



NO. S-232804  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

CONIFEX TIMBER INC.

PETITIONER

AND:

THE LIEUTENANT GOVERNOR IN COUNCIL and  
BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

RESPONDENTS

**RESPONSE TO PETITION**

**Filed by:** British Columbia Hydro and Power Authority (**BC Hydro**)

THIS IS A RESPONSE TO the Petition filed by Conifex Timber Inc. (**Conifex**) on April 11, 2023.

**Part 1: ORDERS CONSENTED TO**

None.

**Part 2: ORDERS OPPOSED**

All.

**Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

None.

**Part 4: FACTUAL BASIS***Overview*

1. Conifex seeks to challenge an Order in Council that directed the British Columbia Utilities Commission (BCUC) to order a temporary pause on electricity service by BC Hydro to new cryptocurrency mining projects. The Order in Council was validly issued pursuant to section 3 of the *Utilities Commission Act*, which authorizes the Lieutenant Governor in Council to issue a direction to the BCUC with respect to the exercise of the powers and performance of its duties. The BCUC “must comply” with such a direction despite any other provisions of its governing statute.
2. The Order in Council addresses a pressing public policy concern. Cryptocurrency projects require very large amounts of electricity. Without the temporary pause provided through the BCUC’s order, BC Hydro would become committed to supplying substantial amounts of electricity, which would have implications for province-wide electrification and carbon reduction goals and the rates paid by other customers. Further, BC Hydro may be unable to fulfill its committed support of the government’s climate action goals. The pause effectively maintains the status quo while government considers its policy priorities and ensures that BC Hydro is able to support those priorities regardless of how they are determined.
3. In fiscal 2023, BC Hydro has received interconnection requests from cryptocurrency miners that would have used enough energy to serve the annual energy consumption of approximately 1.5 million residential customer premises. To put that figure in perspective, BC Hydro currently serves approximately 2 million residential customer premises. Conifex’s proposed projects alone would use almost half of the output of the Site C project, which is currently under development on the Peace River at a cost of \$16 billion.
4. The Order in Council at issue is a measured response to an emergent situation and falls squarely within the powers of the Lieutenant Governor in Council.

### ***BC Hydro's Statutory Mandate***

5. BC Hydro is a corporation continued under the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212, c. 2 (the *HPAA*). It generates, transmits, and distributes electricity throughout much of British Columbia.

6. BC Hydro is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government.<sup>1</sup>

7. BC Hydro is also a public utility within the meaning of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 (the *UCA*).

8. BC Hydro is regulated by the British Columbia Utilities Commission (**BCUC**), a tribunal established by the *UCA*.

9. Section 3 of the *UCA* authorizes the Lieutenant Governor in Council to issue a direction to the BCUC with respect to the exercise of the powers and performance of its duties, including, without limitation, a direction requiring the BCUC to exercise a power or perform a duty, or refrain from doing either, as specified in the regulation.

10. BC Hydro manages interconnection service to prospective customers on a first-come, first-served basis. BC Hydro does not discriminate between prospective customers seeking to connect to its system and has an obligation to continue serving a customer once service commences, except as provided by the terms and conditions of service established by BCUC order.<sup>2</sup>

### ***Cryptocurrency Mining: Large Increase in Service Requests***

11. Cryptocurrency mining creates sustainability issues primarily because of the very large amount of electrical energy used to get new “coins” in circulation. Depending on the volume of requests received and the amount of energy each requires, this could create challenges for BC

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<sup>1</sup> *HPAA*, s. 3(1).

<sup>2</sup> Affidavit of Christopher O’Riley, sworn June 2, 2023 (**O’Riley Affidavit**), at para. 8.

Hydro's available energy supply, which could mean less energy for other customer requests and higher electricity rates for British Columbians and industry in the province.<sup>3</sup>

12. BC Hydro has recently experienced an increasing and unprecedented level of requests to connect to its systems from cryptocurrency mining operations.<sup>4</sup>

13. For example, BC Hydro's December 2020 Load Forecast showed that energy use by cryptocurrency mining facilities was expected to almost double in one year (from 60,000 megawatt-hours per year in fiscal 2022 to 108,000 megawatt-hours per year in fiscal 2023).<sup>5</sup>

14. In fiscal 2023, BC Hydro in fact received interconnection requests from cryptocurrency miners that far exceeded estimates in the 2020 Load Forecast. The amount of electrical energy required for the requests would be enough to serve the annual energy consumption of up to 1.5 million residential customer premises. BC Hydro currently serves approximately 2 million residential customer premises.<sup>6</sup>

15. In December 2022, BC Hydro released a report titled "Crypto conundrum: Why cryptocurrency mining could challenge B.C.'s clean transition", documenting its concerns with the unprecedented connection requests from cryptocurrency miners.<sup>7</sup>

### ***OIC 692 and the BCUC Order***

16. On December 21, 2022, the Lieutenant Governor in Council (the **LGiC**) made Order in Council 692/22 (**OIC 692**) pursuant to s. 3 of the *UCA*. OIC 692 directed the BCUC to issue orders within 10 days of an application for those orders by BC Hydro relieving BC Hydro of its obligation to supply service respecting new cryptocurrency mining projects for a period of 18 months.<sup>8</sup>

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<sup>3</sup> O'Riley Affidavit, para. 3.

<sup>4</sup> O'Riley Affidavit, para. 4.

<sup>5</sup> O'Riley Affidavit, para. 5.

<sup>6</sup> O'Riley Affidavit, para. 6.

<sup>7</sup> O'Riley Affidavit, para. 7, Ex. A.

<sup>8</sup> O'Riley Affidavit, para. 9, Ex. B.

17. On December 21, 2022, BC Hydro applied to the BCUC for the orders described above.<sup>9</sup>
18. The BCUC granted the same through the issuance of Final Order No. G-390-22A on December 28, 2022 (the **BCUC Order**).<sup>10</sup>
19. The total anticipated energy usage of all the cryptocurrency facilities directly affected by OIC 692 and the BCUC Order is approximately 3,660,000 megawatt-hours per year.<sup>11</sup>
20. The BCUC Order effects an 18-month temporary pause on BC Hydro's obligation to serve certain cryptocurrency facilities and required a change to BC Hydro's normal processes for handling interconnection requests in regard to those facilities.
21. On January 23, 2023, BC Hydro wrote to Conifex noting that two of Conifex's cryptocurrency projects currently in BC Hydro's interconnection queue – Ashton Creek and Salmon Valley (the **Conifex Projects**) – were considered “paused projects” pursuant to OIC 692 and the BCUC Order and would not be advanced at that time.<sup>12</sup>
22. In accordance with BC Hydro's *Business Practice for Load Interconnection Queue Management*, as amended on February 10, 2023, any customer whose project is included as a “paused project” may elect to terminate its System Impact Study Agreement during the suspension period and in such a case BC Hydro will return all deposits provided to BC Hydro by that customer in respect of the “paused project” and will not invoice for any costs incurred in relation to any work completed on their System Impact Study.<sup>13</sup>

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<sup>9</sup> O'Riley Affidavit, para. 10, Ex. C.

<sup>10</sup> O'Riley Affidavit, para. 11, Ex. D.

<sup>11</sup> O'Riley Affidavit, para. 12.

<sup>12</sup> O'Riley Affidavit, para. 14, Ex. F.

<sup>13</sup> O'Riley Affidavit, Ex. E, s. 5.4.

***The 2021 IRP***

23. BC Hydro's current plan to meet the future electricity needs of its customers is titled the 2021 Integrated Resource Plan (the **2021 IRP**). The 2021 IRP is currently the subject of a public interest review by the BCUC which remains ongoing.<sup>14</sup>

24. The 2021 IRP reflects BC Hydro's expectations at the end of 2021 in relation to available resources and electricity forecasts. The 2021 IRP indicates that, at the end of 2021, BC Hydro expected to have sufficient resources to meet the most likely electrical energy forecasts until 2031. For example, in 2024, the energy surplus was expected to be 917,000 megawatt-hours per year.<sup>15</sup>

25. The 2021 Integrated Resource Plan Signposts Update, filed June 15, 2023, indicates that BC Hydro will need additional energy resources. For example, in F2031, under BC Hydro's Reference Load Forecast, there is a need of approximately 7,220,000 MWh of energy that would need to be satisfied through new demand side measures, new energy acquisitions, and other actions.<sup>16</sup>

26. In comparison, the Conifex Projects would collectively use approximately 2,500,000 megawatt-hours of electrical energy per year. That figure far exceeds BC Hydro's nine largest customer sites. In fiscal 2022, BC Hydro did not deliver more than 1,000,000 megawatt-hours to any one of those nine sites.<sup>17</sup>

27. For further context, the Conifex Projects alone would use almost half of the output of the Site C Project currently under development on the Peace River at a cost of approximately \$16 billion.<sup>18</sup>

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<sup>14</sup> O'Riley Affidavit, para. 16, Ex. H.

<sup>15</sup> O'Riley Affidavit, paras. 17-18.

<sup>16</sup> Affidavit of Christopher Sandve, sworn June 26, 2023, Ex A.

<sup>17</sup> O'Riley Affidavit, paras. 19-20.

<sup>18</sup> O'Riley Affidavit, para. 21.

***BC Hydro's Interest in Pausing Service to New Cryptocurrency Projects***

28. The rapid growth of cryptocurrency operations in British Columbia could make it more difficult for BC Hydro to meet its electrification objectives. It could also affect the rates of all customers, particularly if BC Hydro must acquire substantial additional resources and infrastructure to serve the unprecedented electrical demand from cryptocurrency customers.<sup>19</sup>

29. The temporary pause in service to new cryptocurrency projects provided for under the BCUC Order relates to BC Hydro's larger electrification objectives, which are based on priorities and expectations provided by the government.<sup>20</sup>

30. In a letter dated June 15, 2021, from the Minister of Energy, Mines and Low Carbon Innovation to BC Hydro, government directed BC Hydro to adopt several overarching principles and to incorporate various priorities and expectations in its policies and programs for fiscal 2022 (the **2021 Mandate Letter**).<sup>21</sup>

31. In particular, the 2021 Mandate Letter directs BC Hydro to provide leadership in advancing CleanBC's climate and economic development objectives, including electrification, fuel switching, and energy efficiency initiatives in the built environment, transportation, mining, oil and gas, and other sectors.<sup>22</sup>

32. BC Hydro partly addressed the priorities and expectations set out in the 2021 Mandate Letter in its Electrification Plan dated September 2021 (the **2021 Electrification Plan**).<sup>23</sup>

33. In general, the 2021 Electrification Plan aims to increase awareness of existing programs directed at electrification and further address barriers to electrification with new programs.

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<sup>19</sup> O'Riley Affidavit, para. 25.

<sup>20</sup> O'Riley Affidavit, para. 24.

<sup>21</sup> O'Riley Affidavit, para. 26, Ex. I.

<sup>22</sup> O'Riley Affidavit, para. 27.

<sup>23</sup> O'Riley Affidavit, para. 28, Ex. J.

Overall, the 2021 Electrification Plan is expected to result in an additional 3,100,000 megawatt-hours of energy usage.<sup>24</sup>

34. In February 2023, BC Hydro released its 2023/24-2025/26 Service Plan (the **Service Plan**) which outlines how BC Hydro will support the government's priorities. The Service Plan includes the following goals/objectives:<sup>25</sup>

- BC Hydro will take advantage of its clean electricity to support CleanBC and the Province's economic growth strategies.
- BC Hydro will help electrify the BC economy and encourage its customers to use its clean electricity.
- BC Hydro will support achieving the Province's climate action targets.

35. In summary, the temporary pause on service to new cryptocurrency mining projects is critical from BC Hydro's perspective. Cryptocurrency projects require very large amounts of electricity. Without the temporary pause provided through the BCUC Order, BC Hydro would become committed to supplying substantial amounts of electricity, which would have implications for province-wide electrification and carbon reduction goals and the rates paid by other customers. Further, BC Hydro may be unable to fulfill its committed support of the government's climate action goals in the timelines required, as mandated in the 2021 Mandate Letter. The pause effectively maintains the status quo while government considers its policy priorities and ensures that BC Hydro is able to support those priorities regardless of how they are determined.<sup>26</sup>

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<sup>24</sup> O'Riley Affidavit, para. 29.

<sup>25</sup> O'Riley Affidavit, paras. 30-31, Ex. K.

<sup>26</sup> O'Riley Affidavit, para. 32.



**Part 5: LEGAL BASIS**

36. Legislation can validly authorize Cabinet or a minister to issue binding directives to a board or administrative tribunal. Whether a particular provision provides such authorization is a question of statutory interpretation.<sup>27</sup>

37. In the present case, section 3 of the *UCA* clearly authorizes the LGiC to issue binding directives to the BCUC. Section 3(1) provides that the LGiC, by regulation, may issue a direction to the BCUC. Section 3(2) provides that the BCUC “must comply” with such a direction. Section 3(2)(a) goes on to say that the BCUC must comply with such a direction “despite ... any provision of ... this Act [the *UCA*].”

38. The Court of Appeal has held that a provision such as section 3 “elevates the status of a special direction above any other inconsistent provisions, statutory or otherwise” and “makes plain the importance of a special direction as an instrument of government policy.”<sup>28</sup>

39. These provisions “establish a close policy connection between the government and the Commission through the mechanism of special directions which take precedence over inconsistent provisions of the Commission's governing statutes or regulatory principles otherwise applicable.”<sup>29</sup>

40. A direction such as OIC 692 is not inconsistent with the scheme of the *UCA* because section 3 forms an integral part of the *UCA*. As the Yukon Court of Appeal held with respect to an OIC issued pursuant to the comparable section 18(1) of the *Public Utilities Act* (Yukon):<sup>30</sup>

... The order in council is not inconsistent with the scheme of the Act or the powers of the board. It is pursuant to s. 18(1), and if something is to be said to be inconsistent, it would have to be s. 18(1). I do not think it can be said to be

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<sup>27</sup> *Innisfil Township v. Vespra Township*, 1981 CanLII 59 (S.C.C.), [1981] 2 SCR 145 at 171-173.

<sup>28</sup> *BC Hydro and Power Authority v. Terasen Gas (Vancouver Island) Inc.*, 2004 BCCA 346, at para. 9. The Court of Appeal described the provision at issue (s. 7 of the *Vancouver Island Natural Gas Pipeline Act*) as being “similar” to s. 3 of the *UCA* (see para. 22).

<sup>29</sup> *Terasen Gas*, at para. 23 (emphasis added).

<sup>30</sup> *Yukon (Utilities Board) v. Yukon (Commissioner in Executive Council)*, 1987 CarswellYukon 1, 15 B.C.L.R. (2d) 139 (Y.T.C.A.), at para. 13 (emphasis added).

inconsistent. It is part of the Act. It offers an alternative way of making an order. The usual way that was being employed by the board, before this order in council, requires hearings and so forth. This s. 18(1) method is inconsistent only to the extent that every alternative means is inconsistent with the normal means of proceeding to an order. In my view, the order in council is consistent with s. 18(1), and s. 18(1) is part of the Act and cannot be said to be inconsistent with the Act of which it is a part. This particular provision, s. 18(1), is designed for a particular purpose.

41. In *BC Old Age Pensioners' Organization v. British Columbia (Ministry of Public Safety & Solicitor General)*,<sup>31</sup> Justice Bauman (as he then was) considered section 3 of the *UCA* in conjunction with its counterpart (s. 47) of the *Insurance Corporation Act*. Together these two provisions authorize the LGiC to issue directions to the BCUC with respect to the Insurance Corporation of British Columbia. The effect of these provisions is clear: “while the BCUC has been given a regulatory jurisdiction over aspects of ICBC's undertaking, the BCUC is subject, in the exercise of that jurisdiction, to the direction of the Lieutenant Governor in Council”.<sup>32</sup> As Justice Bauman put it, “What the province giveth in the sense of a discretionary jurisdiction, however, is what it may also taketh away.”<sup>33</sup>

42. In *Labrador (City) v. Newfoundland & Labrador Hydro Inc.*,<sup>34</sup> the appellants argued that a decision of the Board of Commissioners of Public Utilities with respect to funding a deficit for rural customers was discriminatory. In deciding which customers would fund the rural deficit, the Board followed a mandatory direction issued by the Lieutenant Governor in Council pursuant to section 5.1 of the *Electrical Power Control Act* that required the rural deficit to be funded by other customers. In dismissing the application for leave to appeal, the Newfoundland and Labrador Court of Appeal held as follows:<sup>35</sup>

In its submissions to the Court, the intended appellants did not consider the fact that section 5.1 commences with the words, “Notwithstanding section 3 and

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<sup>31</sup> 2006 BCSC 257 (*BC Old Age Pensioners' Organization*).

<sup>32</sup> *BC Old Age Pensioners' Organization*, at para. 8.

<sup>33</sup> *BC Old Age Pensioners' Organization*, at para. 3.

<sup>34</sup> *Labrador (City) v. Newfoundland & Labrador Hydro Inc.*, 2004 NLCA 61.

<sup>35</sup> *Labrador Hydro*, at para. 24 (emphasis added).

section 4 of the Act and the provisions of the *Public Utilities Act*’.

“Notwithstanding” means “in spite of” or “without regard to or prevention by” (Concise Oxford Dictionary). In the context of this case, where the intended appellants look to the very sections specifically named in section 5.1 (sections 3 and 4) as the source of the non-discrimination directive, the Board’s view that it was required to follow the directive of the Lieutenant Governor in Council, whether discriminatory or not, is entirely reasonable. I see no “reasonably arguable case” otherwise. I would not grant leave on this ground.

43. Where legislation is clear, as is section 3 of the *UCA*, the relationship between a tribunal and the executive branch of government cannot be overridden by reference to common law principles or presumptions. As the Supreme Court of Canada held in *Ocean Port Hotel Ltd. v. British Columbia*:<sup>36</sup>

Ultimately, it is Parliament or the legislature that determines the nature of a tribunal’s relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction.

44. Provisions such as section 3 serve an important role in ensuring accountability and transparency in a constitutional democracy. These provisions ensure that policy decisions are made by a body (the LGiC) that is democratically accountable to those who will be affected by its decisions and that can respond quickly to emergent issues, as was the case here.

45. As the Federal Court of Appeal held in considering a similar provision (s. 18(1) of the *Canadian Wheat Board Act*):<sup>37</sup>

By requiring that this authority be exercised formally and in public, by Order in Council, Parliament ensured that the government would be accountable politically for the use made of that authority. The repository of the power and the mode of its exercise reinforce the broad scope of the authority set out in subsection 18(1) and Parliament’s intent that the government should retain the ultimate power to decide in the event of a disagreement.

46. In *Manitoba Metis Federation Inc. v. Pallister*, the Manitoba Court of King’s Bench and Court of Appeal each considered at some length the unique institutional role of Cabinet in

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<sup>36</sup> *Ocean Port Hotel Ltd. v. British Columbia*, 2001 SCC 52, at para. 22.

<sup>37</sup> *Canadian Wheat Board v. Canada (Attorney General)*, 2009 FCA 214, at para. 50, leave to appeal refused 2010 CarswellNat 71 (S.C.C.). See also: Giorilyn Bruno, “Section 67 of the Responsible Energy Development Act: Seeking a Balance between Independence and Accountability” (2015) 52:4 *Alta L Rev* 829 at 865-866.

weighing polycentric considerations and implementing policy based on those considerations in a manner that is responsive to emergent issues and is politically accountable. In considering a directive issued to Manitoba Hydro under section 13(1) of the *Crown Corporations Governance and Accountability Act* (Manitoba), Chief Justice Joyal of the Manitoba Court of King's Bench held as follows:<sup>38</sup>

In summary, the Directive is not *ultra vires* Cabinet's Directive power and it is in fact, a lawful exercise of Cabinet's statutory authority to enforce its stewardship role over Hydro. I accept Manitoba's argument that in binding Hydro, it has the same effect as if it were written in the legislation. The Directive in question is a lawful exercise of Cabinet's statutory discretion. The decision by Cabinet in the present case as represented by the Directive, is one of a number of possible reasonable outcomes (within a broad range of possible acceptable outcomes) that can be seen as informed by and dependent upon policy considerations that fall within Cabinet's unique institutional role and which are defensible in fact and law. This decision by Cabinet cannot be set aside as one of those most "egregious cases" requiring court intervention.

...

The nature of the Cabinet decision making process does not and cannot give rise to an expectation or a right on the part of an interested person to make formal advance submissions. I accept the proposition advanced by Manitoba that Cabinet must preserve the capacity to act and react quickly. It functions best when its members are free to express themselves unreservedly, without concern of "ill-informed or captious public or political criticism" or being trammelled by considerations of consistency with the past or self-justification in the future. ... Having acknowledged what might be the political imperatives for ensuring in some instances, a minimal and commonsensical amount of advance public engagement, a validated, formalized or endorsed expectation by the courts of a right on the part of interested parties to make advance submissions (as with advance public notice) could frustrate Cabinet's ability to respond swiftly and effectively to political, economic and social concerns as they arise. In this connection, it must be remembered that Cabinet policy decisions do not follow an adjudication process. Instead, they are decisions as Manitoba suggests, based on polycentric, diffuse and subjective considerations that consider all constituencies.

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<sup>38</sup> *Manitoba Metis Federation Inc. v. Pallister*, 2020 MBQB 49, at paras. 94, 139 (citations omitted).

47. In dismissing the appeal, the Manitoba Court of Appeal expanded on the role of Cabinet under the legislative scheme as follows:<sup>39</sup>

[T]he Directive is an exercise of Cabinet’s statutory power to enforce its stewardship role over Hydro. The CCGAA confers the directive power onto Cabinet. It requires that any directive be issued through an order in council (see section 13(1)). I agree with Manitoba’s submission that, by vesting the directive power in Cabinet, the Legislature assigned “policy” its broadest possible meaning, given that Cabinet represents all constituencies within government and considers the widest range of polycentric and diffuse factors. Cabinet is “a body of diverse policy perspectives representing all constituencies within government” ...

...

Unless constrained by the constitution, Parliament and the provincial Legislatures are supreme. I point out that the MMF does not attack the validity and constitutionality of the CCGAA. It gives Cabinet the authority to issue mandatory directives to Hydro on “matters of policy”. The CCGAA also provides that its provisions prevail to the extent of any inconsistency or conflict with another act (see section 3(1)). As I have explained above, the Directive does, in my view, address a matter of policy. I agree with Manitoba’s submission that Cabinet cannot ensure that Hydro is operating within the parameters it set without in some way interfering in Hydro’s own statutory authority. To say, as the MMF suggests, that a properly issued directive on a matter of policy cannot constrain Hydro’s statutory powers under its home statute would remove the force or effectiveness of the directive power.

48. In the present case, a review of Hansard confirms that a similar role was intended for section 3 of the *UCA*. During Second Reading of the 1980 *Utilities Commission Act* (Bill 52), the Hon. Mr. McClelland said the following regarding section 3:<sup>40</sup>

The same thing is true now that the government has given B.C. Hydro the responsibility for rural electrification. That's a matter that worries Hydro extremely, in connection with what a utilities commission might consider. We've said that we may be able to give those directions to the Utilities Commission — not in some kind of blind and secret way — but we've also said that when we give those directions they must be up front, they must be regulations published in the

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<sup>39</sup> *Manitoba Metis Federation Inc. v. Pallister*, 2021 MBCA 47, at paras. 100, 102, leave to appeal refused 2022 CarswellMan 57 (S.C.C.). The Court of Appeal held that the chambers judge had erred in finding that the honour of the Crown was not engaged but upheld the decision in the result and with respect to Cabinet’s power to issue directions under the statute.

<sup>40</sup> British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 32nd Parl, 2nd Sess (20 August 1980) at 4089 (Hon. Mr. McClelland) (emphasis added).

normal way that regulations are published when given by the Lieutenant-Governor-in-Council. So rather than being some secret proposal made by the government they will be up front for everyone to see and they'll be known very carefully.

...

We do not agree that an independent body outside of government should make policy decisions. We believe the government was elected to make those policy decisions, and we intend to make them, Mr. Speaker. I don't apologize for that, and I never will. It's the people who are elected who must make policy decisions. If they make the wrong policy decisions and abuse their powers I know darned well that they'll be kicked out by the electorate. I stand here and accept that, and I hope all of you do as well, because that's what parliamentary democracy is all about: you make decisions, you hope you make the right decisions; and if you don't, the electorate answers you. That's fair, and that's the kind of democracy I support. That's what this bill supports as well.

49. The foregoing applies with particular force in the context of a direction issued with respect to BC Hydro, which is for all its purposes an agent of the government and an instrument of its energy policy in the province.<sup>41</sup> The language of section 3 that expressly states that a direction shall prevail over any other provisions of the Act was not in the original version as it read in 1980. That language was added in 1994 but at first only with respect to directions regulating and fixing the rates of BC Hydro. In 2008, the section was amended into its current form to require the BCUC to comply with directions under section 3 in regard to any regulated public utility despite other provisions of the *UCA*.

50. In summary, the legislature conferred on the LGiC a broad power in section 3 of the *UCA* to issue binding directions to the BCUC. OIC 692 is a measured response to an emergent situation and falls squarely within the powers of the LGiC under section 3.

51. The petitioner cannot challenge OIC 692 on the basis that it did not get a hearing before the LGiC because there is no right of procedural fairness for legislative decisions of the LGiC.<sup>42</sup>

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<sup>41</sup> *HPAA*, s. 3(1). See also ss. 12(1.1)(c) and 38(2)(b).

<sup>42</sup> *Attorney General of Canada v. Inuit Tapirisat of Canada*, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735, at pp. 758-59.

52. The petitioner cannot challenge OIC 692 on the basis that it did not get a hearing before the BCUC because:

- (a) The right to a hearing is set out in section 28 of the *UCA*. Section 3 operates “despite” that provision.
- (b) Given that the BCUC “must comply” with the direction, there was no decision for it to make that could be altered or influenced by what could be said at a hearing.<sup>43</sup>
- (c) In the alternative, if the BCUC was required to hold a hearing before making its decision, which is denied, that would not be a reason to invalidate OIC 692. The petitioner would need to challenge the BCUC’s decision through the avenues prescribed by the *UCA*, which it has not done.

53. The petitioner cannot challenge OIC 692 on the basis that it is unduly discriminatory because:

- (a) The obligation of a public utility to provide service without “undue discrimination” and the role of the BCUC to be the “sole judge” of whether there has been undue discrimination are set out in sections 39 and 59 of the *UCA*, respectively. Section 3 operates “despite” these provisions.
- (b) The BCUC is authorized under the *UCA* to distinguish between customers for reasons related to its statutory mandate. The LGiC, in exercising its power under section 3, can direct the BCUC in how to make such distinctions, as was the case here. Leaving aside the issue of a hearing, discussed above, the BCUC Order was well within the jurisdiction of the BCUC to make.
- (c) In any event, for the reasons given above, the LGiC has the power to make distinctions under section 3 that the BCUC would not be authorized to make. The legislature has recognized in section 3 the unique institutional role for the LGiC in

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<sup>43</sup> See *M-Systems Flash Disk Pioneers Ltd. v. Canada (Commissioner of Patents)*, 2010 FC 441, at paras. 32-34, aff’d 2011 FCA 112, leave to appeal refused 2011 CarswellNat 6319 (SCC).

considering policy matters and taking action swiftly when necessary to address them.

54. BC Hydro adopts and relies on paragraphs 50-55 of the Response to Petition filed by the LGiC on May 25, 2023, with respect to the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44.

**Part 6: MATERIAL TO BE RELIED ON**

55. Affidavit of Chris O'Riley, sworn June 2, 2023;

56. Affidavit of Christopher Sandve, sworn June 26, 2023;

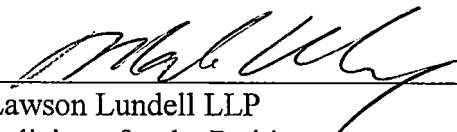
57. Affidavit of Les MacLaren, sworn May 24, 2023;

58. The pleadings and process filed herein; and

59. Such further and other materials as counsel may advise and this Honourable Court may permit.

The Petitioner estimates that the hearing of the Petition will take 2 days.

Dated at the City of Vancouver, in the Province of British Columbia, this 27<sup>th</sup> day of June, 2023.

  
Lawson Lundell LLP  
Solicitors for the Petitioner

The petition respondent's address for service is c/o Lawson Lundell LLP, 1600-925 West Georgia Street, Vancouver, British Columbia V6C 3L2.

Fax number for delivery is: (604) 669-1620.

The name and office address of the petition respondent's solicitor is: Lawson Lundell LLP, 1600-925 West Georgia Street, Vancouver, British Columbia, V6C 3L2 (Attention: Marko Vesely, KC).