprise Inc., 2017 BCCA 29 (CanLII)

Date: 2017-01-20
Docket: CA42199
Citation: Ecobase Enterprises Inc. v. Mass Enterprise Inc., 2017 BCCA 29 (CanLII), <http://canlii.ca/t/gx162>, retrieved on 2017-11-08

COURT OF APPEAL FOR BRITISH COLUMBIA

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

Date: 20170120
Docket: CA42199

Between:

Ecobase Enterprises Inc.

Respondent
(Plaintiff)

And

Mass Enterprise Inc. and Seyed Siamek Mirmohamaddi Tehrani

Appellants
(Defendants)

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

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

Counsel for the Appellants: D.K. Georgetti

Counsel for the Respondent : C.N. Mangan

Place and Date of Hearing:	Vancouver, British Columbia October 7, 2016
Place and Date of Judgment:	Vancouver, British Columbia January 20, 2017

Written Reasons by:
The Honourable Madam Justice Fenlon

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

Summary:

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

Reasons for Judgment of the Honourable Madam Justice Fenlon:

INTRODUCTION

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

BACKGROUND

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

> [2] In August 2008 [the two companies] entered into a "Joint Venture Agreement" to purchase and develop land in New Westminster with each company contributing $150,000. To make its investment Mass borrowed $150,000 from Ecobase.
>
> [3] In a document entitled "addendum to joint venture agreement Promissory note" the $150,000 loan with interest at 10% per annum was agreed to be repaid within a year from August 27, 2008. Seyed Siamek Mirmohamaddi Tehrani ("Mr. Tehrani"), the principal of Mass agreed to give a personal cheque for $165,000 to Ecobase "as a guaranty of the repayment of this account, dated for August 27, 2009". If Mass was not able to repay the loan with interest on August

> 27, 2009, the date of repayment would be extended to February 27, 2010 with interest continuing at 10% per annum. If the February 27, 2010 date for repayment was not met, Mass agreed to transfer its one-half interest in the New Westminster property to Ecobase "at market price and if the property value will be less than its final liability amount (loan + interest), the balance of the loan needs to be paid in cash …".
>
> …
>
> [5] A question arose at the trial about whether the $165,000 "guaranty" cheque was actually given by Mr. Tehrani to Ecobase. In his amended response to civil claim in the Ecobase action, Mr. Tehrani denies he "executed any guaranty of $150,000 loan" but "does admit that he provided a cheque to [Ecobase] in the amount of $165,000 to stand as security for the obligation of Mass to pay this sum of $150,000 to [Ecobase]".

[3] Eventually the joint venture to develop the New Westminster property failed. In February 2010, the parties made a handwritten notation on the joint venture agreement: "this contract is cancelled and void". The appellants took the position that they were no longer required to repay the loan. The trial judge described the dispute this way:

> [6] Mass and Mr. Tehrani allege the debt has been "satisfied in full" by a later agreement whereby Mr. Tehrani would sell 50% of the shares in Jupiter Café Ltd. ("Jupiter") to the principal of Ecobase Mr. Parvaresh for the sum of $250,000. The purchase would be accomplished by Ecobase treating the $150,000 loan as paid in full and the remaining $100,000 "would be paid from profits expected to be earned from the business of Jupiter Café Ltd., failing which $100,000 will be paid by [Mr.] Parvaresh to [Mr.] Tehrani on or before June 29, 2010." The business of Jupiter was a restaurant in Vancouver.
>
> [7] The proposed agreement regarding Jupiter was intended to allow Arman Tehrani ("Arman") and Shervin Parvaresh ("Shervin"), the respective sons of Mr. Tehrani and Mr. Parvaresh, to work together to manage the restaurant. An injection of cash was needed for renovations.
>
> [8] Mr. Parvaresh asked Mr. Tehrani to provide financial records to support a $500,000 value for the restaurant. He was informed that no records existed apart from some "spreadsheets" that had apparently come from the previous owner Mr. Hedayati.

[4] Mr. Parvaresh and Mr. Tehrani exchanged written proposals concerning the sale of a 50 per cent interest in the Jupiter Café to Ecobase. Each also contributed funds to renovate the restaurant. In May 2010, Mr. Parvaresh rejected Mr. Tehrani's proposed terms. He also demanded repayment of the loan relating to the New Westminster property. Mass did not repay the loan. The restaurant continued to lose money and closed its doors in 2011.

AT TRIAL

[5] At trial, Mass raised two defences to Ecobase's claim for recovery of the loan. Primarily, Mass asserted that Ecobase had entered into a binding agreement to purchase an interest in Jupiter—and had forgiven the loan as part of the purchase

price. In the alternative, Mass pleaded that Ecobase was "estopped by its conduct from enforcing its right to repayment of the loan".

[6] The trial judge concluded the parties had not reached an agreement for the purchase and sale of an interest in Jupiter. He then dealt summarily with the alternative defence of estoppel:

> [13] Mass relies on the doctrine of promissory estoppel to preclude Ecobase from enforcing the loan. To rely on this doctrine Mass must point to words or conduct on the part of Ecobase that are unambiguously intended to alter the relationship between the parties such that, Mass would be entitled to treat its obligation to pay the loan to have ended: *Maracle v. Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC), [1991] 2 S.C.R. 50. I cannot find Mr. Parvaresh spoke such words or conducted himself towards Mr. Tehrani to that effect. If there was to be forgiveness of the $150,000 loan, it was contingent on an agreement between Mr. Parvaresh and Mr. Tehrani for the former to purchase shares in Jupiter, and that never happened. In my view the doctrine of promissory estoppel plays no role in this matter.

ON APPEAL

[7] The sole issue on appeal is whether the trial judge's reasons addressing the estoppel defence are sufficient to permit appellate review. The test for sufficiency of reasons is set out in *K.L.K. v. E.J.G.K.*, 2011 BCCA 276 (CanLII):

> [25] The function of reasons in the civil context is to justify and explain the result, to tell the losing party why he or she lost, to provide for informed consideration of the grounds of appeal, and to satisfy the public that justice has been done: *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41.

A failure to give adequate reasons is not a free-standing basis for appeal. Nor can an appellate court intervene merely because it believes the trial judge did a poor job of expressing himself: *F.H. v. McDougall*, 2008 SCC 53 (CanLII) at para. 99.

[8] In *R. v. Walker*, 2008 SCC 34 (CanLII), Binnie J. described the approach to be taken by an appellate court assessing the sufficiency of reasons this way:

> [20] … Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue. …The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confe[r] entitlement to appellate intervention" ([*R. v. Sheppard*, 2002 SCC 26 (CanLII)] para. 53).

[9] Finally, as this Court observed in *Shannon v. Shannon*, 2011 BCCA 397 (CanLII), a decision should not be set aside if the record permits meaningful appellate review:

> [9] It is now settled law that there is no free-standing right of appeal on the adequacy or sufficiency of a judge's reasons. Moreover, even where the logical connection between the evidence and the decision cannot be discerned (i.e., the reasons are objectively inadequate), appellate intervention will not be justified if

the record itself permits meaningful appellate review. This is evident from the comments of Mr. Justice Bastarache and Madam Justice Abella, for the majority of a five-judge panel in *R. v. Gagnon,* 2006 SCC 17 (CanLII), [2006] 1 S.C.R. 621:

> [13] ... Finding an error of law due to insufficient reasons requires two stages of analysis: (1) are the reasons inadequate; (2) if so, do they prevent appellate review? In other words, the Court [in *Sheppard*] concluded that even if the reasons are objectively inadequate, they sometimes do not prevent appellate review because the basis for the verdict is obvious on the face of the record. But if the reasons are both inadequate and inscrutable, a new trial is required. [Emphasis added.]

[10] I turn now to the adequacy of the reasons relating to estoppel in this case. As set out in *Maracle v. Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC), [1991] 2 S.C.R. 50 at 57, a party seeking to rely on promissory estoppel must establish four elements:

1. an existing legal relationship;
2. a promise or assurance made by the other party and intended to affect their legal relationship;
3. reliance on the promise or assurance; and
4. a change in position to the party's detriment.

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

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

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

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

[14] However, Mass acknowledged that it did not rely on this evidence as "a standalone issue" at trial. Mass further acknowledged that because Ecobase denied the

cheque had been returned, the testimony supporting its return was given less emphasis than other uncontested evidence Mass relied on to establish promissory estoppel. Mass says nonetheless that it was an important part of its case and "the judge was invited to make a finding on it".

[15] In my view, the record demonstrates that the return of the cheque was a relatively minor part of the evidence tendered by Mass to establish that Ecobase had promised to forgive the loan. The trial took place over thirteen days. Only a few of the 645 pages of transcribed evidence address return of the cheque.

[16] In cross-examination, Shervin Parvaresh denied that he gave the cheque back to Arman Tehrani:

> Q By February 20th of 2010, I'm going to suggest to you, you had returned the $165,000 cheque that Arman Tehrani had given you. Is that true or untrue?
>
> A That's not true.
>
> * * *
>
> Q Okay. And you have -- well, okay, I got that. In late June and July of 2009, late June or July of 2009, Arman Tehrani asked you to return the cheque that he had given you. And I pause there to say I know you've already told me that he didn't give you a cheque for $165,000. I know that. But I want to put something to you, in any event, all right?
>
> A Okay.
>
> Q I'm going to suggest to you that in -- in June or July of 2009, Mr. Tehrani asked you to return to him the cheque for $165,000 that he had given you earlier with respect to the loan on the New Westminster property. Is that true or untrue?
>
> A That is definitely completely false.
>
> Q Completely false?
>
> A There was no cheque.
>
> Q And I'm going to suggest to you that you returned that cheque to him in Abbas Khalil[i]'s autobody shop in North Vancouver. And Mr. Khalil[i] was present when that occurred. Is that true or untrue?
>
> A That is completely untrue. I don't know the guy, Abbas Khalil[i].
>
> Q And I think your evidence earlier is, and feel free to correct me if I've got this wrong, but your evidence is that with 95 percent certainty, you've never met Mr. Khalil[i] before?
>
> A Yeah, that's true.
>
> Q And you -- and you've never taken your car -- again, with 95 percent certainty, you've never taken your car there to have it fixed?
>
> A Yeah, that's true.

[17] Arman Tehrani's evidence in chief on this issue was as follows:

> Q Okay, you said that you thought that you had a deal.

A Yes.

Q And as part of this deal you said you understood the loan for $150,000 was forgiven?

A Yes.

Q And pursuant to the promissory note, I believe you said that you gave Shervin a personal cheque in the amount of $165,000.

A Yes.

Q Okay. What happened to that cheque?

A I got it back. Shervin gave it back to me.

Q Okay. Can you explain the circumstances around that?

A Yes. Me and Shervin met at Jupiter one day. We took Shervin's car to a repair shop in North Shore to get it repaired and then we went back to Jupiter and several hours later we came back to pick up his car and while we were -- while we were waiting to get his car back, Shervin gave me the cheque.

Q Was anyone else present when he gave you the cheque back?

A Yes.

Q Who?

A The owner of the auto shop --

Q Okay.

A -- which is also my -- used to be my soccer coach.

Q And what's his name?

A Abbas.

Q And his last name?

A Khalili.

Q What did you do with that cheque?

A I destroyed it.

Q Okay. And did you later have a conversation with Mr. Khalili about this?

A Yes.

Q Can you describe that conversation?

A He -- later he asked me what that cheque was when I -- I think I saw him at soccer or somewhere and he asked me what the cheque was, and I told him it was in relation with Jupiter --

[18] Abbas Khalili's evidence in chief was as follows:

Q Okay. Now, I assume that you had a look at Mr. Parvaresh's car?

A They left the car with us in order to examine, and then they left together.

Q And did they later return?

A They came back, yes, later.

Q And when they were in your auto repair shop and in your presence, did you hear a conversation between them?

A They came to my office waiting for the car to be repaired or completed. They were discussing matters relating to the renovation or repairs to Jupiter Café.

* * *

Q And did you make any other observations while this conversation was going on?

A At the time that they were discussing in that -- in my office, I saw a cheque was given by Shervin to Arman, yes.

Q Did you see for how much the cheque was written for, the amount of the cheque?

A I did not.

Q Did you see the date on the cheque?

A I did not.

Q Did you see the signature on the cheque?

A I did not.

Q Did you make any observation of what Mr. Tehrani did with the cheque?

A I was not then aware, but a week later when Arman came for some practice --

Q Just a moment, I'll stop you there. But my question was did you see what Mr. Tehrani, Arman Tehrani did with the cheque that was handed to him by Shervin Parvaresh?

A I did not become aware of anything at the time -- at that time that they were in my office.

Q Did you later have a conversation with Arman Tehrani?

A A week later, during practice, soccer practice. I talked to Arman. I asked him what happened to your -- that matter you were discussing about Jupiter. Arman told me that we have the participated together in that Jupiter Café. And the cheque which was given to me was in respect of -- about a property in which they had previously shared. And participated together.

[19] It is apparent from the materials before us that evidence of the return of the cheque played only a minor role in the appellants' assertion that they could establish a representation by Ecobase. The thrust of the factum is that Ecobase, by its conduct generally, led Mass to believe they had a deal concerning the Jupiter restaurant, which included forgiveness of the loan. The following paragraphs from the appellant's factum are illustrative:

> 43. The appellants submitted at trial that the respondent was estopped from enforcing the Addendum to the Joint Venture Agreement requiring repayment of the Loan because the appellants had relied to their detriment on the representations made by the Parvareshs, by their words and by their conduct, that the Loan was forgiven. The appellants submitted at trial that the conduct of the parties from June

of 2009 until the dispute herein arose is consistent with the conclusion that Arman, Siamak, Raoof and Shervin all believed that they had an agreement on shared ownership of Jupiter and that the Loan had been forgiven.

...

88. Whether or not there was *consensus ad idem* on the terms of an agreement respecting Jupiter, Raoof and Shervin, conducted themselves as though there was such an agreement and the Loan had been forgiven. For the purposes of the estoppel defence, it is irrelevant whether an agreement had in fact been reached. [Emphasis added.]

[20] Mass' allegation that Shervin Parvaresh had returned the cheque was part of a litany of conduct the appellants relied on to establish that Ecobase had made a promise to forgive the loan:

> (a) Raoof's assurance that the Loan was to be forgiven is stated in both versions of the [proposed] agreement (the Parvaresh Version and the Handwritten Contract);
>
> (b) Raoof and Shervin by their actions and words after June of 2009 acted as though they had acquired an ownership share in Jupiter and were partners with the Tehranis. In particular, in many contemporary written communications the Parvareshs referred to themselves as owners/partners in Jupiter. It was only in May of 2010 as Jupiter was in danger of failing that Raoof asserted there was no agreement and that the Loan remained payable;
>
> (c) in contrast to Raoof's testimony that Siamak had told him in the summer of 2009 that he was unable to repay the Loan because of a lack of financial resources, on July 6, 2009 Siamak loaned Raoof $200,000 which was repaid on July 9, 2009 without any mention by Raoof of repayment of the Loan;
>
> (d) in July/August of 2009 Arman testified that Shervin retuned the Guarantee Cheque to him;
>
> (e) in August of 2009 Raoof advanced the $75,000 to Jupiter as called for in both versions of the agreement ($75,000 being Raoof's half of the $150,000 to be allocated for renovations to the restaurant pursuant to both versions of the agreement);
>
> (f) by August of 2009 Siamak contributed $90,000 to Jupiter;
>
> (g) from the summer of 2009, Shervin acted as though he was an owner of Jupiter. In particular he assumed an administrative role respecting its operations. Shervin's testimony to the contrary was contradicted by the testimony of both Sunny and Arman as well as the entirety of the contemporaneous written communications among the parties, including Shervin's Apology Email;
>
> (h) the Due Date for the Loan (August 27, 2009) passed with no demand for repayment from the Parvareshs nor any request to explain any "unexpected situation" as set out in the Addendum to invoke the extension;
>
> (i) respecting Sunny's involvement in Jupiter:

(i) Sunny testified that he would not have invested in Jupiter if Shervin (or his family) did not own shares in Jupiter;

(ii) contrary to Shervin's testimony, Sunny testified that Shervin told him that Shervin (or his family) owned shares in Jupiter;

(iii) Sunny stated that the Bank Draft which Shervin held was only to be released to Jupiter if the parties agreed to the terms of the Temporary Shareholder's Agreement;

(iv) Sunny's evidence is supported by all of the contemporaneous correspondence as well as Arman's testimony.

(j) the Extended Due Date (February 27, 2010) passed without any demand for repayment of the Loan by the Parvareshs;

(k) on or about February 20, 2010, Shervin executed the written Cancellation of the Joint Venture Agreement on behalf of Ecobase within a week of the Extended Due Date, without mention of any obligation to repay the Loan;

(l) Raoof first raised the issue of repayment of the Loan in email communication in May of 2010 (3 months after the Extended Due Date) and only after the parties became embroiled in a dispute about the future and direction of Jupiter; and

(m) Ecobase made no demand on Mass to pay the Loan until September of 2010 (6 months after the Extended Due Date) and only after it became clear that the business of Jupiter would fail.

[21] A trial judge is not required in his or her reasons to refer to all of the evidence tendered by the parties. In the context of this case as it was presented and argued at trial, it is not surprising that the judge did not expressly address whether the cheque had been returned and, if so, its significance to the defence of promissory estoppel.

[22] In addition, the reasons must be read in the context of Ecobase's position at trial that a conditional promise cannot, by definition, be "unequivocal". Ecobase argued that the conduct Mass relied on reflected nothing more than its intention to forgive the loan if the parties reached a deal on Jupiter.

[23] Ecobase relies on *Irwin (Re)* (1993), 1993 CanLII 835 (BC SC), 79 B.C.L.R. (2d) 120 (S.C.). In that case, the debtor made an "informal" proposal to his creditors for an orderly repayment of the various amounts he owed. As part of that proposal, the bank agreed to forgive interest due after a certain date if the debtor paid the balance of the loan in full. The debtor paid 90 per cent of the balance before declaring bankruptcy. In the bankruptcy proceedings, the bank claimed the remaining balance and the interest it had promised to forgive. The debtor argued the bank was estopped from claiming that interest because it had agreed to forego it in exchange for repayment of the balance, and the debtor had relied on that promise to his detriment, paying off almost all of the loan before making an assignment into bankruptcy.

[24] MacDonald J. concluded:

(a) The representation on which the estoppel is based must be "clear and unambiguous" and must not be conditional. (See, *Engineered Homes v. Mason*

(1983) 1983 CanLII 142 (SCC), 146 D.L.R. (3d) 577 (S.C.C.) at p. 581.) No such unequivocal promise was made by the Bank in this case. I have already found that its covenant to release Irwin was conditional upon payment in full of the September 30, 1982 balance in accordance with the terms of the proposal. There is no suggestion of any subsequent representation by the Bank to the contrary. [At p. 5.] [Emphasis added.]

[25] In the present case, as in *Irwin,* the trial judge found the alleged representation by conduct (which included all of the conduct alleged at trial with no particular emphasis on the return of the cheque), was tied to and conditional on the parties reaching an agreement whereby Ecobase would purchase an interest in the restaurant. I repeat here the judge's finding in this regard:

> [13] Mass relies on the doctrine of promissory estoppel to preclude Ecobase from enforcing the loan. To rely on this doctrine Mass must point to words or conduct on the part of Ecobase that are unambiguously intended to alter the relationship between the parties such that, Mass would be entitled to treat its obligation to pay the loan to have ended: *Maracle v. Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC), [1991] 2 S.C.R. 50. I cannot find Mr. Parvaresh spoke such words or conducted himself towards Mr. Tehrani to that effect. If there was to be forgiveness of the $150,000 loan, it was contingent on an agreement between Mr. Parvaresh and Mr. Tehrani for the former to purchase shares in Jupiter, and that never happened. In my view the doctrine of promissory estoppel plays no role in this matter. [Emphasis added.]

[26] The appellants do not challenge the judge's finding that Ecobase did not make an unequivocal representation to Mass. They challenge only the sufficiency of the judge's reasons. In my view, the reasons read in the context of the record as a whole adequately explain the "why" of the finding on estoppel and permit appellate review. I would accordingly dismiss the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Harris"

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