ALBERTA UTILITIES COMMISSION

IN THE MATTER OF THE *ALBERTA UTILITIES COMMISSION ACT*, Section 8

IN THE MATTER OF THE *ALBERTA UTILITIES COMMISSION ACT*, Section 63

AND IN THE MATTER OF APPLICATION NO. 26379-A001 BY ALBERTA UTILITIES COMMISSION ENFORCEMENT STAFF

WRITTEN SUBMISSIONS ON ALL OUTSTANDING MATTERS IN PROCEEDING 26379 OF LINK GLOBAL TECHNOLOGIES INC.

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INTRODUCTION

1. On December 17, 2021, the Alberta Utilities Commission ("**AUC**" or "**Commission**") issued a ruling on further process ("**Further Process Ruling**") in Proceedings 26379 and 26972.[1] The Further Process Ruling re-opened Phase 1 of Proceeding 26379 for the limited purpose of reconsidering the following aspects of Decision 26379-D02-2021 (the "**Phase 1 Decision**"):

   - The effect of the March 8[2] and March 11, 2021 agreements[3], the nature of Link Global's activities at the Sturgeon and Kirkwall plants from the date of those agreements, and whether Link Global's activities from either of March 8 or March 11, 2021 onward constitute "own-use."[4]

   - Depending on its findings on those issues, the Commission may reconsider its finding at paragraph 6(v) of the Decision: "Link Global failed to meet the definition of own-use for the purposes of obtaining exemption from approval under the Hydro and Electric Energy Act until March 8, 2021, when it acquired ownership of the digital currency processing facilities."

   - Depending on its findings on those issues, the Commission may reconsider its comments on how the Sturgeon and Kirkwall facilities can

[1] 26379-X0081.

[2] March 8, 2021 Sales Agreement between Link Global and Block One Technologies.

[3] March 11, 2021 Sales Agreement between Link Global and 1292491 B.C. Ltd.

[4] For the purpose of these submissions, Link Global is going to use March 11, 2021 as the relevant date, because that was the date of the second agreement under which ownership of the digital currency processing facilities was transferred by Link Global to a third party.

achieve compliance going forward (recognizing that, as a practical matter, Link Global has indicated that it does not intend to restart the Sturgeon plant).[5]

2. The Further Process Ruling also combined Proceeding 26379, commenced in respect of Link Global's Sturgeon and Kirkwall facilities, and Proceeding 26972, commenced in respect of Link Global's Westlock facility. This was done "due to the similar nature of the issues" in the two proceedings "and because reopening Phase 1 of [Proceeding 26379] places the two proceedings at a similar procedural stage."[6]

3. Finally, the Further Process Ruling provided that Link Global could file submissions "on all outstanding matters in both proceedings".[7] As already noted, the Commission has stated that re-opening Proceeding 26379 places it at a similar procedural stage as Proceeding 26972, i.e., Phase 1. Given this, Link Global interprets "all outstanding matters in both proceedings" to mean all outstanding matters in Phase 1 of both proceedings. Link Global has already filed Phase 2 submissions in Proceeding 26379 and Proceeding 26972 is still in Phase 1, so there are no outstanding matters for Link Global to address with respect to Phase 2 in either proceeding.

[5] *Ibid* at para. 17.

[6] *Ibid*, at para. 20.

[7] *Ibid,* at para. 21.

A. What are the outstanding matters in the combined proceeding?

4. In its application filed in respect of the Westlock power plant,[8] Enforcement Staff allege that Link Global is responsible for the following contraventions:

> Alleged Contravention 1: Did Link Global operate the Westlock power plant contrary to the *Hydro and Electric Energy Act* and Rule 007?
>
> (a) Was Link Global generating electric energy solely for its own-use?
>
> (b) Did Link Global fail to satisfy the conditions stipulated in Rule 007 before construction and operation of the Westlock power plant? Specifically:
>
> (i) Did Link Global fail to ensure that the Westlock power plant complied with AUC Rule 012 prior to operation?
>
> (ii) Did Link Global fail to ensure that there were no adverse environmental effects prior to operation.
>
> Alleged Contravention 2: Having contravened or failed to comply with the Hydro and Electric Energy Act and AUC Rule 007, did Link Global then conceal its actions, impeding the Commission's ability to effectively and efficiently regulate in the public interest?

5. As per the Further Process Ruling, the following Phase 1 matters are outstanding with respect to Sturgeon and Kirkwall:

[8] 26379-X0087.

1) What is the effect of the March 8 and March 11, 2021 agreements with respect to the nature of Link Global's activities at the Sturgeon and Kirkwall plants from the date of those agreements?

2) Did Link Global's activities from either of March 8 or March 11, 2021 onward constitute "own-use"?

3) Should the Commission reconsider its finding at paragraph 6(v) of the Phase 1 Decision that "Link Global failed to meet the definition of own-use for the purposes of obtaining exemption from approval under the Hydro and Electric Energy Act ("**HEE Act**") until March 8, 2021, when it acquired ownership of the digital currency processing facilities"?

4) Should the Commission reconsider its comments on how the Kirkwall facility can achieve compliance going forward?

6. Because the matter of "own-use" is now, as a result of the Further Process Ruling, outstanding with respect to all three facilities (Sturgeon, Kirkwall and Westlock), it will be dealt with once only, rather than separately for Westlock and for Sturgeon and Kirkwall.

7. Therefore, these submissions will be divided into two parts:

1) The non-"own-use" issues at Westlock (non-compliance with the HEE Act and Rule 007; and the concealment allegation); and

2) The own-use issue.

B. Submissions on the Outstanding Matters

1. Westlock: issues other than own-use

(a) Operating contrary to the HEE Act and AUC Rule 007

8. Enforcement Staff alleges that Link Global operated the Westlock power plant contrary to the HEE Act and AUC Rule 007, by failing to ensure that the plant complied with AUC Rule 012 prior to operation and failing to ensure that there no adverse environmental effects prior to operation. Link Global does not deny these allegations.

9. Link Global acknowledges that it operated the Westlock power plant contrary to the HEE Act and Rule 007. More particularly, Link Global acknowledges that it failed to ensure that the Westlock power plant complied with AUC Rule 012 and that there were no adverse environmental effects prior to operation.

10. In acknowledging that it failed to ensure that the Westlock power plant complied with AUC Rule 012 and that there were no adverse environmental effects prior to operation, contrary to the HEE Act and Rule 007, Link Global relies on the following documents entered into evidence in the combined proceeding:

- Exhibit 26379-0088: Link Global's October 22, 2021 response to Enforcement Staff's October 15, 2021 letter advising that it had commenced an investigation of all power plant operations of Link Global in Alberta, other than the Sturgeon and Kirkwall plants, and including the Westlock power plant.

- Exhibit 26379-X0089: Link Global's November 3, 2021 responses to Enforcement Staff's October 27, 2021 request for further information with respect to the Westlock plant.

11. With respect to noise, as per Exhibit 26379-X0088[9] Link Global acknowledges that a noise impact assessment ("**NIA**") was not conducted prior to operations commencing at Westlock and that this should have been done.

12. With respect to environmental effects, as per Exhibit 26379-X0088[10] Link Global acknowledges that steps to determine the environmental effect of the Westlock power plant were not undertaken prior to construction and that this should have been done.

13. After operations at Westlock had commenced, Alberta Environment and Parks ("**AEP**") notified Link Global that it was out of compliance with the Environmental Protection and Enhancement Act ("**EPEA**").[11] On October 1, 2021 Link Global submitted to AEP an application under EPEA for a new power plant. Although Link Global has since voluntarily ceased operations at the Westlock power plant,[12] the EPEA application for Westlock continues to be reviewed by AEP and Link Global is awaiting receipt of an approval.

[9] At pdf page 5, response to question h.

[10] At pdf page 5, response to question i.

[11] *Ibid.*

[12] 26379-X0109.

(b) Concealment

14. Enforcement Staff alleges that having contravened or failed to comply with the HEE Act and AUC Rule 007, Global then concealed its actions by providing Enforcement Staff and the Commission with false information, thereby impeding the Commission's ability to effectively and efficiently regulate in the public interest. Link Global denies this allegation.

15. Link Global submits that it did not intentionally conceal its actions from the Commission. Rather, there was a failure at the highest level of Link Global's senior management to understand what its obligations to the Commission were and to ensure that those obligations were met. Part of the failure was not understanding and clarifying what Link Global's role was in the licensing and approval process as distinguished from that of the natural gas supplier at Westlock, MAGA Energy ("**MAGA**").

16. For example, as indicated in Exhibit 26379-X0089,[13] the public consultation conducted for the Westlock facility was carried out by MAGA, not Link Global. Link Global expected that MAGA would be in contact with the AUC following completion of the consultation program, which obviously did not happen. That said, Link Global acknowledges that it did not follow up with MAGA to confirm that the AUC had been advised of the outcome of the consultation program for the purpose of confirming that no person would be directly and adversely affected by the Westlock facility.

[13] Response to Request 2, Question A.

17. Further, after the noise issue arose at Westlock, an acoustical consultant, FDI Acoustics Inc. ("**FDI**"), was retained. However, FDI was retained by MAGA, not Link Global.[14] When Link Global attempted to obtain a copy of the Comprehensive Sound Level Survey ("**CSL**") conducted by FDI in response to a request from Enforcement Staff, MAGA declined to provide it, instead only offering excerpts.[15] While this was after operations had commenced, and does not directly bear on the issue of Link Global's failure to obtain a NIA prior to commencing operations, it does show that MAGA and Link Global did not clearly identify roles and responsibilities for dealing with the AUC.

18. In saying this, Link Global does not attempt to avoid responsibility for its failure to follow the necessary steps to obtain an approval (or confirmation of exemption from the requirement to obtain an approval) from the AUC for Westlock. Rather, we simply point out that there was a lack of coordination and clear communication between Link Global and MAGA with respect to which party was responsible for obtaining those approvals. Link Global did not intend to mislead the Commission or conceal anything.

19. In its Westlock application, Enforcement Staff allege that Link Global "provided false information with respect to the ongoing operation of the Westlock power plant".[16] Specifically, Enforcement Staff assert that on May 4, 2021 Link Global told Enforcement Staff that Westlock was not operating and would ensure that it would be in compliance with AUC Rules. These representations were then

[14] 26379-X0089, Response to Request 2, Question B.

[15] *Ibid.*

[16] 26379-X0087, para. 35.

included in the Statement of Agreed Facts and Contraventions ("**Agreed Statement**") jointly filed by the parties on May 21, 2021.[17] Specifically, paragraph 10 of the Agreed Statement stated:

> Link Global is also developing a 10 MW power plant in Westlock County (the Westlock County power plant) that is anticipated to begin operations in early July 2021.

20. Link Global acknowledges this statement was not correct. In fact, Link Global started commissioning the Westlock power plant on March 10, 2021 and was anticipating the facility to be fully operational in July 2021. The Board of Directors of Link has no explanation for why senior management did not identify the above statement as being incorrect in May 2021 when the Agreed Statement was being drafted. Indeed, as noted in Link Global's Phase 2 Submissions, the Board did not even learn of the existence of the Agreed Statement until after the media reported on Enforcement Staff's Phase 2 Submissions many months later.

21. Just as the Board of Directors of Link Global was unaware of what was occurring during Phase 1 of this proceeding when it included only Sturgeon and Kirkwall,[18] the Board was similarly not aware of the operational status of Westlock, the responsibility for which lay with senior management. To the Board's knowledge, the Westlock plant had all the approvals it needed to operate. Clearly that was not the case, but there was no intent to conceal anything.

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[17] *Ibid,* para. 39.

[18] 26379-X0065, at para. 4.

22. Finally, Link Global wishes to advise Enforcement Staff and the Commission that it is in the process of hiring a new Chief Executive Officer to replace Mr. Jenkins. Although the hire is not final, the candidate is a business entrepreneur based in the United States who is a former Securities and Exchange Commission enforcement attorney. As such, he understands the importance of regulatory compliance and one of his first priorities will be to ensure that everything is done that needs to be done to bring Link Global's Alberta facilities into compliance with both the AUC's and AEP's requirements.

2. Own-use

(a) Introduction

23. The question whether Link Global was generating electricity at Westlock solely for its own-use has not yet been determined by the Commission.

24. As noted in our Phase 2 Submissions,[19] Link Global reiterates that it is not in the business of bitcoin mining; neither is it in the business of simply selling energy to bitcoin miners. Instead, Link Global is in the business of providing comprehensive "hosting services" which consist of generating and supplying power to specialized containers in which Link Global houses its customers' computers. Link Global furnishes, operates, services and repairs the computers. While Link Global generates revenue by charging a fee for the power supplied, that fee is for all its hosting services.

25. Link Global may also share in the digital currencies mined by its customers, but only if certain operating milestones and efficiency metrics are met. None

[19] 26379-X0065.

of these milestones or metrics were ever met at any of the Sturgeon, Kirkwall or Westlock facilities. Therefore, no digital currencies were earned or received by Link Global.

26. In the Phase 1 Decision, the Commission determined that Link Global's Sturgeon and Kirkwall power plants met the definition of own-use for the purposes of the *Electric Utilities Act* ("**EU Act**") at all times. However, the Commission found that Sturgeon and Kirkwall did not meet the definition of own-use for the purposes of the HEE Act from the commencement of operations to March 8, 2021, but did meet that definition after that date.

27. March 8, 2021 is the date of the agreement between Link Global and Block One Technology Inc. ("**Block One**"), pursuant to which "ownership of Block One's digital currency processing facilities [at Sturgeon and Kirkwall] was transferred to Link Global".[20] In the Phase 1 Decision, the Commission held that after March 8, 2021 Link Global was generating:

> ... electric energy via units it owns and are located on the Sturgeon and Kirkwall sites, and uses that electric energy to power digital currency processing facilities it owns, on those same sites. The Commission finds that since March 8, 2021, Link Global has been "a person generating or proposing to generate electric energy solely for the person's own-use" at both sites.[21]

28. In its Phase 2 Submissions with respect to Sturgeon and Kirkwall, Link Global voluntarily disclosed that the March 8, 2021 agreement with Block One was

[20] Phase 1 Decision, para. 34.

[21] *Ibid,* para. 41.

part of a larger transaction in which the digital currency processing facilities (computers) which Link Global acquired from Block One were sold to a third party, 1292491 B.C. Ltd. ("**1292491**").[22] Link Global further stated:

> Link Global acknowledges that the effect of the New Service Agreement [with 1292491] is that Link Global did not, after March 8, 2021, become the owner of both "the generating units and the digital currency processing facilities on each site", as per paragraph 41 of the Phase 1 Decision.[23]

29. As noted in the Introduction, based on this disclosure made by Link Global, the Commission determined in the Further Process Ruling that it would re-open Phase 1 of Proceeding 26379 for the limited purpose of reconsidering certain aspects of the Phase 1 Decision:

    a. What is the effect of the March 8 and March 11, 2021 agreements with respect to the nature of Link Global's activities at the Sturgeon and Kirkwall plants from the date of those agreements?

    b. Did Link Global's activities from either of March 8 or March 11, 2021 onward constitute "own-use"?

    c. Should the Commission reconsider its finding at paragraph 6(v) of the Phase 1 Decision that "Link Global failed to meet the definition of own-use for the purposes of obtaining exemption from approval under the

[22] 26379-X0065, paras. 19-20.

[23] *Ibid,* para. 26.

Hydro and Electric Energy Act until March 8, 2021, when it acquired ownership of the digital currency processing facilities"?

d. Should the Commission reconsider its comments on how the Kirkwall facility can achieve compliance going forward?

30. In summary, as will be discussed below Link Global's position is:

1) At all times, both before and after March 11, 2021, the nature of Link Global's activities at Sturgeon and Kirkwall was that Link Global provided comprehensive hosting services to its customers. Apart from owning the computers housed in the specialized containers, Link Global's customers had no involvement with either facility. The same arrangement was in place at Westlock.

2) Link Global's relationship with its customers at Sturgeon, Kirkwall and Westlock is properly characterized as a bailment.

3) Link Global's activities at each of Sturgeon, Kirkwall and Westlock met the definition of own-use for the purposes of the HEE Act at all times (in the case of Sturgeon and Kirkwall, both before and after March 11, 2021).

4) Therefore, the Commission should reconsider its finding that Link Global failed to meet the definition of own-use for the purposes of obtaining exemption from approval under the HEE Act until March 8, 2021.

5) Since Link Global met the definition of own-use at Kirkwall, the Commission need not reconsider its comments on how the Kirkwall facility can achieve compliance going forward.

31. Further, Link Global submits that finding that Link Global met the definition of own-use for the purposes of the EU Act but not the HEE Act, either before or after March 11, 2021, creates a contradiction in the interpretation and application of the two statutes. It is inconsistent with the wording of the acts and the overall statutory scheme administered by the Commission.

32. Link Global submits that ownership of both the generating units and the computers by one person is not the determinative factor in meeting the own-use definition. Rather, when the HEE Act and the EU Act are read together harmoniously and coherently, the determinative factor is that the arrangement at each of Westlock, Sturgeon and Kirkwall was a "closed-loop" of power generation and use, with no connection to the grid and the electric energy market.

33. Procedurally, making ownership of both the generating units and the computers the determinative factor of whether the own-use definition is met, as per the Phase 1 Decision, would be unfair to Link Global with respect to Westlock, since the outcome will be a foregone conclusion. This is because the business model and facility arrangement at Westlock was the same as it was at Sturgeon and Kirkwall: Link Global generates the power, owns the buildings that house the crypto-mining equipment, and operates the site, but another entity owns the computers. As will be discussed further below, Link Global is effectively a bailee of the computers.

34. Link Global respectfully requests that the Commission reconsider the own-use issue and do so with an open mind, based on the additional disclosure voluntarily made by Link Global in its Phase 2 Submissions and having regard to the applicable principles of statutory interpretation.

35. Given the evidence about the effect of the March 11, 2021 agreement, there can be only two outcomes: either the own-use definition for the purposes of the HEE Act was met at all three sites for the entire time they were operating, or it was not. Link Global submits that it was.

(b) The Commission's Finding on own-use in the Phase 1 Decision

36. At para. 33 of the Phase 1 Decision, the Commission accepted that neither the Kirkwall or Sturgeon plants were connected to the Alberta interconnected electric system ("**AEIS**" or "**grid**") and that the electric energy was consumed on site.

37. Despite this finding, the Commission held at para. 38 that the definition of "person" in the HEE Act did not extend to de facto partnerships or joint ventures. Therefore, the fact that Block One owned the computers at Sturgeon and Kirkwall meant that Link Global was not a person generating power solely for its own use.

38. In support of this conclusion, the Commission referenced Decision 2008-121[24] In that decision, which is less than three pages long, the Commission held that

[24] Wind Power Inc., Request to Transfer Power Plant Approval No. U2007-74, November 26, 2008.

the definition of "person" in the HEE Act does not include a limited partnership. Link Global will discuss Decision 2008-121 further below.

39. With regard to the EU Act, the Commission noted that the own-use definition in that act, which is similar to that in the HEE Act, has an "important qualification" at s. 2(3), which expressly contemplates separate ownership of the generating unit and of the property on which the power is generated. The Commission concluded that since the energy was produced and consumed on the same property, the fact that Link Global did not own the computers did not matter and each of Kirkwall and Sturgeon had been exempt from the EU Act since inception.

(c) Statutory Scheme

40. The HEE Act and the EU Act are "home statutes" administered by the AUC that work together to ensure the economic, orderly and efficient development of electric energy and of an efficient electricity market based on fair and open competition. The two acts influence each other.

41. The purposes of the EU Act are set out in Section 5, and include the following:

- To provide an efficient Alberta electric industry structure;
- To provide a competitive power pool so that an efficient electricity market based on fair and open competition can develop;
- Share the costs and benefits of the electricity market and provide a regulatory framework that minimizes costs.

42. In short, the EU Act is preoccupied with the development and the regulation of a fair, open and competitive electricity market.

43. The HEE Act's purposes are found at Section 2 and include:

> 2 The purposes of this Act are
>
> > (a) To provide for the economic, orderly and efficient development and operation, in the public interest of hydro energy and in the generation, transmission and distribution of electric energy in Alberta
> >
> > (b) To secure the observance of safe and efficient practices in the public interest in the development of hydro energy and in the generation, transmission and distribution of electric energy in Alberta;
> >
> > …

44. Importantly, Section 3 of the HEE Act explicitly mentions the EU Act, mandating that when considering an application for a power plant approval under Section 11, the Commission must have regard for the purposes of the EU Act (see ss. 3(1)(d)):

> 3(1) Where the Commission is considering
>
> > (a) An application under section 11 for the construction or operation of a generating unit as defined in the Electric Utilities Act
> >
> > …
>
> the Commission, for the purposes of the consideration required to be given by the Commission under section 17 of the Alberta Utilities Act, and in order to determine whether the purposes of this Act will be achieved,

...

(d) must have regard for the purposes of the Electric Utilities Act. [Emphasis added]

45. The Commission's determination in the Phase 1 Decision that the own-use definition was met for the purposes of the EU Act but not for the purposes of the HEE Act appears to rest, at least in part, on the assertion that the exemption requirements in the two statutes "serve different purposes".[25] This statement, however, ignores the express direction of Section 3 of the HEE Act. When considering an application for approval of a power plant under section 11 of the HEE Act, the Commission must have regard for the purposes of the EU Act. Therefore, when considering whether a person is exempt from having to apply for approval of a power plant under section 11 of the HEE Act, the Commission must similarly have regard for the EU Act.

46. The EU Act defines "person" as including "an individual, unincorporated entity, partnership, association, corporation, trustee, executor, administrator or legal representative."[26]

47. The HEE Act simply defines "person" as including "a municipal corporation or other corporation."[27]

48. The own-use exemption in the EU Act states:

2(1) This Act does not apply to

[25] Phase 1 Decision, at para. 43.

[26] Section 1(1)(kk).

[27] Section 1(1)(j).

> (b) electric energy produced on property of which a person is the owner or a tenant, and consumed solely by that person and solely on that property.
>
> …
>
> (3) The exemption under subsection (1)(b) applies whether or not the owner or tenant is the owner of the generating unit producing the electric energy.

49. The own-use exemption in the HEE Act states:

> 13(1) Section 9 and 11 do not apply to a person generating or proposing to generate electric energy solely for the person's own use, unless the Commission otherwise directs.

50. In addition to the HEE Act, the EU Act and the AUC Act, the Commission administers several other enactments, including the *Public Utilities Act*, the *Gas Utilities Act*, the *Pipeline Act*, and the *Gas Distribution Act*,.[28] The Alberta government has created and implemented this specialized legislative framework to ensure that the Commission is able to provide oversight of the transmission, distribution, and some aspects of the retail sale of natural gas and electricity within Alberta.[29]

51. As will be discussed further below, none of these other enactments define "person".

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[28] Rate Regulation Initiative, Re, 2014 ABCA 397, para. 14.

[29] *Ibid*, para. 15.

52. The *Alberta Utilities Commission Act*, SA 2007, c A-37.2 ("**AUC Act**"), another one of the Commission's home statutes, also does not define the word "person". However, the word "person" is used throughout the act, and it is relevant for provisions such as Section 63(1) which states that if the Commission determines that a **person** has contravened or failed to comply with any provision of this Act or any other enactment under the jurisdiction of the Commission, it may impose an administrative penalty on that person or impose any terms or conditions on that person.

(d) Principles of Statutory Interpretation

53. The Supreme Court of Canada summarized the principles of statutory interpretation in its seminal decision of *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559. The SCC held that:

- There is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

- The preferred approach recognizes that the legislative context plays a role in interpretation.

- "[W]here the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive."

- The principle of interpretation presumes harmony, coherence, and consistency between statutes dealing with the same subject matter.[30] [emphasis added]

54. In the context of the present matter, the third and fourth principles in *Bell ExpressVu* are particularly relevant. The own-use definition in the HEE Act is found in an act that is a component of a large and complex statutory scheme and the principle of statutory interpretation presumes harmony, coherence and consistency between it and the other statutes in that statutory scheme. A finding that the own-use definition is met for the purposes of one of these statutes but not the other does not read the two acts in harmony and consistently with each other, even though they both deal with different aspects of the same subject matter.

55. Notably, the Court in *Bell ExpressVu* stated that even though the *Radiocommunication Act* did not contain its own statement of purpose, it did not exist in a vacuum and its provisions had to be read in light of other enactments such as the *Broadcasting Act* and the *Copyright Act*, which referenced the *Radiocommunications Act*.

56. While the plain or ordinary meaning of a word or the wording of a provision can be determinative, another meaning may be revealed after reference is had to the larger legislative scheme and the purpose of the provision and its relationship with related legislation.[31]

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[30] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at paras. 26-27.

[31] *R v Garland*, 2021 ABCA 46, para. 52.

57. The Court of Appeal applied the above principles in *R v Atchinson*, 2006 ABCA 258 when it considered whether a person on a skateboard could be considered a pedestrian as defined in the *Traffic Safety Act* ("**TSA**"). Skateboards were not explicitly referred to in the TSA's definition of pedestrian, so the Court examined the word in the context of the purpose of the TSA. It found that skateboards did not perform the functions of a vehicle, such as traveling long distances or operating on a highway. As such, many of the provision of the TSA and its regulations did not apply to skateboards. In that context, it was appropriate to use the rules of statutory interpretation to find that persons on skateboards fall within the definition of "pedestrian". [32]

(e) Plain Meaning

58. Link Global submits that a plain reading of the word "person" as defined in the HEE Act is not particularly helpful or illuminating. The HEE Act uses the verb "includes" to make explicit that municipal corporations and other corporations fall within the definition of "person". Read in isolation, all this definition tells us is that in addition to individuals, a corporation and municipality is a "person". To paraphrase Decision 200-121, the HEE Act is silent as to whether Link Global may, on the facts of this case, be considered a "person" for the purposes of qualifying for the own-use exemption under the HEE Act.[33]

59. Fortunately, the HEE Act does not exist in a vacuum. The Commission's responsibility to administer a complex statutory scheme, as well as the explicit

[32] *R v Atchinson*, 2006 ABCA 258, paras. 7-8.

[33] Decision 2008-121, at pg. 3.

guidance of section 3 of the HEE Act, require that the Commission read the HEE Act in conjunction with the EU Act.

60. Viewing the definitions in the HEE Act and the EU Act together means that the word "person" would include an individual, unincorporated entity, partnership, association, corporation, trustee, executor, administrator or legal representative **and** a corporation and municipal corporation.

61. This definition is consistent with the principle that the legislature does not speak in vain. Section 2(3) of the EU Act clarifies that the exemption in s. 2(1) applies whether or not the owner or tenant of the property on which power is being generated is the owner of the generating unit. In other words, section 2(3) clarifies that the exemption in section 2(1) includes scenarios where more than one entity is present in a closed-loop arrangement of power generation and use.

62. Further, the word "person" in the EU Act is defined to include partnerships. In the *Partnership Act*, RSA 2000, c P-3, "partnership" is defined as the relationship that subsists between persons carrying on a business in common with a view to profit. Clearly, a "partnership" by definition requires more than one person. Therefore, even without the clarification in sec. 2(3), the definition of person in the EU Act expressly contemplates the possibility of electric energy being generated and used on a site where there are more than a single person or entity involved.

63. An interpretation of the own-use exemption in the HEE Act that focuses on the fact that it is expressed in the singular is not consistent with the definition of

"person" in the EU Act, which is inclusive of different types of entities, including multi-entity and unique business arrangements such as that used by Link Global and its customers.

64. Further, as noted by the Commission in Decision 2008-121[34] the word "includes" is generally used to enlarge the meaning of the specific words used in the statute in order to embrace something else not specifically stated.[35] The word "includes" in a statute immediately before a list generally indicates that the list is not intended to be exhaustive.

65. In *Pridgen v University of Calgary*, 2010 ABQB 644, the Court disagreed that s. 31(1)(a) of the *Post-Secondary Learning Act*, SA 2003,c P-19.5 limited discipline appeals to fines, suspension or expulsion, but excluded probation. The Court explained that such a limiting interpretation would fail to give meaning to the word "includes" and would remove any statutory basis for other forms of discipline such as probation.

66. As noted above, the definition of "person" in the EU Act includes unincorporated entities, which suggests the legislative intention was to cast as broad a net as possible, capturing both entities created by statute and those that are not.

67. Link Global submits, therefore, that the word "person" in the EU Act and by association, in the HEE Act, is meant to be a broad definition. The legislative intent was to include any entity, whether comprised of a single body or several,

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[34] *Ibid,* pg. 2.

[35] *R v Hauser*, [1979] 1 SCR 984, 1979 CarswellAlta 220, para. 59.

involved in the generation of electric energy. The inclusion of specific entities in the list of the definition is not meant to be limiting. Instead, it is meant to ensure certain bodies do not escape the definition. Thus, the inclusion of "municipal corporations and other corporations" in the HEE Act was meant to ensure those entities also followed provisions of the HEE Act. It was not meant to limit it to those entities.

68. Link Global further submits that the inclusive definition of "person" in the two acts encompasses unique business relationships such as bailments for reward, even if those are not expressly mentioned in the definition.

69. Link Global submits that its relationship with its customers at the Westlock, Kirkwall, and Sturgeon sites is properly characterized as a bailment. At common law, bailment is defined as:

> … the delivery of personal chattels on trust, usually on contract, express or implied, that the trust shall be executed and the chattels be delivered in either their original or an altered form as soon as a time for which they were bailed has elapsed. It is to be noted that the legal relationship of bailor and bailee can exist independently of a contract. It is created by the voluntary taking into custody of goods which are the property of another.[36]

70. Bailments require a transfer of possession and a voluntary acceptance of the common law duty of safekeeping.[37] The relationship is created by voluntarily taking into custody good which are the property of another, whether a

[36] *Visscher v Triple Broek Holdings Ltd.*, 2006 ABQB 259, para. 27.

[37] *Ibid*, par. 30.

contract exists or not.[38] The common characteristics of a bailment include: the bailor delivers goods to the occupiers who have control over the goods and can exclude others; the premises are secure, the bailor remains away from the premises for an extended period of time, and the bailee may provide ancillary functions.[39]

71. Bailees also carry a duty of care over the safety of the article entrusted to him and is liable for the loss or damage to the goods.[40] Under the agreements with its customers, Link Global assumes voluntary custody of the computers, in effect creating a relationship of bailment for reward.

72. The Master Service Agreement between Link Global and Block One, for example, creates a bailment relationship. Clause 1 describes Link Global as a host for the computers, providing ancillary services such as the provision of electrical and networking equipment, and other such equipment as required to operate the computers. Clause 10 charges Link Global with the duty to repair or replace damaged equipment. Clause 13 codifies Link Global's duty to keep the computers safe and secure.

73. The customers are not physically present at Link Global's facilities; just their personal property (the computers). Consequently, even though Link Global owns and operates the facilities, while its customers own the computers, there is really only one entity or person at the Westlock, Kirkwall, and Sturgeon sites.

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[38] *Dorico Investments Ltd. v. Weyerhauser Canada Ltd.*, 1999 ABQB 561, page. 8

[39] *Ibid*, page 8.

[40] *Tarpon Energy Services Ltd. v Lal*, 2020 ABQB 317, para. 41.

Link Global may not have ownership of the computers, but it has custody and control of them and the duty to keep the computers safe and secure.

74. Link Global also submits that whether its business relationship with its customers qualifies as “partnership”, “bailment”, or “unincorporated entity” is actually beside the point. The point is that Link Global and its customers (through their ownership of the computers) were entities engaged in the act of generating and consuming power on site. As in the *Atchinson* decision, which grappled with the word pedestrian in the context of skateboards, just because the situation is unique does not mean it is not captured by the legislation. In such situations, the context and the applicability of the statute should guide whether the new situation falls within one definition or another.

75. Similarly, as noted in *Pridgen*, the non-inclusion of a situation in a definition with a list does not mean it was intended to be excluded. If the situation falls within the scope of the intended application of the act, then that situation can be included in the definition.

76. Reading the definition of “person” in the HEE Act in isolation from the definition of “person” in the EU Act , to exclude partnerships and other types of multi-entity arrangements (including bailment), would be contrary to s. 3(1) of the HEE Act. Reading the definition of “person” in the HEE Act harmoniously and consistent with the definition of “person” in the EU Act, but nevertheless excluding multi-entity relationships from the own-use exemption in the HEE Act, would render s. 2(3) of the EU Act meaningless. Neither of these approaches to interpretation is consistent with the approach endorsed by the SCC in *Bell ExpressVu.*

77. The only approach to interpretation that makes sense is for the definitions of "person" and the own-use exemption provisions in the HEE Act and the EU Act to be read together, harmoniously and consistently.

78. As noted above, several of the Commission's home statutes, including the AUC Act, contain no definition of "person", notwithstanding that the word appears throughout these statutes. In the event the Commission is ever called upon to determine the meaning of person as used in any of these statutes, it will naturally look to the definitions of person in both the HEE Act and the EU Act. So in this case it is appropriate for the Commission to have regard to the definition of person in the EU Act when determining its meaning in the HEE Act. This is particularly true since, as discussed above, the definition of person in the HEE Act is not very illuminating.

79. Finally, Link Global submits that the Decision 2008-121 is distinguishable from this case. Decision 2008-121 turned on whether a limited partnership ("**LP**") could fall under the definition of "person". The Commission noted the *Partnership Act* does not define a LP as a person. Further, that act requires that the general partner of a LP be a person and stipulates that only the general partner, not the LP, can hold an interest in real property. From this, the Commission analogized that an LP cannot hold an approval under section 11 of the HEE Act.

80. The key finding in Decision 2008-121, in section 4 titled "Decision", is:

> The HEEA is silent as to whether an LP may be considered a "person" for the purposes of holding an approval under section 11 of that Act. However, the Commission is satisfied that the legal

> status of an LP at common law is sufficiently limited to require that a general partner – which does have the status of a "person" - must hold the approval under section 11 of the HEEA on behalf of the LP.

81. Link Global takes no issue with this decision, which turns on the legal status of a limited partnership at common law, but submits that Decision 2008-121 is distinguishable on the facts. Therefore, the Commission's finding in that decision is of little assistance to this case.

(f) A Harmonious and Coherent Interpretation of the HEE Act and EU Act

82. Just as the meaning of the word "person" cannot be determined in isolation, the "own-use" exemption in the HEE Act also cannot be properly assessed independently of the EU Act. Both the principles of statutory interpretation in *Bell ExpressVu* and section 3 of the EU Act require the Commission to consider the acts, and therefore the exemptions provisions, together.

83. Link Global further submits that the focus of the "own-use" exemption is not on how many persons are present in a power generating site, but rather whether the cycle of power generation and consumption is a "closed loop" or is connected to the grid. This focus is revealed when the two acts are read together harmoniously and coherently.

84. A plain reading of Section 2(1)(b) of the EU Act appears to establish two conditions for the application of the own-use exemption: (1) the energy is produced on the property of which the person is an owner/tenant; and (2) it is consumed solely by that person for their own use on that property. It is these

conditions that provide the basis for the qualification in s. 2(3) that the owner/tenant can be a different person from the owner of the generating unit.

85. By contrast, the own-use exemption in the HEE Act simply refers to a person generating electricity solely for their own use; i.e., the second condition in s. 2(1) of the EU Act. However, Link Global submits that the first condition is implicit within the HEE Act exemption. Of course, to qualify for the exemption the electric energy must be consumed on site. It could not be otherwise. Therefore, there is no substantive difference between the two exemptions.

86. Not only are both conditions implicit in the HEE Act own-use exemption looked at on its own, interpreting the two own-use definitions together, harmoniously and consistently, confirms that for the purposes of the HEE Act there can be two entities on a property, one generating power and the other using it, and the exemption will be met so long as the facility is not connected to the grid.

87. This harmonious interpretation is consistent with the parallel purposes of the two acts, discussed above.

88. The Phase 1 Decision on own-use under the HEE Act could lead to absurd results that are inconsistent with the purposes of the acts. Again, the evidence is that Link Global provides comprehensive hosting services, which means it hosts its customer's computers on its site(s). The result of the Phase 1 Decision is that if Link Global does not own the computers, the own-use exemption is not met; if it owns the computers, the exemption is met.

89. This situation is analogous to that of a property owner who establishes an off-the-grid residence and generates electricity for use solely in his residence. If

that same owner converted their residence into a rental property such that the electricity was now being used by the tenant, by the logic of the Phase 1 Decision the off-the-grid property would no longer meet the own-use exemption under the HEE Act. Surely nobody would think such an outcome was intended by the legislature.

90. The only difference between Link Global's scenario and this hypothetical scenario is that Link Global charges an energy fee to its customers who own the computers whereas the hypothetical residence owner presumably would charge the tenant rent. Link Global submits this difference should not matter.

91. The result of the Phase 1 Decision on own-use is neither efficient nor economic. It undermines the purpose of having an exemption for generators under 10 MW that are not connected to the grid. The purpose of the own-use exemption is to avoid the need for an application where power generation does not impact the electricity market. This purpose was recognized by the Commission in *Advantage Oil and Gas Ltd. and EPCOR Water Services* in relation to Section 2(b) of the EU Act and Section 13 of the HEE Act, among other related provisions:

> The Commission considers it reasonable to conclude that these provisions all share the same target: on-site generation developed for the express purpose of self-supply. When read together, these provisions reflect the legislature's intention to allow a person to build and operate a generating unit on land a person owns or leases, and to exempt the generating unit and the electric energy produced by it from the statutory scheme if the electric energy is intended only for the person's own use, consumed solely by the person, and solely on the person's property. The Commission finds that these exemptions

> reflect the "closed loop" nature of a self-supply arrangement; because the person is not using the market infrastructure and is not transacting in the market, neither the person, the unit, nor the output is bound by the market's rules."[41]

(g) Conclusion on Harmonious Interpretation

92. Link Global submits that the HEE Act and EU Act must be interpreted together, harmoniously and consistently, having regard to the fact that they are parallel acts that serve different but related purposes within the overall statutory scheme for the regulation of electricity in Alberta. A harmonious interpretation precludes the Commission from considering the words of one act in isolation from the other.

93. The word person is defined in both the EU Act and the HEE Act. Both definitions are inclusive, non-exhaustive lists. The listed words are meant to ensure certain entities do not escape the definition, not limit the scope of the definition.

94. The interrelated meaning of the word 'person' in both acts expressly contemplates entities that consist of more than one party, including business arrangements that involve more than one "person", like partnerships.

95. Furthermore, Link Global, as custodian and caretaker of its customers' computers, is a bailee as defined at common-law, meaning that there is in reality only one entity at the Link Global sites.

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[41] *Advantage Oil and Gas Ltd. Re*, 2019 CarswellAlta 804, at para 32; and *EPCOR Water Services Inc. Re*, 2019 CarswellAlta 387, at para. 92.

96. In any event, whether there is more than one person involved in the generation and use of electric energy in one property is not determinative. Instead, the focus of the own-use exemption is whether the energy is produced and consumed on site. This focus is consistent with the interrelated purposes of the EU Act and the HEE Act.

97. At the Link Global sites, power is generated and consumed wholly on site in a closed-loop system that is not connected to the grid. The customers themselves have no involvement in the ownership or operation of the sites. Their only connection is ownership of computers that are hosted on site by Link Global.

98. Given the foregoing, Link Global submits Kirkwall and Sturgeon fell under the own-use exemption both before and after the March 8 and March 11, 2021 agreements. Similarly, Westlock, which has the same operational set-up, fell under the own-use exemption for the entire period of its operation.

CONCLUSION

99. In summary, with regard to the Westlock Power Plant, Link Global:

(a) agrees to Enforcement Staff's Alleged Contravention 1, that it operated the Westlock power plants contrary to the HEE Act and AUC Rule 007 by failing to ensure that (i) the Westlock plant complied with AUC Rule 012 and (ii) there would be no adverse environmental effects, prior to operation;

(b) denies Enforcement Staff's Alleged Contravention 2, that it concealed its actions by intentionally providing false information; and

(c) denies that Link Global did not generate electric energy at Westlock solely for its own use.

100. With regard to the Sturgeon and Kirkwall plants, Link Global denies that it did not generate electric energy solely for its own use, either before or after March 11, 2021.

101. With regard to how Kirkwall can achieve compliance going forward, Link Global submits there is no need for the Commission to reconsider its comments in the Phase 1 Decision[42] because the own-use exemption was met at all times. Therefore, Link Global asks the Commission to confirm that should Link Global wish to recommence operations at Kirkwall, it may file information with the Commission that it has either obtained approval under EPEA or confirmation from AEP that approval is not required in the circumstances. For the Commission's information, Link Global is in the process of finalizing an EPEA Application for submission to AEP, which should occur in the very near future.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Calgary, in the Province of Alberta, this 2nd day of February, 2022.

McLennan Ross LLP

Per: _____

Gavin S. Fitch, Q.C. and Cesar Agudelo
Solicitors for Link Global Technologies Inc.

[42] Phase 1 Decision, para. 83.

TABLE OF AUTHORITIES

Tab 1:

Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559

Bell ExpressVu Limited Partnership *Appellant*

v.

Richard Rex, Richard Rex, c.o.b. as 'Can-Am Satellites', and c.o.b as 'Can Am Satellites' and c.o.b. as 'CanAm Satellites' and c.o.b. as 'Can Am Satellite' and c.o.b. as 'Can Am Sat' and c.o.b. as 'Can-Am Satellites Digital Media Group' and c.o.b. as 'Can-Am Digital Media Group' and c.o.b. as 'Digital Media Group', Anne Marie Halley a.k.a. Anne Marie Rex, Michael Rex a.k.a. Mike Rex, Rodney Kibler a.k.a. Rod Kibler, Lee-Anne Patterson, Michelle Lee, Jay Raymond, Jason Anthony, John Doe 1 to 20, Jane Doe 1 to 20 and any other person or persons found on the premises or identified as working at the premises at 22409 McIntosh Avenue, Maple Ridge, British Columbia, who operate or work for businesses carrying on business under the name and style of 'Can-Am Satellites', 'Can Am Satellites', 'CanAm Satellites', 'Can Am Satellite', 'Can Am Sat', 'Can-Am Satellites Digital Media Group', 'Can-Am Digital Media Group', 'Digital Media Group', or one or more of them *Respondents*

and

The Attorney General of Canada, the Canadian Motion Picture Distributors Association, DIRECTV, Inc., the Canadian Alliance for Freedom of Information and Ideas, and the Congres Iberoamericain du Canada *Interveners*

Indexed as: Bell ExpressVu Limited Partnership *v.* Rex

Neutral citation: 2002 SCC 42.

File No.: 28227.

2001: December 4; 2002: April 26.

Bell ExpressVu Limited Partnership *Appelante*

c.

Richard Rex, Richard Rex, faisant affaire sous les dénominations sociales 'Can-Am Satellites', 'Can Am Satellites', 'CanAm Satellites', 'Can Am Satellite', 'Can Am Sat', 'Can-Am Satellites Digital Media Group', 'Can-Am Digital Media Group' et 'Digital Media Group', Anne Marie Halley, alias Anne Marie Rex, Michael Rex, alias Mike Rex, Rodney Kibler, alias Rod Kibler, Lee-Anne Patterson, Michelle Lee, Jay Raymond, Jason Anthony, M. Untel 1 à 20, M^me^ Unetelle 1 à 20 et toute autre personne qui a été vue travaillant dans les locaux situés au 22409, avenue McIntosh, Maple Ridge, Colombie-Britannique, ou identifiée comme étant une telle personne, qui exploite des entreprises, ou l'une ou plusieurs de celles-ci, faisant affaire sous les dénominations sociales 'Can-Am Satellites', 'Can Am Satellites', 'CanAm Satellites', 'Can Am Satellite', 'Can Am Sat', 'Can-Am Satellites Digital Media Group', 'Can-Am Digital Media Group', 'Digital Media Group', ou qui travaille pour ces entreprises ou pour l'une ou plusieurs de celles-ci *Intimés*

et

Le procureur général du Canada, l'Association canadienne des distributeurs de films, DIRECTV, Inc., la Canadian Alliance for Freedom of Information and Ideas et le Congres Iberoamericain du Canada *Intervenants*

Répertorié : Bell ExpressVu Limited Partnership *c.* Rex

Référence neutre : 2002 CSC 42.

N^o^ du greffe : 28227.

2001 : 4 décembre; 2002 : 26 avril.

Present: L'Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Communications law — Radiocommunications — Direct-to-home distribution of television programming — Decoding in Canada of encrypted signals originating from foreign satellite distributor — Whether s. 9(1)(c) of Radiocommunication Act prohibits decoding of all encrypted satellite signals, with a limited exception, or whether it bars only unauthorized decoding of signals that emanate from licensed Canadian distributors — Radiocommunication Act, R.S.C. 1985, c. R-2, s. 9(1)(c).

Statutes — Interpretation — Principles — Contextual approach — Grammatical and ordinary sense — "Charter values" to be used as an interpretive principle only in circumstances of genuine ambiguity.

Appeals — Constitutional questions — Factual record necessary for constitutional questions to be answered.

The appellant engages in the distribution of direct-to-home (DTH) television programming and encrypts its signals to control reception. The respondents sell U.S. decoding systems to Canadian customers that enable them to receive and watch U.S. DTH progamming. They also provide U.S. mailing addresses to their customers who do not have one, since the U.S. broadcasters will not knowingly authorize their signals to be decoded by persons outside the United States. The appellant, as a licensed distribution undertaking, brought an action in the British Columbia Supreme Court, pursuant to ss. 9(1)(*c*) and 18(1) of the *Radiocommunication Act*, requesting in part an injunction prohibiting the respondents from assisting resident Canadians in subscribing to and decoding U.S. DTH programming. Section 9(1)(*c*) enjoins the decoding of encrypted signals without the authorization of the "lawful distributor of the signal or feed". The chambers judge declined to grant the injunctive relief. A majority of the Court of Appeal held that there is no contravention of s. 9(1)(*c*) where a person decodes unregulated signals such as those broadcast by the U.S. DTH companies, and dismissed the appellant's appeal.

Présents : Les juges L'Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit des communications — Radiocommunication — Distribution de programmation télévisuelle par satellite de radiodiffusion directe — Décodage au Canada de signaux encodés émanant de distributeurs étrangers utilisant des satellites — L'article 9(1)c) de la Loi sur la radiocommunication interdit-il le décodage de tous les signaux encodés émis par des satellites, sous réserve d'une exception limitée, ou prohibe-t-il seulement le décodage de signaux émanant de distributeurs canadiens titulaires de licence? — Loi sur la radiocommunication, L.R.C. 1985, ch. R-2, art. 9(1)c).

Lois — Interprétation — Principes — Approche contextuelle — Sens ordinaire et grammatical — Recours aux « valeurs de la Charte » comme principe d'interprétation seulement en cas d'ambiguïté véritable.

Appels — Questions constitutionnelles — Refus de répondre aux questions constitutionnelles pour cause d'absence de fondement factuel.

L'appelante, une entreprise de distribution de programmation télévisuelle par satellite de radiodiffusion directe (« SRD »), encode ses signaux pour en circonscrire la réception. Les intimés vendent à des clients canadiens des décodeurs américains leur permettant de recevoir et de regarder de la programmation SRD américaine. Ils fournissent en outre une adresse postale aux États-Unis à ceux de leurs clients qui n'en possèdent pas déjà une, car les radiodiffuseurs américains n'autorisent pas sciemment le décodage de leurs signaux par des personnes se trouvant à l'extérieur des États-Unis. L'appelante, à titre d'entreprise de distribution titulaire d'une licence, a intenté une action devant la Cour suprême de la Colombie-Britannique en vertu de l'al. 9(1)*c*) et du par. 18(1) de la *Loi sur la radiocommunication*, sollicitant notamment une injonction interdisant aux intimés d'aider des résidants canadiens à s'abonner à la programmation SRD américaine et à décoder les signaux pertinents. L'alinéa 9(1)*c*) interdit « de décoder, sans l'autorisation de leur distributeur légitime, [. . .] un signal d'abonnement ou une alimentation réseau ». Le juge siégeant en chambre a refusé l'injonction demandée. La Cour d'appel à la majorité a jugé que la personne qui décode des signaux non visés par la réglementation, tels ceux diffusés par les entreprises SRD américaines, ne contrevient pas à la disposition en question et elle a rejeté l'appel formé par l'appelante.

Held: The appeal should be allowed. Section 9(1)(*c*) of the Act prohibits the decoding of all encrypted satellite signals, with a limited exception.

It is necessary in every case for the court charged with interpreting a provision to undertake the preferred contextual and purposive interpretive approach before determining that the words are ambiguous. This requires reading the words of the Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids, including other principles of interpretation such as the strict construction of penal statutes and the "*Charter* values" presumption.

When the entire context of s. 9(1)(*c*) is considered, and its words are read in their grammatical and ordinary sense in harmony with the legislative framework in which the provision is found, there is no ambiguity and accordingly no need to resort to any of the subsidiary principles of statutory interpretation. Because the *Radiocommunication Act* does not prohibit the broadcasting of subscription programming signals (apart from s. 9(1)(*e*), which forbids their unauthorized retransmission within Canada) and only concerns decrypting that occurs in Canada or other locations contemplated in s. 3(3), this does not give rise to any extra-territorial exercise of authority. Parliament intended to create an absolute bar on Canadian residents' decoding encrypted programming signals. The only exception to this prohibition occurs where authorization is acquired from a distributor holding the necessary legal rights in Canada to transmit the signal and provide the required authorization. The U.S. DTH distributors in the present case are not "lawful distributors" under the Act. This interpretation of s. 9(1)(*c*) as an absolute prohibition with a limited exception accords well with the objectives set out in the *Broadcasting Act* and complements the scheme of the *Copyright Act*.

The constitutional questions stated in this appeal are not answered because there is no *Charter* record permitting this Court to address the stated questions. A party cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial. "*Charter* values" cannot inform the interpretation given to s. 9(1)(*c*) of the *Radiocommunication Act*, for these

Arrêt : Le pourvoi est accueilli. L'alinéa 9(1)*c*) interdit le décodage de tous les signaux encodés transmis par satellite, sous réserve d'une exception limitée.

Le tribunal appelé à interpréter une disposition législative doit, dans chaque cas, se livrer à l'analyse contextuelle et téléologique privilégiée avant de décider si le texte de la disposition est ambigu. À cette fin, il lui faut lire les mots de la disposition dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de celle-ci et l'intention du législateur. C'est uniquement lorsque au moins deux interprétations plausibles, qui s'harmonisent chacune également avec l'intention du législateur, créent une ambiguïté véritable que les tribunaux doivent recourir à des moyens d'interprétation externes, y compris d'autres principes d'interprétation — telles l'interprétation stricte des lois pénales et la présomption de respect des « valeurs de la *Charte* ».

L'examen du contexte global de l'al. 9(1)*c*) et l'interprétation des mots qui le composent suivant leur sens ordinaire et grammatical, en conformité avec le cadre législatif dans lequel s'inscrit cette disposition, ne révèlent aucune ambiguïté et il n'est en conséquence pas nécessaire de recourir à l'un ou l'autre des principes subsidiaires d'interprétation législative. Puisque la *Loi sur la radiocommunication* n'interdit pas la radiodiffusion de signaux d'abonnement (exception faite de l'al. 9(1)*e*) qui interdit la retransmission non autorisée au Canada de tels signaux) et ne s'applique qu'au décodage survenant au Canada et aux autres endroits prévus au par. 3(3), la présente affaire ne soulève aucune question touchant à l'exercice extraterritorial de certains pouvoirs. Le législateur entendait interdire de manière absolue aux résidants du Canada de décoder des signaux d'abonnement encodés. La seule exception à cette interdiction est le cas où l'intéressé a obtenu l'autorisation de le faire du distributeur détenant au Canada les droits requis pour transmettre le signal concerné et en permettre le décodage. En l'espèce, les radiodiffuseurs SRD américains ne sont pas des « distributeurs légitimes » au sens de la Loi. Le fait de considérer que l'al. 9(1)*c*) établit une interdiction absolue assortie d'une exception limitée est une interprétation qui s'accorde bien avec les objets de la *Loi sur la radiodiffusion* et qui complète le régime établi par la *Loi sur le droit d'auteur*.

Aucune réponse n'a été donnée à l'égard des questions constitutionnelles, puisque le dossier ne comportait pas d'éléments relatifs à la *Charte* propres à permettre à la Cour de se prononcer sur ces questions. Une partie ne peut invoquer un argument entièrement nouveau qui aurait nécessité la production d'éléments de preuve additionnels au procès. Les « valeurs de la *Charte* » ne peuvent être

values are to be used as an interpretive principle only in circumstances of genuine ambiguity. A blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction, and wrongly upset the dialogic balance among the branches of governance. Where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result.

Cases Cited

Not followed: *R. v. Love* (1997), 117 Man. R. (2d) 123; *R. v. Ereiser* (1997), 156 Sask. R. 71; *R. v. LeBlanc*, [1997] N.S.J. No. 476 (QL); *R. v. Thériault*, [2000] R.J.Q. 2736, aff'd Sup. Ct. Drummondville, No. 405-36-000044-003, June 13, 2001; *R. v. Gregory Électronique Inc.*, [2000] Q.J. No. 4923 (QL), aff'd [2001] Q.J. No. 4925 (QL); *R. v. S.D.S. Satellite Inc.*, C.Q. Laval, No. 540-73-000055-980, October 31, 2000; *R. v. Branton* (2001), 53 O.R. (3d) 737; **referred to:** *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *R. v. Open Sky Inc.*, [1994] M.J. No. 734 (QL), aff'd (1995), 106 Man. R. (2d) 37, leave to appeal ref'd (1996), 110 Man. R. (2d) 153; *R. v. King*, [1996] N.B.J. No. 449 (QL), rev'd (1997), 187 N.B.R. (2d) 185; *R. v. Knibb* (1997), 198 A.R. 161, aff'd [1998] A.J. No. 628 (QL); *ExpressVu Inc. v. NII Norsat International Inc.*, [1998] 1 F.C. 245, aff'd (1997), 222 N.R. 213; *WIC Premium Television Ltd. v. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628; *Canada (Procureure générale) v. Pearlman*, [2001] R.J.Q. 2026; *Ryan v. 361779 Alberta Ltd.* (1997), 208 A.R. 396; *R. v. Scullion*, [2001] R.J.Q. 2018; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56; *Stoddard v. Watson*, [1993] 2 S.C.R. 1069; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015; *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108; *R. v. Goulis* (1981), 33 O.R. (2d) 55; *R. v. Hasselwander*, [1993] 2 S.C.R. 398; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53; *Westminster Bank Ltd. v. Zang*, [1966] A.C. 182; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743; *Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Corbiere v. Canada (Minister of Indian*

utilisées pour éclairer l'interprétation de l'al. 9(1)*c*), puisqu'elles ne doivent être utilisées comme principe d'interprétation qu'en cas d'ambiguïté véritable. L'application d'une présomption générale de conformité à la *Charte* pourrait parfois contrecarrer le respect de l'intention véritable du législateur, contrairement à ce que prescrit la démarche privilégiée en matière d'interprétation législative, et perturber à tort l'équilibre dialogique entre les pouvoirs législatif, exécutif et judiciaire. Lorsqu'une loi n'est pas ambiguë, les tribunaux doivent donner effet à l'intention clairement exprimée par le législateur et éviter d'utiliser la *Charte* pour arriver à un résultat différent.

Jurisprudence

Arrêts non suivis : *R. c. Love* (1997), 117 Man. R. (2d) 123; *R. c. Ereiser* (1997), 156 Sask. R. 71; *R. c. LeBlanc*, [1997] N.S.J. No. 476 (QL); *R. c. Thériault*, [2000] R.J.Q. 2736, conf. par C.S. Drummondville, n^{o} 405-36-000044-003, 13 juin 2001; *R. c. Gregory Électronique Inc.*, [2000] J.Q. n^{o} 4923 (QL), conf. par [2001] J.Q. n^{o} 4925 (QL); *R. c. S.D.S. Satellite Inc.*, C.Q. Laval, n^{o} 540-73-000055-980, 31 octobre 2000; *R. c. Branton* (2001), 53 O.R. (3d) 737; **arrêts mentionnés :** *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554; *R. c. Open Sky Inc.*, [1994] M.J. No. 734 (QL), conf. par (1995), 106 Man. R. (2d) 37, autorisation d'appel refusée (1996), 110 Man. R. (2d) 153; *R. c. King*, [1996] N.B.J. No. 449 (QL), inf. par (1997), 187 R.N.-B. (2d) 185; *R. c. Knibb* (1997), 198 A.R. 161, conf. par [1998] A.J. No. 628 (QL); *ExpressVu Inc. c. NII Norsat International Inc.*, [1998] 1 C.F. 245, conf. par [1997] A.C.F. n^{o} 1563 (QL); *WIC Premium Television Ltd. c. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628; *Canada (Procureure générale) c. Pearlman*, [2001] R.J.Q. 2026; *Ryan c. 361779 Alberta Ltd.* (1997), 208 A.R. 396; *R. c. Scullion*, [2001] R.J.Q. 2018; *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536; *Québec (Communauté urbaine) c. Corp. Notre-Dame de Bon-Secours*, [1994] 3 R.C.S. 3; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *R. c. Gladue*, [1999] 1 R.C.S. 688; *R. c. Araujo*, [2000] 2 R.C.S. 992, 2000 CSC 65; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2; *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3; *R. c. Ulybel Enterprises Ltd.*, [2001] 2 R.C.S. 867, 2001 CSC 56; *Stoddard c. Watson*, [1993] 2 R.C.S. 1069; *Pointe-Claire (Ville) c. Québec (Tribunal du travail)*, [1997] 1 R.C.S. 1015; *Marcotte c. Sous-procureur général du Canada*, [1976] 1 R.C.S. 108; *R. c. Goulis* (1981), 33 O.R. (2d) 55; *R. c. Hasselwander*, [1993] 2 R.C.S. 398; *R. c. Russell*, [2001] 2 R.C.S. 804, 2001 CSC 53; *Westminster Bank Ltd. c. Zang*, [1966] A.C. 182; *CanadianOxy Chemicals Ltd. c. Canada (Procureur général)*, [1999] 1 R.C.S. 743; *Québec (Procureur général) c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831;

and Northern Affairs), [1999] 2 S.C.R. 203; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Perka v. The Queen*, [1984] 2 S.C.R. 232; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *R. v. Gayle* (2001), 54 O.R. (3d) 36, leave to appeal to S.C.C. refused, [2002] 1 S.C.R. vii; *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *Baron v. Canada*, [1993] 1 S.C.R. 416; *R. v. Mills*, [1999] 3 S.C.R. 668; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. Lucas*, [1998] 1 S.C.R. 439; *Symes v. Canada*, [1993] 4 S.C.R. 695; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

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VI. Analysis

A. *Introduction*

22 It is no exaggeration to state that s. 9(1)(*c*) of the federal *Radiocommunication Act* has received inconsistent application in the courts of this country. On one hand, there is a series of cases interpreting the provision (or suggesting that it might be interpreted) so as to create an absolute prohibition, with a limited exception where authorization from a lawful Canadian distributor is received: *R. v. Open Sky Inc.*, [1994] M.J. No. 734 (QL) (Prov. Ct.), at para. 36, aff'd (1995), 106 Man. R. (2d) 37 (Q.B.) (*sub nom. R. v. O'Connor*), at para. 10, leave to appeal refused on other grounds (1996), 110 Man. R. (2d) 153 (C.A.); *R. v. King*, [1996] N.B.J. No. 449 (QL) (Q.B.), at paras. 19-20, rev'd on other grounds (1997), 187 N.B.R. (2d) 185 (C.A.) (*sub nom. King v. Canada (Attorney General)*); *R. v. Knibb* (1997), 198 A.R. 161 (Prov. Ct.), aff'd [1998] A.J. No. 628 (QL) (Q.B.) (*sub nom. R. v. Quality Electronics (Taber) Ltd.*); *ExpressVu Inc. v. NII Norsat International Inc.*, [1998] 1 F.C. 245 (T.D.), aff'd (1997), 222 N.R. 213 (F.C.A.); *WIC Premium Television Ltd. v. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628, at para. 72; *Canada (Procureure générale) v. Pearlman*, [2001] R.J.Q. 2026 (C.Q.), at p. 2034.

23 On the other hand, there are a number of conflicting cases that have adopted the more restrictive interpretation favoured by the majority of the Court of Appeal for British Columbia in the case at bar: *R. v. Love* (1997), 117 Man. R. (2d) 123 (Q.B.); *R. v. Ereiser* (1997), 156 Sask. R. 71 (Q.B.); *R. v. LeBlanc*, [1997] N.S.J. No. 476 (QL) (S.C.); *Ryan v. 361779 Alberta Ltd.* (1997), 208 A.R. 396 (Prov. Ct.), at para. 12; *R. v. Thériault*, [2000] R.J.Q. 2736 (C.Q.), aff'd Sup. Ct. Drummondville, No. 405-36-000044-003, June 13, 2001 (*sub nom. R. v. D'Argy*); *R. v. Gregory Électronique Inc.*, [2000] Q.J. No. 4923 (QL) (C.Q.), aff'd [2001] Q.J. No. 4925 (QL) (Sup. Ct.); *R. v. S.D.S. Satellite Inc.*, C.Q. Laval, No. 540-73-000055-980, October 31, 2000; *R. v.*

VI. L'analyse

A. *Introduction*

On peut, sans exagérer, affirmer que l'al. 9(1)*c*) de la *Loi sur la radiocommunication*, une loi fédérale, n'a pas été appliqué de manière uniforme par les tribunaux du pays. D'une part, dans certaines décisions les tribunaux ont interprété cette disposition (ou suggéré qu'elle pouvait l'être) d'une manière ayant pour effet de créer une interdiction absolue, assortie d'une exception limitée, savoir les cas où le distributeur canadien légitime accorde l'autorisation prévue : *R. c. Open Sky Inc.*, [1994] M.J. No. 734 (QL) (C. prov.), par. 36, conf. par (1995), 106 Man. R. (2d) 37 (B.R.) (*sub nom. R. c. O'Connor*), par. 10, demande d'autorisation d'appel à la Cour d'appel refusée pour d'autres motifs (1996), 110 Man. R. (2d) 153 (C.A.); *R. c. King*, [1996] N.B.J. No. 449 (QL) (B.R.), par. 19-20, inf. pour d'autres motifs par (1997), 187 R.N.-B. (2d) 185 (C.A.) (*sub nom. King c. Canada (Attorney General)*); *R. c. Knibb* (1997), 198 A.R. 161 (C. prov.), conf. par [1998] A.J. No. 628 (QL) (B.R.) (*sub nom. R. c. Quality Electronics (Taber) Ltd.*); *ExpressVu Inc. c. NII Norsat International Inc.*, [1998] 1 C.F. 245 (1re inst.), conf. par [1997] A.C.F. nº 1563 (QL) (C.A.); *WIC Premium Television Ltd. c. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628, par. 72; *Canada (Procureure générale) c. Pearlman*, [2001] R.J.Q. 2026 (C.Q.), p. 2034.

D'autre part, on relève un certain nombre de décisions à l'effet contraire, où les tribunaux ont adhéré à l'interprétation plus restrictive retenue en l'espèce par les juges majoritaires de la Cour d'appel de la Colombie-Britannique : *R. c. Love* (1997), 117 Man. R. (2d) 123 (B.R.); *R. c. Ereiser* (1997), 156 Sask. R. 71 (B.R.); *R. c. LeBlanc*, [1997] N.S.J. No. 476 (QL) (C.S.); *Ryan c. 361779 Alberta Ltd.* (1997), 208 A.R. 396 (C. prov.), par. 12; *R. c. Thériault*, [2000] R.J.Q. 2736 (C.Q.), conf. par C.S. Drummondville, nº 405-36-000044-003, 13 juin 2001 (*sub nom. R. c. D'Argy*); *R. c. Gregory Électronique Inc.*, [2000] J.Q. nº 4923 (QL) (C.Q.), conf. par [2001] J.Q. nº 4925 (QL) (C.S.); *R. c. S.D.S. Satellite Inc.*, C.Q. Laval, nº 540-73-000055-980, 31 octobre 2000;

Scullion, [2001] R.J.Q. 2018 (C.Q.); *R. v. Branton* (2001), 53 O.R. (3d) 737 (C.A.).

As can be seen, the schism is not explained simply by the adoption of different approaches in different jurisdictions. Although the highest courts in British Columbia and Ontario have now produced decisions that bind the lower courts in those provinces to the restrictive interpretation, and although the Federal Court of Appeal has similarly bound the Trial Division courts under it to the contrary interpretation, the trial courts in Alberta, Manitoba, and Quebec have produced irreconcilable decisions. Those provinces remain without an authoritative determination on the matter. This appeal, therefore, places this Court in a position to harmonize the interpretive dissonance that is echoing throughout Canada.

In attempting to steer its way through this maze of cases, the Court of Appeal for British Columbia, in my respectful view, erred in its interpretation of s. 9(1)(*c*). In my view, there are five aspects of the majority's decision that warrant discussion. First, it commenced analysis from the belief that an ambiguity existed. Second, it placed undue emphasis on the sheer number of judges who had disagreed as to the proper interpretation of s. 9(1)(*c*). Third, it did not direct sufficient attention to the context of the *Radiocommunication Act* within the regulatory *régime* for broadcasting in Canada, and did not consider the objectives of that *régime*, feeling that it was unnecessary to address these "wider policy issues". Fourth, the majority did not read s. 9(1)(*c*) grammatically in accordance with its structure, namely, a prohibition with a limited exception. Finally, the majority of the court effectively inverted the words of the provision, such that the signals for which a lawful distributor could provide authorization to decode (i.e., the exception) defined the very scope of the prohibition.

R. c. Scullion, [2001] R.J.Q. 2018 (C.Q.); *R. c. Branton* (2001), 53 O.R. (3d) 737 (C.A.).

24 Comme on peut le constater, cette divergence d'interprétations ne s'explique pas seulement par le fait que différentes juridictions dans diverses provinces ont adopté des démarches distinctes. Bien que les tribunaux de dernier ressort de la Colombie-Britannique et de l'Ontario se soient prononcés en faveur de l'interprétation restrictive et que ces décisions lient les tribunaux inférieurs de ces provinces, et que la Cour d'appel fédérale ait rendu une décision à l'effet contraire liant la Section de première instance de cette cour, les tribunaux de première instance de l'Alberta, du Manitoba et du Québec ont rendu des décisions inconciliables et il n'y a pas encore, dans ces provinces, d'arrêt contraignant sur la question. Le présent pourvoi offre donc à notre Cour l'occasion d'harmoniser les interprétations discordantes qui existent dans l'ensemble du Canada.

25 En toute déférence, j'estime que la Cour d'appel de la Colombie-Britannique a mal interprété l'al. 9(1)*c*) en tentant de trouver son chemin dans ce dédale de décisions contradictoires. À mon avis, cinq aspects de la décision des juges majoritaires requièrent examen. Premièrement, les juges majoritaires ont commencé leur analyse en tenant pour acquis qu'il y avait ambiguïté. Deuxièmement, ils ont accordé une importance excessive au seul fait qu'un grand nombre de juges avaient divergé d'opinions quant à l'interprétation de l'al. 9(1)*c*). Troisièmement, ils ne se sont pas arrêtés suffisamment à la place de la *Loi sur la radiocommunication* au sein du régime de réglementation de la radiodiffusion au Canada ni pris en considération les objectifs de ce régime, estimant plutôt qu'il était inutile d'examiner ces [TRADUCTION] « questions de principe plus générales ». Quatrièmement, les juges majoritaires n'ont pas interprété le texte anglais de la disposition conformément à sa structure grammaticale, à savoir une interdiction suivie d'une exception limitée. Enfin, ils ont dans les faits inversé les éléments du texte de la disposition, de telle sorte que les signaux dont un distributeur légitime pouvait permettre le décodage (c'est-à-dire l'exception) se trouvaient à définir l'étendue même de l'interdiction.

B. *Does Section 9(1)(c) of the Radiocommunication Act Create an Absolute Prohibition Against Decoding, Followed by a Limited Exception, or Does it Allow all Decoding, Except for Those Signals for Which There Is a Lawful Distributor who Has not Granted its Authorization?*

(1) Principles of Statutory Interpretation

26 In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like

B. *L'alinéa 9(1)c) de la Loi sur la radiocommunication interdit-il le décodage de manière absolue, sous réserve d'une exception limitée, ou autorise-t-il le décodage de tous les signaux, sauf ceux pour lesquels il existe un distributeur légitime qui n'a pas donné l'autorisation de le faire?*

(1) Principes d'interprétation législative

Voici comment, à la p. 87 de son ouvrage *Construction of Statutes* (2e éd. 1983), Elmer Driedger a énoncé le principe applicable, de la manière qui fait maintenant autorité :

> [TRADUCTION] Aujourd'hui, il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Notre Cour a à maintes reprises privilégié la méthode moderne d'interprétation législative proposée par Driedger, et ce dans divers contextes : voir, par exemple, *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536, p. 578, le juge Estey; *Québec (Communauté urbaine) c. Corp. Notre-Dame de Bon-Secours*, [1994] 3 R.C.S. 3, p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21; *R. c. Gladue*, [1999] 1 R.C.S. 688, par. 25; *R. c. Araujo*, [2000] 2 R.C.S. 992, 2000 CSC 65, par. 26; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2, par. 33, le juge en chef McLachlin; *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3, par. 27. Je tiens également à souligner que, pour ce qui est de la législation fédérale, le bien-fondé de la méthode privilégiée par notre Cour est renforcé par l'art. 12 de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui dispose que tout texte « est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet ».

Cette méthode reconnaît le rôle important que joue inévitablement le contexte dans l'interprétation par les tribunaux du texte d'une loi. Comme l'a fait remarquer avec perspicacité le professeur John Willis dans son influent article intitulé « Statute Interpretation in a Nutshell » (1938), 16 *R. du B.*

people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, *per* Lamer C.J.)

can. 1, p. 6, [TRADUCTION] « les mots, comme les gens, prennent la couleur de leur environnement ». Cela étant, lorsque la disposition litigieuse fait partie d'une loi qui est elle-même un élément d'un cadre législatif plus large, l'environnement qui colore les mots employés dans la loi et le cadre dans lequel celle-ci s'inscrit sont plus vastes. En pareil cas, l'application du principe énoncé par Driedger fait naître ce que notre Cour a qualifié, dans *R. c. Ulybel Enterprises Ltd.*, [2001] 2 R.C.S. 867, 2001 CSC 56, par. 52, de « principe d'interprétation qui présume l'harmonie, la cohérence et l'uniformité entre les lois traitant du même sujet ». (Voir également *Stoddard c. Watson*, [1993] 2 R.C.S. 1069, p. 1079; *Pointe-Claire (Ville) c. Québec (Tribunal du travail)*, [1997] 1 R.C.S. 1015, par. 61, le juge en chef Lamer.)

Other principles of interpretation — such as the strict construction of penal statutes and the "*Charter* values" presumption — only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115, *per* Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at p. 413; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46. I shall discuss the "*Charter* values" principle later in these reasons.)

28 D'autres principes d'interprétation — telles l'interprétation stricte des lois pénales et la présomption de respect des « valeurs de la *Charte* » — ne s'appliquent que si le sens d'une disposition est ambiguë. (Voir, relativement à l'interprétation stricte : *Marcotte c. Sous-procureur général du Canada*, [1976] 1 R.C.S. 108, p. 115, le juge Dickson (plus tard Juge en chef du Canada); *R. c. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), p. 59-60; *R. c. Hasselwander*, [1993] 2 R.C.S. 398, p. 413, et *R. c. Russell*, [2001] 2 R.C.S. 804, 2001 CSC 53, par. 46. Je vais examiner plus loin le principe du respect des « valeurs de la *Charte* ».)

What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, *supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to

29 Qu'est-ce donc qu'une ambiguïté en droit? Une ambiguïté doit être « réelle » (*Marcotte*, précité, p. 115). Le texte de la disposition doit être [TRADUCTION] « raisonnablement susceptible de donner lieu à plus d'une interprétation » (*Westminster Bank Ltd. c. Zang*, [1966] A.C. 182 (H.L.), p. 222, lord Reid). Il est cependant nécessaire de tenir compte du « contexte global » de la disposition pour pouvoir déterminer si elle est raisonnablement susceptible de multiples interprétations. Sont pertinents à cet égard les propos suivants, prononcés par le juge Major dans l'arrêt *CanadianOxy Chemicals Ltd. c. Canada (Procureur général)*, [1999] 1 R.C.S. 743, par. 14 : « C'est uniquement lorsque deux ou plusieurs interprétations plausibles, qui s'harmonisent chacune

Tab 2:

R v Garland, 2021 ABCA 46

In the Court of Appeal of Alberta

Citation: R v Garland, 2021 ABCA 46

Date: 20210208
Docket: 1701-0085-A
Registry: Calgary

Between:

Her Majesty the Queen

Respondent

- and -

Douglas Robert Garland

Appellant

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter

Reasons for Judgment Reserved of the Honourable Mr. Justice Watson
Concurred in by the Honourable Mr. Justice Martin

Dissenting Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter

Appeal from the Sentence by
The Honourable Mr. Justice M.D. Gates
Dated the 17th day of February, 2017
(2017 ABQB 198, Docket: 140790361Q1)

Reasons for Judgment Reserved
of the Honourable Mr. Justice Watson

The Majority:

I. Introduction

[1] The appellant Garland was found guilty by a jury of three counts of first-degree murder. He was given the mandatory life sentence, and the mandatory 25-year periods of parole ineligibility on each count by the trial judge. The parole ineligibility periods were directed by the trial judge to run consecutively: ***R v Garland***, 2017 ABQB 198, [2017] AJ No 853 (QL) ("trial reasons"). Garland appealed from conviction and that appeal was dismissed: ***R v Garland***, 2019 ABCA 479, 386 CCC (3d) 221.

[2] This judgment concerns Garland's appeal from the sentence disposition. Specifically, Garland challenges the trial judge's exercise of discretion to make the parole ineligibility periods run consecutively rather than concurrently, as Garland says should have occurred.

[3] This appeal by was heard at the same sittings of the Court as Crown appeals in the cases of ***R v Klaus and Frank***, 2021 ABCA 48. The judgments should be read together. Klaus and Frank were also convicted of three counts of first-degree murder and each was given three life sentences with parole ineligibility periods of 25 years. But in their cases the trial judge chose to direct that the parole ineligibility periods would run concurrently. The appeals of Klaus and Frank from conviction were also earlier dismissed by this Court: ***R v Klaus and Frank***, 2019 ABCA 483, [2019] AJ No 1669 (QL). In ***Klaus and Frank***, the Crown challenged the trial judge's exercise of discretion to direct that the parole ineligibility periods should run concurrently: ***R. v Klaus and Frank***, 2018 ABQB 97, 67 Alta LR (6^{th}) 328.

II. Circumstances of the Offences

[4] The appellant committed first-degree murders of Alvin and Kathryn Liknes, and of their five-year-old grandson Nathan O'Brien. As elaborated in more detail in the conviction appeal judgment at 2019 ABCA 479, the appellant previously had a business relationship with Alvin Liknes about eight years before the murders. A key motivation for the murders appeared to be Garland's grievance arising from Mr Liknes having patented a pump of which Garland claimed to have contributed to the invention. Garland cultivated a grudge about this and perhaps other things, despite the fact the pump was never profitable, for the years that followed, ultimately extending Garland's hatred to Kathryn Liknes. As the trial judge pointed out, there also appears to have been a family relationship element to this hostility: trial reasons at para 8.

[5] His hatred culminated in the planned and deliberate murders of Alvin and Kathryn Liknes. Nathan O'Brien happened to be staying with his grandparents at the time, and the motivation for

recommendation, if any, made pursuant to section 745.21, by order, decide that the periods without eligibility for parole for each murder conviction are to be served consecutively. [Underlining added]	recommandation formulée en vertu de l'article 745.21, ordonner que les périodes d'inadmissibilité à la libération conditionnelle pour chaque condamnation pour meurtre soient purgées consécutivement. [Soulignements ajoutés]

[49] In their initial factums, counsel did not address both the English and French versions of these provisions and the Court asked counsel to make further submissions on the French version and comparatively. The supplementary submissions of counsel are covered below in connection with discussion of the grounds.

B. Statutory Construction

[50] There is now one foundational principle of statutory interpretation, initially given stature in ***Re: Rizzo and Rizzo Shoes Ltd***. [1998] 1 SCR 27 and later confirmed in ***Bell ExpressVu Limited Partnership v Rex***, 2002 SCC 42 at para 26, [2002] 2 SCR 559. This principle emanates from what ***Rizzo Shoes*** called an encapsulation of principle by Prof Driedger, in *Construction of Statutes* (2nd ed) (Toronto: Butterworths, 1983) at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[51] This 'modern' approach was constructed from the historic rules such as the 'mischief rule' and the 'golden rule' and so forth. It starts with the text, or the "grammatical and ordinary meaning" of the words. It might be noted that, in so saying, Prof Driedger drew from Lord Atkinson in ***Victoria (City) v Bishop of Vancouver Island***, [1921] 2 AC 384/387 where he said:

> In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

[52] The meaning derived from the wording of the provision may be essentially determinative unless another meaning is revealed after reference to the larger and closer contexts and consideration of the purpose of the provision in question and the legislation more generally, the

relationship of the provision being interpreted to the rest of the statute and related legislation, and the intention of Parliament: R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed, (Markham: LexisNexis, 2014) at paras. 2.3-2.6.

[53] The primary power of the text in statutory construction is manifested in a decision which has been repeatedly cited by the Supreme Court as an explanation of the 'modern' approach, namely ***Canada Trustco Mortgage Co v Canada***, 2005 SCC 54 at para 10, [2005] 2 SCR 601:

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. *When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role.* The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [Emphasis added]

[54] As can be seen from this quotation, not only do the words play a dominant role, but the mere existence of alternative meanings to the words is not a declaration of ambiguity. It is an invitation to further explore via the contextual and purposive analysis to determine which of potential alternatives is the most reasonable meaning.

[55] In ***R v McIntosh***, [1995] 1 SCR 686, Lamer CJC in the context of interpreting the complex and archaic language of the then 'self-defence' provisions of the *Code* referred to the *Driedger* second edition which figured soon thereafter in ***Rizzo Shoes***, and quoted this:

> 3 If the words are apparently obscure or ambiguous, then a meaning *that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them*. [Emphasis added]

The foregoing quote from ***Canada Trustco*** has been acknowledged and applied in: ***Placer Dome Canada Ltd v Ontario (Minister of Finance),*** 2006 SCC 20, [2006] 1 SCR 715; ***Imperial Oil Ltd v Canada; Inco Ltd v Canada***, 2006 SCC 46, [2006] 2 SCR 447; ***Celgene Corp v Canada (Attorney General)***, 2011 SCC 1, [2011] 1 SCR 3; ***Canada v Craig***, 2012 SCC 43, [2012] 2 SCR 489; ***R v A(J)***, 2011 SCC 28, [2011] 2 SCR 440.

[56] More recently, ***Canada Trustco*** was cited in ***Orphan Well Association***, 2019 SCC 5 at para 88 and in ***Vavilov Canada***, 2019 SCC 65 at para 120, 441 DLR (4th) 1 and ***9354-9186 Québec inc v Callidus Capital Corp***, 2020 SCC 10 at para 60, 444 D.L.R. (4th) 373 where the Court refused a "strained interpretation" of the text that was mounted upon an alleged analogy, in that instance an alleged statutory analogy.

[57] Here Garland presses an analogy to common law notions in *Cokes Institutes*, vol. 2, at p. 468, which was described in ***R v Skolnick***, [1982] 2 SCR 47 at p. 50. That concept is that when two offences are tried together and convictions are entered on both after one trial, they are to be treated as one for the purpose of determining whether a more severe penalty applies. That common law principle, however, can be displaced by statute, as Parliament has done here.

[58] Even before ***Rizzo Shoes***, the Supreme Court in ***Canada v Friesen***, [1995] 3 SCR 103 at paras 11 and 5,9 adopted the sage suggestion of Prof Hogg respecting the *Income Tax Act* that the "clear language of the [statute] takes precedence over a court's view of the object and purpose of a provision". Accordingly, to the extent that the 'message' of these provisions is clear that the common law notions underlying *Coke's Institutes* are not applicable there is no requirement that the provisions be interpreted to conform to *Coke's Institutes*. Nothing in the *Code* sections suggests that a laddering of sentences as in *Coke's Institutes* is contemplated.

[59] Similarly, in ***Orphan Well Association***, the argument presented to the Court reached out into context to provide an "alternative interpretation", and the Court reacted thus at para 88:

> 88 … As has been noted, when the words of a provision are precise and unequivocal, their ordinary meaning plays a dominant role in the interpretive process (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). ….. This Court has no option other than to accede to the clear intention of Parliament.

[60] The former rule that penal statutes receive a 'strict' construction does not dominate the principles in the modern general rule of statutory interpretation. Indeed, it even serves a "subsidiary role" related to penal statutes: see ***R v Hasselwander,*** [1993] 2 SCR 398 at paras 27-31. It is regarded as a "principle of last resort" where there is remaining ambiguity as to the meaning of a provision: ***Bell ExpressVu*** at para 28; ***R v SAC***, 2008 SCC 47 at para 16, [2008] 2 SCR 675. For the purposes of statutory interpretation, "ambiguity" only arises where the words of the provision are still reasonably capable of more than one meaning at the end of the 'modern approach' interpretive process: ***Bell ExpressVu*** at para 29.

[61] In ***R v Jarvis***, 2019 SCC 10 at para 105, [2019] 1 SCR 488, Wagner CJC explained ambiguity as a trigger for *Charter* interpretation this way:

> 105 What does it mean, then, for a provision to have ambiguity? This Court has held that "genuine" ambiguity only arises where there are "two or more plausible

Tab 3:

R v Atchinson, 2006 ABCA 258

In the Court of Appeal of Alberta

Citation: R. v. Atchison, 2006 ABCA 258

Date: 20060915
Docket: 0503-0235-A3
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent

- and -

Lonnie Atchison

Appellant

The Court:

The Honourable Madam Justice Ellen Picard
The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Peter Martin

Memorandum of Judgment
Delivered from the Bench

Appeal from the Order by
The Honourable Mr. Justice R.P. Belzil
Dated the 28th day of July, 2005

Memorandum of Judgment
Delivered from the Bench

Picard J.A. (For the Court):

[1] Lonnie Mae Atchison (the "appellant") appeals the summary conviction appeal decision that reversed the traffic commissioner's determination that a person on a skateboard is not a pedestrian for the purposes of the ***Traffic Safety Act***, R.S.A. 2000, c. T-6 ("***TSA***").

[2] The appellant was charged under s. 41(1) of the *Use of Highway and Rules of the Road Regulation*, Alta. Reg. 304/2002 (the "*Regulation*") for failing to yield to a pedestrian in a cross-walk. The complainant was crossing the street on his skateboard when he was allegedly struck by the appellant's vehicle.

[3] The initial hearing took place before a traffic commissioner, who directed a non-suit on the basis that the complainant was not a pedestrian within the meaning of the ***TSA*.** The Crown appealed to a summary conviction appeal justice, who overturned the traffic commissioner's decision and directed that the matter be sent back for trial. The summary conviction appeal justice held that the definition of pedestrian under the *TSA* includes a person on a skateboard or similar device, noting that any other interpretation would leave a huge gap in the legislation and lead to an absurd result, contrary to the principles of statutory interpretation.

GROUNDS OF APPEAL & STANDARD OF REVIEW

[4] This Court granted the appellant leave to appeal on the following ground:

> 1. For purposes of the ***Traffic Safety Act***, is a person on a skateboard or similar device a pedestrian?

This question of law is reviewable on the correctness standard: ***Housen v. Nikolaisen*** [2002], 2 S.C.R. 235, 2002 SCC 33 at para. 8.

ANALYSIS

A) Statutory Interpretation

[5] Pursuant to s. 1(1)(gg) of the ***TSA***, "pedestrian" means (i) a person on foot, or (ii) a person in or on a mobility aid, and includes those persons designated by regulation as pedestrians. According to s. 1(1)(v), "mobility aid" means a device used to facilitate the transport, in a normal seated orientation, of a person with a physical disability. Section 1(1)(ww) provides that a "vehicle" is a device in, on or by which a person or thing may be transported or drawn on a highway, but does not include a mobility aid.

[6] Skateboards and similar devices are not explicitly referred to in the definition of pedestrian or vehicle, nor can they be considered a mobility aid. Such devices are also not defined elsewhere in the ***TSA*** or its regulations. Skateboards and similar devices are mentioned in the ***TSA*** only once, in reference to a municipality's power under s. 13(1)(l) to make bylaws governing the impounding of such devices. The *Regulation* refers to skateboards only in s. 85, which prohibits persons on such devices from riding or being towed outside of a vehicle.

[7] Skateboards and similar devices are not intended for use on the portion of the highway where one would normally find vehicles and bicycles, nor are they designed to permit the user to remain on them for extended periods of time or to travel significant distances. Various rules governing the use of vehicles, such as the licensing and registration requirements under Part 3 of the ***TSA*** and the driving rules set out in Division 4 of the *Regulation*, are obviously not intended to apply to persons on skateboards and similar devices. Thus, when considered in the entire context of the ***TSA*** and its regulations, it is clear that "vehicle" does not include skateboards and similar devices.

[8] Since skateboards and similar devices are clearly not vehicles or mobility devices, nor are they specifically covered elsewhere in the ***TSA*** or the *Regulation*, it is appropriate to use the rules of statutory interpretation to consider whether persons on such devices fall within the definition of "pedestrian". As stated by E.A. Driedger in *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[9] The scheme and object of the ***TSA*** is to promote the safety of persons using roadways by imposing various requirements and rules such as those set out in Division 9 of the *Regulation*. This Division establishes rules for yielding the right of way to other vehicles and pedestrians, but does not specifically refer to persons on skateboards or similar devices. Neither are there rules anywhere else in the ***TSA*** or *Regulation* that deal with yielding to persons on skateboards and the many other similar devices that are commonly used on modern roadways. Thus, there is a distinct gap in the legislation, unless persons on such devices can be considered pedestrians.

[10] If persons on skateboards and similar devices are not considered pedestrians for purposes of the ***TSA***, the driver of a vehicle striking such a person could never be charged with an offence; similarly, if two persons were struck, one walking and one travelling on a skateboard or similar device, the driver could only be charged with striking the person who was walking. As pointed out by the summary conviction appeal justice, this is an absurd result and cannot have been the intention of the Legislature.

[11] While most dictionary definitions of pedestrian generally refer to a person travelling on foot, this Court has previously noted that the definition of pedestrian in *Black's Law Dictionary*, 6th ed. includes persons on roller skates, ice skates, stilts or crutches: ***Stantec Consulting Ltd. v. Edmonton (City)*** (2004), 354 A.R. 336, 2004 ABCA 241 at para. 18. Persons travelling with the aid of these types of devices can still be considered to be travelling on foot, as opposed to in a vehicle, and it is our view that the ordinary and grammatical meaning of the word "pedestrian" is broad enough to encompass persons travelling on skateboards or similar devices.

[12] Thus, when the ordinary and grammatical meaning of the word "pedestrian" is considered in light of the object and scheme of the ***TSA*** and the intention of the Legislature, it is our view that it must include persons on skateboards and similar devices.

B) The Approach in other Provinces

[13] Other courts have taken a similarly expanded view, finding that persons on skateboards or roller blades constitute pedestrians in various contexts: see for example ***Littlewood v. Prendergast***, [2004] B.C.J. No. 2115, 2004 BCSC 1321; ***Falconar v. Le***, [2003] B.C.J. No. 2214, 2003 BCSC 1434; ***R. v. Zimmer***, [2004] S.J. No. 680, 2004 SKQB 444; ***R. v. Greer***, [1995] O.J. No. 655 (Ct. J.-Prov. Div.). Although none of these decisions are binding upon this Court, we find them to be persuasive.

CONCLUSION

[14] In the result, we conclude that the summary conviction appeal justice did not err in finding that a person on a skateboard is a pedestrian for purposes of the ***Traffic Safety Act***. This appeal is accordingly dismissed. The case is remitted for trial as ordered by the Court of Queen's Bench.

Appeal heard on September 07, 2006

Memorandum filed at Edmonton, Alberta
this 15th day of September, 2006

Picard J.A.

Appearances:

D.C. Marriott
for the Respondent

J.R. Fixsen
for the Appellant

Tab 4:

Pridgen v University of Calgary, 2010 ABQB 644

Court of Queen's Bench of Alberta

Citation: Pridgen v. University of Calgary, 2010 ABQB 644

Date: 20101012
Docket: 0901 12180
Registry: Calgary

In the Matter of Keith Pridgen and Steven Pridgen on Findings of Non-Academic Misconduct on Appeal from the AD HOC Review Committee of the General Faculties Counsel

Between:

Keith Pridgen and Steven Pridgen

Applicants

- and -

The University of Calgary

Respondent

Reasons for Judgment
of the
Honourable Madam Justice J. Strekaf

I Introduction

[1] Two University of Calgary undergraduate students, Keith and Steven Pridgen, were found by the University's General Faculties Council Review Committee to have committed non-academic misconduct and were placed on probation as a result of negative comments they posted on a Facebook site with respect to one of their professors. They have applied for judicial review pursuant to Part 56.1 of the Rules of Court and seek to set aside that decision on various grounds, including that their right to free expression guaranteed in section 2(b) of the *Canadian Charter of Rights and Freedoms* was infringed.

II Relevant Facts

[2] The relevant facts are not in dispute. The applicants are identical twin brothers who were enrolled as full time undergraduate arts students at the University of Calgary. In the 2007 fall session, both were enrolled in the Faculty of Communication and Culture in a legal survey course entitled Law and Society (LWSO) 201. The course instructor, Professor Aruna Mitra, was not a professor from the Communication and Culture faculty and was teaching the course for the first time. Professor Mitra was not popular with her students. One of the students, Thomas Strangward, created a "wall" on his Facebook page entitled "I NO Longer Fear Hell, I Took a Course with Aruna Mitra" (“Wall”). The Wall was publicly available to anyone searching on the internet. A number of students in the class posted comments on the Wall, many of which were critical of Professor Mitra.

[3] The Applicants each posted a single message on the Wall. Steven Pridgen's message posted on November 13, 2007 stated:

> Some how I think she just got lazy and gave everybody a 65....that's what I got. Does anybody know how to apply to have it remarked?

[4] Keith Pridgen's message posted on August 26, 2008 stated:

> Hey fellow LWSO. homees .. So I am quite sure Mitra is NO LONGER TEACHING ANY COURSES WITH THE U OF C !!!!! Remember when she told us she was a long-term professor? Well actually she was only sessional and picked up our class at the last moment because another prof wasn't able to do it ... lucky us. Well anyways I think we should all congratulate ourselves for leaving a Mitra-free legacy for future L.S.W.O. students!

[5] Professor Mitra complained about the Wall to Dean Tettey, Interim Dean of the Faculty of Communication and Culture on September 4, 2008. He invited the ten students who had posted material on the Wall to attend a meeting on September 18, 2008 to discuss the incident. In addition to himself, also in attendance at the meeting were four other professors from the department, namely Department Head Dr. Chloe Atkins, Associate Dean Dr. Douglas Brent, Professor Lynne Perras and Dr. Tamar Seiler. Dr. Atkins was Professor Mitra's spouse. Following the meeting, all ten students, including the Applicants, were found to have committed non-academic misconduct and were sanctioned.

[6] By a letter dated November 20, 2008, Dean Tettey advised Keith Pridgen that his conduct constituted non-academic misconduct and that he was placed on probation for 24 months. The letter stated in part:

> It is my conclusion that the conduct you displayed on this publicly accessible site has clearly caused unwarranted professional and personal injury to Prof. Mitra and clearly meets the criteria for non-academic misconduct as outlined in the

[15] The Applicants filed an Originating Notice initiating this application on August 19, 2009.

III Regulatory Context

[16] Before proceeding to address the various issues that need to be decided on this application, it is useful to begin by examining the regulatory context within which the Review Committee's decision to discipline the Applicants was made.

[17] The Respondent is a university that operates within Alberta subject to the provisions of the *Post-Secondary Learning Act,* S.A. 2003, c. P-19.5, as amended ("*PSL Act*"). The *PSL Act* provides for the establishment of a board of governors and a general faculties council for each university. Section 26 of the *PSL Act* provides the general faculties council of a university, subject to the authority of the board, with responsibility for the academic affairs of the university and with authority to, *inter alia*, "(g) provide for the preparation and publication of the university calendar"; "(h) hear and determine appeals from the decisions of faculty councils on applications, requests or petitions by students or others"; and "(n) determine standards and policies respecting the admission of persons to the university as students." A general faculties council may delegate any of its powers, duties or functions, including the powers referred to in section 31 (s. 26(3)). Section 31(1) of the *PSL Act* deals with student discipline. It states:

> The general faculties council has general supervision of student affairs at a university and in particular, but without restricting the generality of the foregoing, the general faculties council may
>
> (a) subject to a right of appeal to the board, discipline students attending the university, and the power to discipline includes the power
>
> (i) to fine students,
>
> (ii) to suspend the right of students to attend the university or to participate in any student activities, or both, and
>
> (iii) to expel students from the university;
>
> (b) delegate its power to discipline students in any particular case or generally to any person or body of persons, subject to any conditions with respect to the exercise of any delegated power that it considers proper;

(c) give to a student organization of the university the powers to govern the conduct of students it represents that the general faculties council considers proper.

[18] The University Calendar contained a Statement of Principles of Conduct which indicated that it applied "to all members of the University community" and a Student Misconduct Policy, which included a section regarding Disciplinary Action for Non-academic Misconduct ("Policy"), which provides:

1. Definition: The term "non-academic misconduct" includes but is not limited to

   (a) conduct which causes injury to a person and/or damage to University property and/or the property of any member of the University community;

   (b) unauthorized removal and/or unauthorized possession of University property;

   (c) conduct which seriously disrupts the lawful educational and related activities of other students and/or University staff.

[19] When a dean becomes aware of a complaint of non-academic misconduct, the student is required to appear immediately before the dean to respond to the allegations (s. 2(b)). Where the severity of the misconduct does not warrant suspension, the dean may place a student on probation for a specified period of time, with conditions attached as deemed necessary. Probation is appealable by the student to the General Faculties Council's Review Committee (s. 2 (c)). The composition and process of the General Faculties Council's Review Committee is prescribed in the Policy (ss. 3 - 7).

IV Preliminary Issues

[20] At the outset of the hearing of this application, counsel for the Respondent raised two preliminary issues:

1. Whether the Applicants should be precluded from advancing their constitutional arguments which were not set out in their Originating Notice as they were out of time?

2. Whether the applications for judicial review should be dismissed as they are moot?

A Are the Applicants' constitutional arguments out of time?

C Were the actions taken by the University *ultra vires* the jurisdiction of the Province of Alberta ?

[84] The Applicants have argued that state sanctioned wrongful speech is the exclusive jurisdiction of the Parliament of Canada. I understand the Applicants to be submitting that the *PSL Act* and the University Calendar encroach on the federal government's jurisdiction with regards to the criminal law pursuant to s.91(27) of the *Constitution Act*, 1867 (U.K.), 30 & 31 Victoria, c. 3 ("*Constitution Act*"). I find that both the *PSL Act* and the University Calendar are validly enacted and *intra vires* of the province of Alberta.

[85] Provincial legislation is to be approached with the assumption that it is validly enacted: *Nova Scotia (Board of Governors) v. McNeil*, [1978] 2 S.C.R. 662 at 687-688 (majority judgment of Ritchie J.). Moreover, in *Chatterjee v. Ontario*, 2009 SCC 19, [2009] 1 S.C.R. 624 at para. 2, Justice Binnie wrote for the Court that the proliferation of jurisdictional enclaves (or "interjurisdictional immunities") has previously been discouraged by the Supreme Court of Canada and "should not now be given a new lease on life." The Court further reiterated that, quoting *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 at para. 37, "a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government"[emphasis in original].

[86] The first step when considering a constitutional challenge is to determine the "pith and substance" of the impugned legislation: *Chatterjee* at para. 16. The pith and substance of the *PSL Act* can be found in the preamble, which sets out the government's legislative purpose that the universities and colleges established thereunder provide an accessible, responsive and flexible system of post-secondary education in Alberta through a co-ordinated and integrated system approach known as Campus Alberta.

[87] Clearly, the purpose of the *PSL Act* and the University Calendar are the administration of education. The legislative power to administer education is within the purview of the province: *Constitution Act* s. 92-93; Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Looseleaf (Toronto: Thomson Carswell, 2007) at 57-1 to 57-3. A provincial enactment is valid if its dominant purpose is in relation to provincial objects: *Chatterjee* at para. 36. The Applicants have not demonstrated that the *PSL Act* nor any act taken by the Respondent with respect to the findings of non-academic misconduct went beyond the administration of education.

[88] Even if I were to accept that there is an incidental effect on the criminal law power, the provincial government has the ability to legislate in a way that may incidentally affect the power of the federal government and vice versa: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 at 670, quoted by Binnie J. in *Chatterjee* at para. 30. Regardless, the dominant feature of the impugned legislation is clearly provincial and thus is *intra vires* of the province.

D Did the Board of Governors err in refusing to hear the Applicants' appeals ?

[89] Determination of the question of whether the Board of Governors erred in refusing to hear the Applicants' appeals involves the interpretation to be placed upon section 31(1)(a) of the *PSL Act.* The standard of review with respect to this issue is one of correctness, having regard to the factors identified in *Dunsmuir* because:

(a) The issue to be decided is a question of law that involves the interpretation of a statute relating to a matter of jurisdiction,

(b) The *PSL Act* contains no privative clause;

(c) The board of governors of a university has no special expertise in interpreting legislation; and

(d) The question of law as to when an appeal is available is of "central importance to the legal system...and outside the...specialized expertise of the administrative decision maker" (*Dunsmuir* at para 55).

[90] Section 31(1)(a) of the *PSL Act* states:

> The general faculties council has general supervision of student affairs at a university and in particular, but without restricting the generality of the foregoing, the general faculties council may
>
> (a) subject to a right of appeal to the board, discipline students attending the university, and the power to discipline includes the power
>
> (i) to fine students,
>
> (ii) to suspend the right of students to attend the university or to participate in any student activities, or both, and
>
> (iii) to expel students from the university;

"Board" is defined in section 1(f) of the *Act* as "the board of governors of a public post-secondary institution".

[91] The University argues that the right of appeal contemplated in section 31(1)(a) is only available where the discipline imposed resulted in fines, suspension or expulsion. However, this interpretation is not consistent with a plain reading of the language contained in section 31(1). This section clearly provides a statutorily mandated right of appeal to the board of governors of a university from any discipline imposed by the general faculties council ("GFC"), not merely a right of appeal from discipline which resulted in fines, suspensions or expulsions. Use of the word "includes" indicates that these fines, suspensions and expulsions are simply examples of

discipline that could be imposed by the GFC. Nothing in the statute prevents the GFC from imposing probation as a form of discipline provided that whatever discipline is imposed is subject to a right of appeal to the board of governors. If the word discipline was narrowly construed to only include fines, suspension or expulsion, not only would that interpretation fail to give meaning to the word "includes" but there would be no statutory basis for other forms of discipline (such as probation) to be imposed by the GFC. If the GFC has the statutory authority to impose a form of discipline, the exercise of such authority is subject to a right of appeal to the board of governors, by virtue of section 31(1)(a).

[92] As a result, the Board of Governors was in breach of its statutory duty in refusing to hear the Applicants' appeals.

E Were the Applicants' denied a fair hearing ?

[93] The Applicants argue that they were denied a fair hearing because:

(a) They were denied the opportunity to cross-examine Professor Mitra, who was not a witness at the Review Committee hearing, and were limited in the questions they were permitted to ask at the hearing;

(b) The attribution of the words of other participants on the Facebook site to the Applicants found them guilty by association;

(c) The interventions by counsel were excessive and inappropriate;

(d) Restriction were placed upon the length of the closing statement to be submitted by Keith Pridgen; and

(e) The initial investigating panel and Dean Tettey were often biased against the Applicants from the outset and the participation of Dr. Atkins, Professor Mitra's spouse, in the process that resulted in the initial decisions gives rise to a reasonable apprehension of bias.

[94] The Applicants also argue that the reasons given by the Review Committee were inadequate, which will be addressed below.

[95] The Respondent properly concedes that the Applicants were owed procedural fairness but argues that the requirements were met in the circumstances.

[96] As the British Columbia Supreme Court noted in *Williams v. University of British Columbia*, 2007 BCSC 996, at para. 31:

> Procedural fairness is flexible and variable; the factors for determining whether the duty of fairness has been met include:

Tab 5:

R v Hauser, [1979] 1 SCR 984, 1979 CarswellAlta 220

1979 CarswellAlta 220
Supreme Court of Canada

R. v. Hauser

1979 CarswellAlta 220, 1979 CarswellAlta 280, [1979] 1 S.C.R. 984, [1979] 5 W.W.R. 1, 16 A.R. 91, 26 N.R. 541, 46 C.C.C. (2d) 481, 8 C.R. (3d) 281 (Fr.), 8 C.R. (3d) 89 (Eng.), 98 D.L.R. (3d) 193

R. v. HAUSER et al.

Martland, Ritchie, Spence, Pigeon, Dickson, Beetz and Pratte JJ.

Heard: May 29, 30 and 31, 1978
Judgment: May 1, 1979

Counsel: *J.J. Robinette, Q.C.*, and *D.H. Christie, Q.C.*, for the Crown.
A. Harradence, Q.C., and *T.C. Semenuk*, for respondent.
R. Paisley, Q.C. and *W. Henkel, Q.C.*, for Attorney General of Alberta.
J.D. Watt, D.W. Mundell, Q.C., and *L.E. Weinrib*, for Attorney General of Ontario.
M. Pothier, Y. Berthiaume and *J. Fortin*, for Attorney General of Quebec.
G.S. Gale and *M.E. Herschorn*, for Attorney General of Nova Scotia.
H. Strange, Q.C., for Attorney General of New Brunswick.
L. Lindholm, for Attorney General of British Columbia.
I.W. Bailey, for Attorney General of Prince Edward Island.
S. Kujawa, Q.C., and *K.W. MacKay*, for Attorney General of Saskatchewan.
J.A. Nesbitt, Q.C., for Attorney General of Newfoundland.

***Spence J.*:**

1 This is an appeal, upon leave granted by the Attorney General of Canada, against a prohibition granted by the Appellate Division of the Supreme Court of Alberta on 9th November 1977 [[1977] 6 W.W.R. 501, 37 C.C.C. (2d) 129, 80 D.L.R. (3d) 161, 7 A.R. 89]. By such order the said Appellate Division prohibited Stevenson D.C.J. and any other judge of the District Court of Alberta from taking any further proceedings upon an indictment preferred by the agent of the Attorney General of Canada charging Patrick Arnold Hauser as follows:

> **Count #1**
>
> ...on or about the 23rd day of June, A.D. 1976, at or near Red Deer in the Province of Alberta, in the Judicial District of Red Deer were unlawfully in possession of a Narcotic, to wit: Cannabis resin, for the purpose of trafficking, contrary to Section 4(2) of the Narcotic Control Act [R.S.C. 1970, c. N-1].
>
> **Count #2**
>
> ...on or about the 23rd day of June, A.D. 1976, at or near Red Deer in the Province of Alberta, in the Judicial District of Red Deer were unlawfully in possession of a Narcotic, to wit: Cannabis (marihuana) for the purpose of trafficking, contrary to Section 4(2) of the Narcotic Control Act.

2 An application to quash the said indictment had previously been made to and refused by Stevenson D.C.J. [7 A.R. 240].

means the Attorney General of Canada and except for the purposes of subsection (4) of section 487 [now s. 505(4)] and subsection (3) of section 489 [now s. 507(3)], includes the lawful deputy of the said Attorney General, Solicitor General and Attorney General of Canada.

58 The question whether, as a matter of statutory construction, s. 2(2) excludes the provincial attorney general has been much debated in this court and in the courts below. Stripped of unessentials, the section reads:

'Attorney General' means the Attorney General ... of a province in which proceedings to which this Act applies are taken and, with respect to ...

(*b*) proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a violation of or conspiracy to violate any Act of the Parliament of Canada or a regulation made thereunder other than this Act,

means the Attorney General of Canada.

59 The word "means" is normally construed as comprehending that which is specifically described or defined, whereas the word "includes" is generally used to enlarge the meaning of the specific words used in the statute in order to embrace something else not specifically stated: *R. v. McLeod*, 10 C.R. 318 at 322, [1950] 2 W.W.R. 456, 97 C.C.C. 366 (B.C.C.A.).

60 It is contended that the word "and" as used in relation to s. 2(2)(*b*) must be read as meaning "but", although this cannot be the case insofar as s. 2(2)(*a*) is concerned, as the Attorney General of Canada is the one and only attorney general in respect of the Northwest Territories and the Yukon Territory. Be that as it may, it seems to be the clear intention of Parliament that, once the Attorney General of Canada has met the preconditions of s. 2(2)(*b*), namely, proceedings (i) "instituted at the instance of the Government of Canada"; (ii) "conducted by or on behalf of that Government"; and (iii) "in respect of a violation of or conspiracy to violate any Act of the Parliament of Canada or a regulation made thereunder other than" the Criminal Code, then for that proceeding the provincial attorney general ceases to be the "Attorney General." The Attorney General of Canada becomes, in respect of the proceedings in question, *the* "Attorney General" with all of the powers vested in that office. Even if the final "means" in s. 2(2) is read as "includes", the inclusion of the Attorney General of Canada leads to the exclusion of the attorney general of the province in which the proceedings are taken as soon as proceedings are instituted at the instance of the government of Canada and conducted by or on behalf of that government, pursuant to s. 2(2)(*b*).

61 The phrases "proceedings to which this Act applies" and "in respect of a violation of ... any Act of the Parliament of Canada ... other than this Act" in s. 2(2) draw attention to the distinction between Criminal Code offences and offences under any other federal enactment. By s. 27(2) of the Interpretation Act, R.S.C. 1970, c. I-23:

(2) All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of the *Criminal Code* relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

62 Thus, the procedural provisions of the Code apply to the whole gamut of federal statutes and regulations and offences thereunder. As has been suggested by Lajoie J.A. in *R. v. Miller* (1975), 30 C.R.N.S. 372 at 378, 27 C.C.C. (2d) 438 (C.A. Que.), as a simple matter of statutory interpretation, s. 2(2) seems to set forth a clear rule:

(Translation): (a) When proceedings are instituted in a province pursuant to the Criminal Code, the bill of indictment must be preferred and the proceedings conducted by the Attorney General of that province;

(b) When proceedings are instituted in the Northwest Territories or in the Yukon Territory, 'Attorney General' means the Attorney General of Canada;

Tab 6:

Visscher v Triple Broek Holdings Ltd., 2006 ABQB 259

2006 ABQB 259
Alberta Court of Queen's Bench

Visscher v. Triple Broek Holdings Ltd.

2006 CarswellAlta 680, 2006 ABQB 259, [2006] A.W.L.D. 2569, [2006] A.J. No. 626, 399 A.R. 184, 40 C.C.L.T. (3d) 351, 59 Alta. L.R. (4th) 135

Tiemen Visscher (Plaintiff) and Triple Broek Holdings Ltd. and Triple Broek Holdings Ltd. carrying on business As Jag Holdings Ltd., and 122 Avenue Holdings Ltd. (Defendants)

122 Avenue Holdings Ltd. (Plaintiff by Counterclaim / Defendant)
and Tiemen Visscher (Defendant by Counterclaim / Plaintiff)

Marceau J.

Heard: March 8-9, 2006
Judgment: April 6, 2006
Docket: Edmonton 0103-19478

Counsel: Richard A. Beeken for Plaintiff / Defendant by Counterclaim, Tiemen Visscher
Ellery C. Lew for Defendant / Plaintiff by Counterclaim, 122 Avenue Holdings Ltd.

***Marceau J.*:**

I. Introduction

1 A trailer and contents owned by the Plaintiff, Tiemen Visscher, was parked on property owned by the Defendant, 122 Avenue Holdings Ltd., without its permission. 122 caused the trailer to be hauled away for scrapping. The Plaintiff claims that the trailer and contents, which he values at $44,310.00, were misappropriated by 122. He now seeks damages in that amount from 122 for conversion.

2 The principal issues in this case are whether 122 was entitled to treat the trailer as abandoned or to exercise self-help in having it removed and whether it converted the trailer when the individual who was the operating mind of 122 failed to advise Visscher where to find it after being contacted by him.

3 Triple Broek Holdings Ltd. and Triple Broek Holdings Ltd. carrying on business as Jag Holdings Ltd. (collectively "Jag") have been noted in default by the Plaintiff. However, the Plaintiff is not seeking a remedy against Jag. The only parties involved in the trial were the Plaintiff Visscher and the Defendant 122.

II. Facts

A. Background

4 122 owned a store, warehouse and adjacent parking lots at 14625 — 122 Avenue in the City of Edmonton, which it leased to Arnold Broekhuizen, who was the owner of Jag. Jag, as agent or alter ego of Broekhuizen, sublet about one half of the store and warehouse to 777527 Alberta Ltd., which carried on business as LP Sales. Jag represented in the sublease that it was the registered owner or agent of the owner of the lands. The LP Sales sublease was for the term August 1, 1999 to June 30, 2002, but it was terminated for non-payment of rent in about February 2000.

5 LP Sales bought, reconditioned and sold restaurant equipment. The Plaintiff and William Dixon were employed as sales persons by the company. Both of them also sold bakery equipment out of the same premises, whether on their own account or for LP Sales.

6 The events relevant to this action occurred before the end of September 2000 and the parties' rights crystallized at about that time. No explanation was offered as to why it took so long to bring this matter to trial. Clearly, however, the evidence of all of witnesses suffered from the long delay and my findings of fact reflect the poor recollection of the witnesses about the timing of events.

B. Witnesses

1. Visscher

7 The Plaintiff testified that in about 1980 he was involved in a bakery business that failed. He was left with the equipment, which he said is more difficult than restaurant equipment to dispose of as fewer new bakeries open up. Over the years, he bought, reconditioned and sold bakery equipment as a sideline to whatever job he held at the time. He stored the bakery equipment in an old semi-trailer that had not been used on the highway for some 25 years.

8 The Plaintiff believed Broekhuizen was the owner of the premises in question. There was no evidence that Broekhuizen ever represented himself to the Plaintiff as the owner or that the Plaintiff ever saw the LP Sales sublease. Visscher's belief may have arisen because the sublease identified Broekhuizen's company, Jag, as the owner or for some other reason entirely. In November 1999, the Plaintiff asked Broekhuizen whether he could park his trailer in the parking lot at the front and to the side of the premises. He assured Broekhuizen that he would remove the trailer on 24 hours notice. Broekhuizen agreed that he could leave the trailer there free of charge. The Plaintiff parked the trailer on the lot and secured the doors with padlocks. He cleaned out some gutters on the premises, but I find this was a gesture of appreciation rather than consideration for Broekhuizen allowing him to park the trailer on the property.

9 The Plaintiff, as an employee of LP Sales, was aware that its lease had been terminated by Broekhuizen and that it had vacated its portion of the premises by at least April 30, 2000. He claimed he did not know that Broekhuizen had been leasing the whole of the premises and that his lease had been terminated by consent. He denied knowing that all of the premises were vacant by April 30, 2000. The Plaintiff testified that he kept on acting as a salesperson for LP Sales out of his own house after LP Sales was evicted from the premises. The Plaintiff stated he continued to operate his sideline of buying and selling bakery equipment after that time and periodically would attend at the trailer to drop off equipment for storage or to pick up items for resale. In my view, it is likely that he would have observed that no one was around when he attended at the trailer after April 30 th .

10 The Plaintiff denied that Broekhuizen ever gave him notice to move the trailer.

11 The Plaintiff apparently took three weeks holidays in August. During those three weeks and for possibly up to a week afterwards, he did not attend at the trailer. Sometime in late August or early September, he went to the premises and discovered that the trailer was gone. He talked to Broekhuizen, who said that he knew nothing about the trailer. The Plaintiff then spoke with a dispatcher at Cliff's Towing and, based on information he received from him, contacted Wayne Pertman at Price Steel, who was the person who looked after 122's property and had engaged Cliff's Towing to tow the trailer.

12 Pertman testified that he told the Plaintiff he could have the trailer if he paid the towing charge, but the Plaintiff refused and hung up on him. The Plaintiff's evidence was that he was willing to pay the bill, but wanted to see the trailer first. In cross-examination, Pertman agreed that he had not been prepared to tell the Plaintiff where the trailer was until the towing bill was paid. The Plaintiff did not advise Pertman that the trailer contained any items of value.

13 The Plaintiff could not see the trailer at Price Steel, but learned there was another salvage yard called General Salvage on the south side of the City that was related to Price Steel. He attended there and observed the trailer from a distance. A few days later he went to the site and discovered that the trailer had been damaged and its contents put on various recycling piles.

He concluded he could not usefully salvage any of the items from the piles. However, there was no evidence that the trailer contents were damaged and the Plaintiff did not explain why he felt they could not be salvaged.

2. William Dixon

14 Dixon and the Plaintiff were both employed by LP Sales. He testified that he was not present when the Plaintiff initially received permission from Broekhuizen to leave his trailer in front of the building, although he did recall some conversation between Broekhuizen and the Plaintiff to the effect that it was alright for the Plaintiff to park the trailer there.

15 Dixon said that he never had any discussion with the Plaintiff as to who owned the premises leased by LP Sales. He testified that he helped the Plaintiff sell three or four pieces of bakery equipment during the term of the LP Sales lease. He also recalled helping the Plaintiff put equipment into the trailer during the latter part of April 2000. According to Dixon, he remained on LP Sales' payroll after its eviction from the premises, but the Plaintiff did not.

3. Wayne Pertman

16 For all practical purposes involving this lawsuit, Pertman was the operating mind of 122 and was involved in management of Price Steel and General Scrap. The relationship between 122 and Broekhuizen began in 1994, when Broekhuizen first leased a portion of the premises owned by 122. On July 28, 1994, his lease was extended to include all the building. As far as Pertman was concerned, his dealings were with Broekhuizen alone. He testified that he never authorized Broekhuizen to act as agent for 122. He said that he never dealt directly with any of Broekhuizen's subtenants, nor did he ever obtain any lease payments directly from them. Broekhuizen confirmed this evidence.

17 According to Pertman, Broekhuizen surrendered his lease, although the term of the lease had not yet expired. No payments on account of rent had been made for many months. The statement of account sent to Broekhuizen by 122 included rent to June 2000, but it is clear that, by the end of April, Broekhuizen and his subtenants, including LP Sales and an auction company, had vacated the premises. Pertman accepted Broekhuizen's abandonment of the lease, at least to the extent of looking for tenants and speaking to real estate agents about renting the premises.

18 While his recollection of the events in question was poor as a result of the passage of time, I accept that he saw the trailer on the property after Broekhuizen had vacated the premises. He considered it an eyesore and felt that it detracted from the appearance of the property. A real estate agent suggested that it might negatively impact his ability to obtain a tenant. Sometime around April or May 2000, Pertman contacted Broekhuizen and asked him to get the trailer off the property. Pertman testified that Broekhuizen said it belonged to a friend of his, who would remove it within two weeks. Sometime later, in July or August, Pertman saw the trailer and again telephoned Broekhuizen to ask that it be removed. He indicated to Broekhuizen that if it was not, he would have it towed away. By late August, Pertman considered the trailer to be abandoned. He engaged Cliff's Towing, which took the trailer on August 31, 2000 to the General Scrap yard, where in due course it was emptied and the contents dumped on various piles for recycling. Pertman said that it cost $406.60 for 122 to have the trailer towed away.

19 Aside from speaking with Broekhuizen, Pertman made no further efforts to find out who owned the trailer. Given that the trailer was so old and dilapidated, he did not contemplate that there might be anything of value inside it and he had not been advised to the contrary by Broekhuizen.

4. Arnold Broekhuizen

20 Broekhuizen confirmed Pertman's evidence that 122 was the landlord of the premises and the he was the tenant. He acknowledged that, in the sublease with LP Sales, his company was represented as being the owner or agent of the owner of the premises, but explained that this was simply because he had copied the sublease from the main lease or some other lease.

21 He testified that he gave LP Sales an eviction notice in February 2000 for non-payment of rent. To the best of his recollection, they left sometime in March. He could not recall speaking with the Plaintiff in November 1999 and giving him

permission then to park his trailer on the property. All that he could remember about a trailer was that the Plaintiff had approached him when LP Sales was moving out and had asked him if he could leave his trailer on the lot for a few weeks.

22 Broekhuizen said that he thought the Plaintiff was referring to a utility-type trailer for storing some of his equipment. He was uncertain whether he ever saw the Plaintiff's trailer. He acknowledged he received a phone call from Pertman about a trailer, but said he assumed the trailer Pertman was talking about belonged to a neighbouring trucking company which had a habit of parking trucks and trailers on the street in front of the premises. I am not prepared to accept his evidence on this point given the Plaintiff's evidence about the arrangement they had in terms of the trailer and Pertman's testimony that when he first called Broekhuizen to complain about the trailer, Broekhuizen told him the trailer belonged to a friend of his and would be removed within two weeks. While the passage of time had an effect on the memory of all of the witnesses, Broekhuizen appeared to have the least amount of recall. As a result, I prefer Pertman's evidence on this point and find as a fact that Broekhuizen knew Pertman was referring to the Plaintiff's trailer but failed to give the Plaintiff notice to move it.

III. Analysis

A. Agency

23 I am satisfied that the Plaintiff brought the trailer onto 122's property with the consent of Broekhuizen, the tenant. The Plaintiff believed that Broekhuizen owned the property. No consideration was requested by Broekhuizen. If the Plaintiff cleaned some gutters on the premises, it was simply as a voluntary gesture of thanks.

24 The Plaintiff was under the impression that he had the owner's permission to leave the trailer on the property, on the condition that it be removed on 24 hours notice. Broekhuizen, in fact, was the tenant of the property. He agreed to allow the Plaintiff to park a trailer on the property, although he may not have understood what kind of trailer the Plaintiff meant. Broekhuizen's company, Jag, could not have given the Plaintiff a licence to park the vehicle on the lot as it did not have an interest in the premises. Clearly, there was a duty on Broekhuizen to contact the Plaintiff to tell him that the real owner of the property, 122, wanted the trailer off the premises. However, this was a duty owed to the Plaintiff by Broekhuizen and Boekhuizen is not a party to these proceedings. The Plaintiff has not established that there was any representation made to him that Jag was the owner of the property or that it was Jag which was consenting to the trailer being left on the parking lot.

25 The Plaintiff agreed that he would remove the trailer on 24 hours notice. Given his agreement to do so, he should have contacted Broekhuizen before leaving on a three week holiday in order to confirm that he could still leave the trailer on the property. This is particularly so as he must have been aware that the premises had been vacated by about the end of April.

26 Although Broekhuizen represented in the sublease between Jag and LP Sales that Jag was the owner or agent of the owner of the premises, there is no evidence that 122 clothed Broekhuizen with ostensible or apparent authority to act for it. Broekhuizen was nothing more than 122's tenant. As a tenant, he had a right to sublet, but that did not make him an agent of the landlord.

B. Bailment or Licence

27 Bailment was defined by Mr. Justice Cory in *Punch v. Savoy's Jewellers Ltd.* (1986), 54 O.R. (2d) 383, 26 D.L.R. (4th) 546 (Ont. C.A.), at 551 as:

> ... the delivery of personal chattels on trust, usually on contract, express or implied, that the trust shall be executed and the chattels be delivered in either their original or an altered form as soon as a time for which they were bailed has elapsed. It is to be noted that the legal relationship of bailor and bailee can exist independently of a contract. It is created by the voluntary taking into custody of goods which are the property of another.

28 Bailment must be voluntary. It cannot be foisted on the bailee: *McCutcheon v. Lightfoot*, [1929] 1 W.W.R. 694 (Man. C.A.), affirmed (1929), [1930] S.C.R. 108 (S.C.C.).

29 In *Heffron v. Imperial Parking Co.* (1974), 3 O.R. (2d) 722 (Ont. C.A.), at 727, the Ontario Court of Appeal defined a licence as: "...simply the grant of such authority to another to enter upon land for an agreed purpose as to justify that which

otherwise would be a trespass and its only legal effect is that the licensor until the licence is revoked is precluded from bringing an action for trespass."

30 Binder J. compared bailment and licence in *Dorico Investments Ltd. v. Weyerhaeuser Canada Ltd. / Weyerhaeuser Canada Ltée*, [2000] 1 W.W.R. 334, 249 A.R. 53, 1999 ABQB 561 (Alta. Q.B.) at para. 10(e), stating at W.W.R. pp. 344-345 that:

> Bailments require a transfer of possession and a voluntary acceptance of the common law duty of safekeeping, while licenses amount to no more than a grant of permission to the user of a chattel to leave it upon the licensor's land on the understanding that neither possession shall be transferred, nor responsibility for guarding the chattel accepted: N.E. Palmer, *Bailment*, 2nd ed (London: Law Book Co. Ltd., 1991), at 382.

31 Given that bailment is created by the "voluntary" taking into custody of someone else's goods, the Plaintiff in the present case could not foist bailment on 122 by his failure to remove the trailer from 122's property after the Broekhuizen lease ended. Bailment is a voluntary relationship and cannot be imposed. The term "involuntary bailee" is an oxymoron. The bailee must agree to the bailment. In any event, there is nothing in the evidence to suggest that either Broekhuizen or 122 took possession of or had any control over the trailer prior to late August 2000. Nor is there any evidence of an agreement on their part to safeguard the trailer.

32 In my view, the Plaintiff had a bare licence from Broekhuizen to store the trailer on the property. The licence could not extend beyond the term of Broekhuizen's tenancy, which ended by April 30, 2005 at the latest.

33 The Plaintiff cited *Letourneau v. Otto Mobiles Edmonton (1984) Ltd.*, 315 A.R. 232, 2002 ABQB 609 (Alta. Q.B.). The court concluded in that case that there had been a bailment for reward when the plaintiff followed the specific instructions of the defendant's employee and left his trailer for repair by the defendant on a lot adjacent to the defendant's property. The trailer went missing. The court held that the onus to displace negligence was on the bailee. ***Letourneau*** is distinguishable from the present case as there has been no bailment established as between the Plaintiff and either Broekhuizen or 122.

34 Pertman contacted Broekhuizen in April or May 2000 and asked that the trailer be taken off the property. Broekhuizen advised that the trailer belonged to a friend of his who would remove it within two weeks. Even if it could be said that 122 impliedly gave permission for the trailer to remain for that length of time, any such permission ended after the two week period expired.

C. Abandonment and Self-Help

35 Pertman contacted Broekhuizen again in July or August and insisted that the trailer be removed, otherwise he would do so. Pertman claims that he considered the trailer abandoned. The onus is on him to prove that it was.

36 Abandonment was discussed by Mr. Justice Klebuc in *Stewart v. Gustafson* (1998), 171 Sask. R. 27, [1999] 4 W.W.R. 695 (Sask. Q.B.) at para. 16:

> The act of abandonment is essentially a question of fact to be proven by the party relying on the principle of abandonment: ***Simpson v. Gowers et al*** (1981), 121 D.L.R. (3d) 709 (Ont. C.A.); *Property Law Cases, Text and Materials* by Mendes Da Costa and Richard J. Balfour (Toronto: Emond-Montgomery Limited, 1982) p. 114, c. 3. The burden of proof is an onerous one where the owner's actions do not clearly manifest an intention to surrender ownership of the chattel in issue. In the result, intention often must be inferred by using the approach commonly employed in criminal law where intention is of paramount importance.

37 Klebuc J. went on (at para. 17) to list a number of factors that the authorities suggest support an inference of intention to abandon, including: (1) the passage of time; (2) the nature of the transaction; and (3) the owner's conduct. Another indicator of intent that he added to this list was the nature and value of the property.

38 The Plaintiff in this case did not in fact abandon the trailer and contents. However, his conduct in failing to ascertain whether his licence survived the apparent termination of LP Sales' tenancy and the obvious fact that as time went on all of the

premises were vacated should have led him to at least contact Broekhuizen to confirm that the trailer could remain. Although he believed that Broekhuizen owned the property, the Plaintiff was aware that his licence was subject to termination on 24 hours notice. Certainly, before he went on vacation for three weeks in August, he should have inquired of Broekhuizen whether he could continue to park the trailer on the property.

39 In my view, it was reasonable for Pertman to treat the trailer as abandoned. He advised Broekhuizen in April or May that it must be moved. Broekhuizen said that it would be moved within two weeks. It was not. It remained parked on the lot over June and into July and August. The trailer was old and dilapidated looking. It was secured only with two padlocks. It had been left in a parking lot that was accessible to the public. There was no reason for Pertman to suspect that the trailer contained anything of value.

40 Even if Pertman was wrong to treat the trailer as abandoned, he was entitled to employ self-help when it was not removed from his property after having given reasonable notice. In *Stewart*, Klebuc J. commented at para. 22:

> Proprietors who become involuntary custodians of another person's chattel are not necessarily without a remedy or defence where the facts do not support the defence of abandonment, particularly if the chattel impairs their use or enjoyment of their premises. Often they will be able to successfully rely on one or more of the following: the defences of (1) estoppel, (2) necessity, or (3) abatement of a nuisance; (4) counterclaims for damages in trespass or nuisance; (5) self-help in order to end or abate a trespass or nuisance; and (6) the right of distress damage feasant...

41 In my view, 122 was exercising its right to self-help to end a trespass and nuisance in having the trailer removed from the property. Klebuc J. stated at para. 31 in *Stewart*:

> In my view the right to self-help extends beyond the mere removal of a chattel from a proprietor's premises in circumstances where a cost-benefit analysis demonstrates that the cost of preserving or removing a chattel, as the case may be, materially exceeds its market value or reasonably imputed value to its owner. For example, the cost of removing piles of rotted lumber or old dilapidated farm buildings may warrant the proprietor burning the same where their owner is not known or if known, the owner fails to remove the same within a reasonable time. This limited remedy does not entitle a proprietor to appropriate the chattel as her own or to destroy a chattel of significant value. The burden of establishing the requisite cost-benefit rests with the proponent thereof. Thus, such remedy is not without risk.

42 The plaintiff in *Stewart* had left a number of chattels on the defendant's land past the time when they were to be removed. The chattels fell into five categories. The second category, "several dilapidated buildings and some partially rotted lumber," equates to the trailer in the present case. Klebuc J. concluded (at para. 38) with respect to that category of chattels that:

> Although Mr. Stewart did not by word or deed relinquish his interest in the second group of chattels, I am satisfied that no liability attaches to Mr. Gustafson upon his disposal thereof for three reasons. First, an intention to abandon can be inferred from the very nature of a chattel. Here, the buildings were worth far less than the cost of moving the same intact. The lumber was worthless. In my opinion, Mr. Gustafson was entitled to infer that Mr. Stewart had abandoned these chattels because of their character. Second, Mr. Stewart is estopped from asserting a claim for damages for the reasons stated in connection with the first group of chattels. Thirdly, the presence of the second group on the Gustafsons' land not only constituted an obnoxious nuisance that materially interfered with Gustafsons' enjoyment of their property but also a material trespass. In such circumstances, Mr. Gustafson was entitled to exercise a self-help remedy and did so in a reasonable manner...

43 As was stated by Klebuc J., when an owner of land destroys a chattel that is on his property, he bears the burden of establishing the requisite cost-benefit analysis. In the present case, Pertman suspected that the trailer was parked on the property with the consent of his previous tenant, Broekhuizen. He confirmed this in conversation with Broekhuizen. Any notice requirement was sufficiently given to the tenant by the two phone calls. In my view, to oblige Pertman to cross-examine Broekhuizen to find out who the trailer belonged to would be to impose too great a burden on someone who finds a chattel on his land without permission, particularly where, as here, the chattel was interfering with the owner's enjoyment of the land; that is, harming the prospects of his obtaining a new tenant or giving a new tenant vacant possession.

44 I agree with Klebuc J. that the right to self-help does not allow the appropriation or destruction of a seemingly valuable asset. Pertman, here, did not suspect that anything of value was inside the trailer given its dilapidated state and certainly did not view the trailer itself as being anything but an eyesore. The passage of time without its removal or anyone contacting him would have served to confirm his view that the trailer was abandoned. Even if he had looked inside the trailer, the contents (used bakery machinery, parts, baking pans, old chairs, mops, etc.) would appear to be junk to the inexperienced eye.

45 There was nothing to suggest that the trailer had any value whatsoever which would warrant arrangements being made for its storage. Pertman and 122 were within their rights to have it towed away for scrapping.

46 Once Pertman was contacted by the Plaintiff and learned that Visscher wanted the trailer back, he should have advised the Plaintiff where the trailer could be found. In any event, the Plaintiff was able to locate the trailer on his own. I am unable to make a finding, on the evidence presented at trial, as to when the contents of the trailer were removed and placed on the scrap piles. It is possible that, if the Plaintiff had acted with greater diligence in hunting down the trailer or had informed Pertman that it contained items of value, he could have recovered the bakery equipment. In any event, there is no evidence that he was prevented from reclaiming the bakery equipment and no evidence that any of it was damaged, although it had been placed on a number of recycle piles. Even if it was damaged, there is no evidence that the damage occurred after Visscher contacted Pertman or that the damage could have been prevented if Pertman had immediately advised the Plaintiff where to find the trailer.

47 In the event that I am in error in concluding that 122 did not wrongfully convert the Plaintiff's property, I will assess the damages resulting from 122's actions.

48 The Plaintiff testified that he made a list of the contents of the trailer so that his associate at LP Sales, William Dixon, would know what bakery equipment was available for sale. He could not say precisely when the list was prepared. He said that, after the loss of the trailer, he estimated the market value of each item and added that to the list. The list was entered as an exhibit at trial. I reject the Plaintiff's evidence that the list, minus the market value of the items listed, was prepared in its entirety before the loss. Most telling is the presence on the list of items such as office chairs, auto parts for a 1959 Volvo, miscellaneous janitorial equipment, equipment catalogues, office supplies, letters, envelopes, paper, adding machine, fax machine, and the trailer itself, described as a "storage trailer, single axle 28'." In my view, the inclusion of these items suggests that the list was prepared after the loss occurred. Even if it was prepared beforehand, there is no assurance that some of the equipment listed was not sold after preparation of the list.

49 The Plaintiff said he paid $2,800.00 for the trailer in 1982. On the list, he valued the trailer at $1,200.00. In answer to an undertaking at examinations for discovery, he claimed that the trailer cost $1,500.00. In cross-examination at trial, he said that this $1,500.00 figure was an error and that in fact he had traded bakery equipment worth $2,500.00 for the trailer. His approach to valuation prompts me to view all of his attributed values with suspicion.

50 The Plaintiff treated his trailer in a very casual way. He left it unattended, in a parking lot to which the public had access. After being away for three weeks, he waited several days before going to check the trailer. Once he discovered that it was missing, he made inquiries about it, but only in his spare time, *albeit* he was working at his regular employment during that period. When he eventually found the trailer at the scrap yard, up to two weeks later, it was some days before he actually went to the salvage yard and spoke to a person there. Although he observed some of the trailer contents on scrap piles, he made no effort to retrieve the items, even the Nickolson proofers which he assigned a total value of $5,400.00. This casual approach is difficult to reconcile with the Plaintiff's evidence that the trailer and contents were worth over $44,000.00.

51 I accept the proposition that most of the bakery equipment, if reconditioned, could have been sold by the Plaintiff over time. Nevertheless, as admitted by the Plaintiff, the demand for this equipment was limited and in order to be marketable much of it would have required reconditioning, and storage in the interim In my view, there should be a major discount of the values listed to reflect these factors and that, as conceded by the Plaintiff, used bakery equipment can be acquired for as little as 10 percent of its market value. I fix the value of the trailer at zero dollars because there was no evidence presented that there is

any market for a trailer that has not been used on the highway since 1982. I discount the value of the contents by 75 percent, resulting in a total value of $10,777.50.

IV. Conclusion

52 The Defendant 122 has established that it was entitled to treat the trailer as abandoned. Alternatively, it was entitled to consider the presence of the trailer as a trespass and nuisance. It exercised self-help and acted responsibly in hiring a tow truck to take the trailer to the salvage yard. Although 122's agent should have informed the Plaintiff where to find the trailer when contacted by him, the Plaintiff did not establish that he suffered any damages as a result of this failure. The Plaintiff's action is dismissed.

53 Given that 122 was entitled to treat the trailer as abandoned or to exercise self-help in dealing with a trespass, it follows that it was entitled to remove the trailer at the expense of the Plaintiff. The Defendant is awarded damages on the Counterclaim of $406.60.

54 The parties may speak to costs within 30 days if necessary.

Action dismissed.

Tab 7:

Dorico Investments Ltd. v. Weyerhauser Canada Ltd., 1999 ABQB 561

1999 ABQB 561
Alberta Court of Queen's Bench

Dorico Investments Ltd. v. Weyerhaeuser Canada Ltd. / Weyerhaeuser Canada Ltée

1999 CarswellAlta 709, 1999 ABQB 561, [1999] A.J. No. 869, [2000]
1 W.W.R. 334, 249 A.R. 53, 48 B.L.R. (2d) 222, 73 Alta. L.R. (3d) 30

Dorico Investments Ltd., Plaintiff and Weyerhaeuser Canada Ltd./Weyerhaeuser Canada Ltée, Defendant

Binder J.

Judgment: July 19, 1999
Docket: Edmonton 9503-18441

Counsel: *Jennifer L. Madsen*, for the plaintiff.
Doreen C. Mueller, for the defendant.

***Binder J.*:**

Part I - Introduction

1. Overview

1 This case involves a log cabin that could have been, had a river boat ("Boat") been delivered to North Saskatchewan River Boat Ltd. ("River Boat") as contemplated.

2 In this action, the Plaintiff, Dorico Investments Ltd. ("Plaintiff") by its Statement of Claim, seeks to recover damages in the amount of $54,000.00 from Weyerhaeuser Canada Ltd. ("Defendant"), as a result of the Defendant's alleged breach of duty as a "bailee" in permitting a prefabricated log cabin package ("Package"), alleged to belong to the Plaintiff, to have been removed from the Defendant's premises.

3 The facts are relatively straightforward. The application of the law to the facts is somewhat more difficult, in that there are several issues that arise:

> 1. Whether the legal relationship between the Plaintiff and Defendant at the time the Package was removed from the Defendant's premises was one of "License" or "Bailment";
>
> 2. If Bailment, whether:
>
> (a) The nature of the Bailment was gratuitous or for reward;
>
> (b) There was a breach of the duty of care owed by the Defendant;
>
> 3. Whether the Plaintiff was the owner of the Package at that time;
>
> 4. If so:
>
> (a) What was the market value of the log cabin package;
>
> (b) Did the Plaintiff have a duty to mitigate, and if so, did it fail to mitigate? If so, what effect should that have on calculation of damages;

(c) Should the Defendant be given credit for the amount previously paid to the Plaintiff by a third party on account of the log cabin package?

2. Witnesses

4 The following gave evidence:

For the Plaintiff

Don Richard Corser ..... ("Corser")

Matthew Joseph Mellof ..... ("Mellof")

Nick Iozzo ..... ("Iozzo")

For the Defendant

Gary Everett ..... ("Everett")

Ronald James Nordstrom ..... ("Nordstrom")

Wolfgang Gies ..... ("Gies")

Ed Herman ..... ("Herman")

3. Highlighting and Underlining, Quotations, and Case Reference

5 Unless otherwise specifically indicated in these Reasons, highlighting and underlining have been added for the purpose of emphasis.

6 When the evidence of a witness is quoted, the quote may not be exact, and should therefore be read as if the following words were added thereafter: "or words to that effect."

7 Once a case or text has been fully cited, any reference to such case or text thereafter, unless otherwise specifically indicated, is by the first indexed word(s) of one of the parties or the author, e.g. *National Trust Co. v. Wong Aviation Ltd.* (1969), 3 D.L.R. (3d) 55 (S.C.C.) would be "*National Trust*".

4. Jurisprudence

8 In addressing the issues, I have considered the references submitted by the parties set out in Appendix I.

Part II - License v. Bailment and Ownership

1. Facts

9 From the evidence I find as fact the following:

1. Mr. Corser at all material times had the authority to bind the Plaintiff;

2. Mr. Everett at all material times had the authority to bind the Defendant, in his capacity as the general manager of the Defendant's Edmonton Customer Service Facility, a 20-acre secured site used for the storage and distribution of forest products ("Facility");

3. The Plaintiff was extra-provincially registered in the Province of Alberta at the commencement of the trial on June 21, 1999;

4. In or about April 1993, the Plaintiff and River Boat entered into an arrangement ("Arrangement") whereby the Plaintiff would manufacture, deliver and erect a log cabin ("Cabin") for River Boat, at a site in the river valley near the Saskatchewan River, in the City of Edmonton ("Site"), for use by River Boat in connection with the operation of the Boat, which River Boat had commissioned;

5. The Arrangement was to be completed in stages. The first stage ("First Stage") was the manufacture and delivery of the Package;

6. The First Stage was evidenced (Exhibit 1, Tab 5) by a document referred to as a "Quotation", dated April 30, 1993 ("April 30th Quotation");

7. The April 30th Quotation provided for an original purchase price ("Purchase Price") of $27,637.20, plus GST, for a total of $29,571.81:

- "Fifty percent on order" - that is, fifty percent of the Purchase Price was to be paid at the time River Boat placed the order for the Package. River Boat placed the order and paid the required amount;

- "Fifty percent on shipping;

  Telephone transfer to:

  Bank of Nova Scotia (Lumby Branch 40170);

  Account No. 380-16 Dorico Investments Ltd." - that is, the balance of the Purchase Price ("Balance") was to be paid by River Boat to the Plaintiff by bank transfer of funds prior to the transport of the Package to Edmonton.

- "F.O.B. Lumby" - River Boat was to be responsible for the cost of transporting the package to Edmonton;

8. Due to the size of the Package, a "B-Train" was required to transport the Package from Lumby, British Columbia to Edmonton. A B-Train is a truck with two trailers attached. Due to the length of the B-Train, it was not possible to deliver the Package to the Site. As a result, Mr. Corser made arrangements with the Defendant, through Mr. Everett, to have the Package delivered to the Facility, whereupon it was intended that the Package would be re-loaded onto smaller trucks provided by the Defendant and transported by it to the Site. Two truck loads, comprising ten to fifteen percent of the Package, were in fact delivered by the Defendant to the site. As it was not known at the time how long the process would take, nor the number of trips required to transport the entire Package to the Site, the financial arrangement relating to that transportation was left to be finalized at a later date. There was no charge contemplated for storage, as the Defendant was simply doing the Plaintiff a favour, due to the longstanding relationship between the Defendant and the Corser family;

9. When the time arrived to transport the Package to Edmonton, the Plaintiff was advised by representatives of River Boat that the Balance could not be paid to the Plaintiff's account by bank transfer, as the signatures of two directors of River Boat were required, and it was not possible at that time to obtain those signatures. As it turned out, River Boat never paid the Balance. However, at the time in question, Mr. Corser was faced with a decision as to whether or not the Plaintiff would nevertheless proceed with the transportation of the Package to Edmonton. As Mr. Corser had arranged to travel to Edmonton to take delivery of the Package in any event, he decided to proceed. The Package arrived in Edmonton and was delivered to the Facility on May 31, 1993. During the following month, the Plaintiff as previously noted, arranged for the Defendant to deliver two truck loads, comprising ten to fifteen percent of the Package to the Site, and Mr. Corser also did some preliminary work at the Site;

10. As part of the Arrangement, the Plaintiff was to supply craftsmen to erect the Cabin at $25.00 per hour, and they were to be paid food and lodging by River Boat at $50.00 per day and to be reimbursed for travel at 25 cents per

km. (Exhibit 1, Tab 6). Payments were made by River Boat to the Plaintiff on account of food and lodging and with respect to some preparatory work (Exhibit 1, Tab 16);

11. Upon Mr. Corser's arrival in Edmonton, he became aware that there was a problem with the Boat, in that the builder of the Boat was unwilling to release it to River Boat as there was a dispute between them ("Dispute"). It was anticipated that the Dispute would be resolved quickly, however as it turned out, the Dispute was not resolved and after a month in Edmonton Mr. Corser returned to British Columbia. The Defendant was aware of the Dispute and agreed to continue to store the Package at its Facility;

12. During the next two years, it became clear that the Dispute could not be resolved. The two truckloads of part of the Package previously delivered to the Site were returned to the Facility and stored with the balance of the Package. River Boat was placed in bankruptcy and eventually the Boat was sold to a new company ("River Boat II");

13. Exhibits 2, 3, 4 and 10 relate to the bankruptcy of River Boat and a proposal ("Proposal") made under s. 62 of the *Bankruptcy and Insolvency Act*. The significance of these exhibits is that the Plaintiff filed a proof of loss ("Proof of Loss") in the amount of $17,907.69 (Exhibit 10) and voted in favour of Option B (shares) under the Proposal (Exhibit 3);

14. Although Exhibit 3 showed the Plaintiff as an ordinary creditor of River Boat, the Proof of Loss did not indicate whether the Plaintiff's claim was secured or unsecured, as para. 4 thereof was not completed;

15. The proposal was annulled by the Court in June 1995 and River Boat was assigned into bankruptcy effective June 30, 1995;

16. In early 1995, River Boat II was incorporated and Mr. Iozzo became its general manager. A relationship existed between Mr. Corser's father and River Boat II. River Boat II purchased the Boat from the Trustee in Bankruptcy of River Boat ("Trustee"). Prior to such purchase, Mr. Iozzo inquired of the Trustee as to whether the sale included the Package. He was advised that it did not. However, as River Boat II was interested in the Package, discussions ensued between River Boat II and the Plaintiff. Although a figure of between $38,000.00 and $45,000.00 was discussed, which included transportation and materials only, a final figure was not reached because of what transpired when Mr. Iozzo, Mr. Corser and Mr. Corser's father attended at the Facility to inspect the Package in August of 1995. Upon their arrival at the Facility, they learned that the Package was no longer there, having been removed on June 30 th , 1995;

17. In May of 1995, Mr. Everett received a telephone call from Mr. Corser. Mr. Corser advised Mr. Everett that it appeared that things were happening with the Boat, and that the Package would be removed from the Facility shortly. During a subsequent telephone conversation, Mr. Everett advised Mr. Corser that having regard to the length of time the Defendant had stored the Package, a charge of $2,000.00 would be appropriate. Mr. Everett so advised the Shipping Department at the Facility;

18. Shortly thereafter, Mr. Everett received a telephone call from a person by the name of Ray Collins, who advised Mr. Everett that he would be attending at the Facility to pick up the Package. Mr. Everett replied, "That is great; don't forget to bring a cheque". Mr. Everett did not know Mr. Collins, did not recognize the name, nor did he contact Mr. Corser to determine whether or not Collins had permission to pick up the Package. Mr. Everett simply assumed that he did;

19. Mr. Gies was, at all material times, employed by the Defendant at the Facility as an assistant shipper. Mr. Gies received instructions from Mr. Everett and "Pius" the head shipper that it was "okay for him to release the Package, as long as he received a certified cheque for $2,000.00";

20. On at least three occasions prior to June 30, 1995, Collins and two or three other persons attended at the Facility to inspect the Package. Mr. Gies made no inquiry as to their identity; he simply provided them with hard hats and allowed them to proceed to inspect the Package. On one of these occasions, Mr. Gies was asked whether he knew

of any trucking companies that transported to British Columbia. Mr. Gies provided the names of several trucking companies that the Defendant used. One of them was Craddock Trucking Ltd. ("Craddock");

21. Collins subsequently arrived at the Facility with a Craddock truck on June 30, 1995, provided Mr. Gies with a certified cheque for $2,000.00 (Exhibit 1, Tab 12), and Gies released the Package which was then loaded and transported from the Facility by Craddock. At that time, Collins did not have a proprietary interest in the Package, nor was he representing anyone with such an interest;

22. The Facility at all material times was a secured facility. Visitors were required to report to the general office and truckers were required to report to the shipping office;

23. When the Defendant became aware that Collins' action was unauthorized, the Defendant contacted Craddock and ascertained that the Package had been delivered by Craddock to a Gordon Coxson. The Defendant did not take any further steps, other than to determine Coxson's location, which information the Defendant provided to the Plaintiff. The Plaintiff took no steps as against Collins or Coxson;

24. When the Trustee became aware of Collins' action, it undertook a preliminary investigation, but as the bankrupt's estate was without funds, no action was commenced against Collins or Coxson.

2. License v. Bailment

Jurisprudence

10 Based on the Authorities, the principles relating to license and bailment can be summarized as follows:

• Bailments require a transfer of possession and a voluntary acceptance of the common law duty of safekeeping, while licences amount to no more than a grant of permission to the user of a chattel to leave it upon the licensor's land on the understanding that neither possession shall be transferred, nor responsibility for guarding the chattel accepted: N.E. Palmer, *Bailment*, 2nd ed. (London: Law Book Co. Ltd., 1991), at 382.

License

• A licence is the grant of authority to enter upon land for an agreed purpose where such entry would otherwise be a trespass, and the licensor is precluded from bringing an action for trespass until the licence is revoked: *Heffron v. Imperial Parking Co.* (1974), 3 O.R. (2d) 722 (C.A.) at 727.

• Common characteristics of a license include the following: the occupier does not have exclusive possession of the goods; the licensee needs no co-operation from the occupier to gain access to the goods and access to the goods is not subject to the occupier's control; the premises are open, accessible and insecure; the occupier may be only intermittently present; no ancillary functions are to be performed by the occupier; and payment is made upon deposit, as opposed to withdrawal of goods: *Palmer*, at 384, 394-395, 402-403, 412, 493.

Bailment

• The legal relationship of bailor and bailee can exist independently of a contract, and is created by one party voluntarily taking into custody goods which are the property of another: *Punch v. Savoy's Jewellers Ltd.* (1986), 26 D.L.R. (4th) 546 (Ont. C.A.) at 551.

• Common characteristics of a bailment include: the bailor delivers goods to the occupier who has control over the goods and can exclude others; the premises are secure; the bailor remains away from the premises for an extended period of time; the occupier may provide ancillary functions, for example, delivering the goods to another location: *Palmer*, at 384, 402-403.

• A bailee has a duty to safeguard the goods with reasonable care and redeliver them in the condition in which they were bailed: *Palmer*, at 779.

• A bailee is bound to take reasonable care to see that the chattel is in proper custody, to protect it against unexpected danger should it arise, and to recover it, if it be stolen: *Munroe v. Belinsky* (1995), 103 Man. R. (2d) 12 (Man. Q.B.) at 17.

• In former times it was held that there was a higher duty placed on bailment for reward than on a gratuitous bailment. The significance of reward has declined considerably in recent years: *Carpenter v. Cargill Grain Co.* (1982), 19 Alta. L.R. (2d) 354 (Alta. Q.B.) at 357.

• Occasionally, a delay in collection will entitle the bailee to employ a lower standard of care in the safekeeping of the goods. Unless the circumstances of the delay are exceptional, however, and are such as to show an implied agreement to that effect, it seems likely that the bailee's normal responsibility will not abate and he will continue to owe a duty of reasonable care: *Palmer*, at 777.

• The bailor must establish the existence of the bailment and the non return of the bailed goods while in the possession of the bailee which raises a *prima facie* case of negligence. Once these are established, the onus shifts to the bailee to disprove negligence: *Calgary Transport Services Ltd. v. Pyramid Management Ltd.* (1976), 1 A.R. 320 (Alta. C.A.), at 325-326; *Tri-City Drilling Co. v. Velie* (1960), 32 W.W.R. 716 (Alta. C.A.) at 716.

• When goods are damaged or lost while in the possession of a bailee, the bailee must prove either that he took appropriate care of them, or that his failure to do so did not contribute to the loss. Only if he satisfies the bailor that the bailee's servants exercised all diligence will he be excused from liability: *Morris v. C.W. Martin & Sons Ltd.*, [1965] 2 All E.R. 725 (Eng. C.A.), at 731.

Conclusion

11 To succeed, the Defendant, in my opinion, must show that the facts in this case are analogous to the following situations:

(1) A, the owner of a vehicle, enters a parking lot, takes a ticket and parks the vehicle. A thief gains entry to the vehicle, drives the vehicle to a booth, presents the parking ticket, pays the amount required to the attendant in the booth and drives away. In those circumstances, it is clear that the legal arrangement between the parking lot and A was a "license". In such circumstances, as a matter of policy, a parking lot attendant is generally under no duty to determine whether the person presenting and paying the parking fee is the owner of the vehicle;

(2) A, the owner of a vacant, unsecured lot ("Lot") agrees with B to permit B to store building materials ("Materials") on the Lot, which B had purchased for the construction of a hay shed, for an indefinite period. Ten days later, the Material which B had deposited on the Lot, is stolen. In those circumstances, it is clear that the legal arrangement between A and B was a "license". In such circumstances, as a matter of policy, A had no duty of care relating to the Materials.

12 In my opinion, the circumstances in this case are more analogous to the following situations:

(1) A takes his vehicle in for servicing. B, a rogue is aware that A has done so. B attends at the dealership and indicates he is there to pick up the vehicle. B pays for the maintenance on the vehicle, is given possession of the vehicle without further inquiry and leaves. In those circumstances, in my view, the legal arrangement between A and the dealership was a "bailment for reward". It is clear that as a matter of policy the law imposes a duty of care upon the owner of the dealership and its employees, which duty was breached by the dealership;

(2) A asks a friend of hers B to store A's vehicle in B's garage while A is on holidays. B agrees to do so, as a favour to A at no charge. While A is on holidays, C calls B and informs B that she is a friend of A's and will be picking up A's vehicle. A arrives at B's residence and B delivers possession of A's vehicle to C. B is aware of where A is staying and is able to contact A, but fails to do so as B assumes that C is a friend of A's and that C has A's authority to pick up A's vehicle. In those

circumstances, in my opinion, the arrangement between A and B was a "gratuitous bailment". In my opinion, it is clear that as a matter of policy, the law imposes a duty of care upon B, which duty in the absence of fraud by C was breached by B.

13 In this case, I am satisfied that at all material times, the relationship between the Plaintiff and the Defendant was one of bailment.

14 From the time the Package arrived at the Facility (May 31, 1993) to the time when Mr. Corser left Edmonton and returned to British Columbia (on or about July 1, 1993), the nature of the bailment was gratuitous, as there was no charge anticipated.

15 However, by July 1, 1993, it was reasonable to conclude that the Dispute had become complicated and would likely take much longer to resolve than had been anticipated.

16 By the spring of 1995, Mr. Everett had determined that the Defendant would charge the Plaintiff for storage, due to the length of time the Package had remained at the Facility. At that time, I am satisfied that the nature of the bailment became one for reward.

17 I am further satisfied that the Defendant breached the duty of care it owed to the Plaintiff as a bailee for reward. At the very least, the Defendant had a duty to contact Mr. Corser to determine whether Collins had the Plaintiff's permission to take possession of the Package.

18 It would have been a simple matter for Mr. Everett to have telephoned Mr. Corser to so inquire. He failed to do so. Rather, Everett simply assumed that whoever had called him had obtained such permission. That, in my opinion, was not good enough, nor would it have been sufficient even if the bailment had been gratuitous.

19 In short, I am satisfied that:

1. The relationship between the Plaintiff and the Defendant at the material time was a bailment for reward;

2. The Defendant breached the duty it owed to the Plaintiff by not contacting Mr. Corser to determine whether it was proper for the Defendant to deliver possession of the Package to Collins, or any other person for that matter;

3. Even if the relationship had been a gratuitous bailment the result would be the same.

3. Ownership

Jurisprudence

20 Based on the Authorities, the principles relating to when title transfers from a seller to a buyer, can be stated as follows:

• In order for property to pass between the seller and the buyer, it must be the intention of the parties that the ascertained property pass, and the goods must be in a deliverable state: *Sanders v. Hedman* (1915), 8 W.W.R. 664 (Alta. C.A.) at 667; G.H.L. Fridman, *Sale of Goods in Canada*, 4th ed. (Carswell: Toronto, 1995) at 72, *Sale of Goods Act*, R.S.A. 1980, c. S-2, s. 20(1).

• Under the *Sale of Goods Act*, s. 2(3), goods are in a deliverable state when they are in such a state that the buyer would under the contract be bound to take delivery of them.

• In order to discover the intention of the parties with respect to transfer of ownership, it is necessary to look to the terms of the contract, the conduct of the parties and the circumstances of the case. This general language allows considerable latitude in application and interpretation by the parties and the courts: *Sale of Goods Act*, s. 20(2); *Fridman*, at 73.

• Generally, if the contract is for an unconditional sale of specific goods, property passes when the contract for the sale of the goods is made: *Sale of Goods Act*, s. 21(2).

• However, the parties may determine an alternative date for when they intend the property to pass: *Sanders*, at 667.

• If a party undertakes to perform certain things in relation to the contract it must be determined whether performance of those is meant to precede vesting of property or not. This is a question of construction. The intention of the parties may be express, but if it is not, intention must be construed by looking to the whole agreement: *Jerome v. Clements Motor Sales Ltd.*, [1958] O.R. 738 (Ont. C.A.) at 743, 744.

• If the intentions of the parties cannot be determined with reference to the contract, the course of dealings or the circumstances of the case, the *Sale of Goods Act* provides a number of rules for ascertaining intention: ss. 21(2)-(7).

• Commercial shipping terms are indicia relevant to s. 20 of the *Sale of Goods Act* going to terms of the contract, conduct of the parties and circumstances of the case. The well-established meaning of the commercial shipping term "F.O.B. point of shipment" is that once the goods are on board the shipper, the liability of the seller ceases and *prima facie*, delivery has occurred: *R. v. Steel Co. of Canada*, [1955] S.C.R. 161 (S.C.C.); *Olbert Metal Sales Ltd. v. Cerescorp Inc.*, [1997] 1 F.C. 899 (Fed. T.D.).

• However, this generally accepted meaning of the term may be refuted by an agreement, either express or implied from the circumstances, and thus the transfer of property and risk may be postponed beyond the time of shipment: *Sale of Goods Act*, s. 22(1), (2); *Plets v. Irving Pulp & Paper Ltd.* (1982), 39 Nfld. & P.E.I.R. 361 (P.E.I. S.C.); *Fridman*, at 487.

• Under the common law, a bailee is estopped from disputing his bailor's title. Thus the bailor may sue for the full value of goods which have been lost or destroyed by a negligent act of the bailee, even though the bailor does not have an interest in the goods and regardless of whether the bailor would be responsible to the true owner of the goods for the loss. There are five exceptions to this principle - eviction by title paramount, defence by the authority of the proper owner, redelivery of the goods to the proper owner, contract for hire-purchase and hire, and acquisition of the property by the bailee: *Palmer*, at 265.

Position of Defendant

21 The Defendant argues that title to the Package passed to River Boat at the time of the order when fifty percent of the Purchase Price was paid by River Boat, or in any event, when the Package was shipped.

22 As to the former, I have difficulty accepting that it was the intention of the Plaintiff and River Boat that title to the Package would pass at a time when the Package was non-existent.

23 As to the latter, the Defendant bases its argument on the general understanding in the transportation industry that when the term "F.O.B." is used, it signifies that once the goods are delivered and placed on board the vehicle used to transport the goods, title to the goods passes to the buyer.

24 I agree that in the normal course that is so, where the goods have been paid for by the buyer. However, where the goods have not been paid for, title to the goods may and often does remain in the seller until the goods are paid for.

25 The Defendant further argues that the fact that the Plaintiff filed the Proof of Loss is strong evidence that the Plaintiff considered itself an ordinary creditor and in so doing, acknowledged that it no longer had title to the Package. I disagree. Paragraph 4 of the Proof of Loss provided:

> 4. (*Check and complete appropriate category*.)
>
> ( ) **A. Unsecured Claim**
>
> That in respect of the said debt, I do not hold any assets of the debtor as security and
>
> (*Check appropriate description*.)

( ) I do not claim a right to a priority.

( ) I claim a right to a priority under Section 136 of the ***Bankruptcy and Insolvency Act***. *(Set out on an attached schedule details to support priority claim.)*

( ) B. Secured Claim

That in respect of the said debt, I hold assets of the debtor valued at $_____ as security, particulars of which are as follows:

(*Give full particulars of the security, including the date on which the security was given and the value at which the creditor assesses the security, and attach a copy of the security documents*.)

( ) C. Claim by Farmer, Fisherman, or Aquaculturist

That I hereby make a claim under Subsection 81.2(1) of the ***Bankruptcy and Insolvency Act*** for the unpaid amount of $_____. (*Attach a copy of the sales agreement and delivery documents*.)

26 The Plaintiff did not complete para.4. In my opinion, it is just as likely that the Plaintiff filed the Proof of Loss on the basis of a secured claim as it is that it filed it on the basis of an unsecured claim.

27 The Defendant acknowledged in argument that if title to the Package did not pass to River Boat at the time the Package was shipped to Edmonton, title remained in the Plaintiff at all material times.

Conclusion

28 Counsel for both parties spent much time dealing with this issue. Having regard to the facts and the Authorities, I am satisfied that the intention of the Plaintiff and River Boat was that upon payment of the Balance "on shipping" (Exhibit 1, Tab 5), title to the Package was to pass to River Boat.

29 However, when the Balance was not so paid, the Plaintiff had the option ("Option") of shipping, while retaining title to the Package until the Balance was paid.

30 The Plaintiff exercised the Option. Since the Balance was never paid, title to the Package remained in the Plaintiff at all material times.

31 In any event, in light of my finding to the effect that the arrangement constituted a bailment, in order to raise the issue of title, the Defendant, as bailee, would have to bring itself within one of the exceptions to the rule that the bailee is estopped from disputing the bailor's title. The exceptions of eviction by title paramount and redelivery to the proper owner have no application here, since the Package was not delivered to its proper owner. Defence by authority of the proper owner does not apply since the Defendant has not demonstrated that it is defending upon the right and title and by the authority of the true owner. The other exceptions have no application to the present case. As the evidence shows that the Defendant delivered the Package to one who had no proprietary interest in the Package at the time of delivery, and who did not represent another person with such an interest, the Defendant is estopped from disputing the Plaintiff's title.

Part III - Market Value

Jurisprudence

32 Based on the Authorities, the principles relating to market value can be summarized as follows:

- The general rule is that in cases of negligent dealing with chattels the usual measure of damages is the market value of the chattel lost or damaged: *Jennings v. Wolfe* (1950), 1 W.W.R. 935 (Alta. S.C.) at 938.

• Market value is the price property would command in the open market, i.e. the highest price a willing buyer would pay and a willing seller accept, both being fully informed, and the property being exposed for a reasonable period of time: *Black's Law Dictionary*, 6th ed. (St. Paul, MN: West Publishing Co., 1990) at 971.

• In some cases the market cannot be referred to as the sole standard of value, but other elements must be considered, as where the property involved has not been bought and sold so as to have an established market value, or is so unusual in its character that there is little or no demand for it. Further, the property may be of such character that an award of the market value would not afford due compensation to the owner, in which case he may be entitled to recover the value of the property to himself: *Jennings*, at 940.

Evidence

33 Mr. Mellof was qualified as an expert to give opinion evidence as to the value of the Package in 1993 and 1995.

34 Mr. Mellof opined that the retail value of the Package in:

(a) 1993 would have been $50,940.00, plus an additional $5,300.00 for Wall "B", which had not been included in the drawings (Exhibit 1, Tab 2);

(b) 1995 would have been $54,315.00, plus the additional amount for Wall "B".

35 Mr. Herman was qualified as an expert to give opinion evidence as to the cost of wood products used in the manufacture of log cabins.

36 Mr. Herman opined that the retail value in 1993 would have been $31,429.17 and in 1995 $26,593.92, each increased by five to ten percent, to take into account a five-and-a-half inch size of log, rather than a five inch.

37 I prefer and accept the opinion of Mr. Mellof for several reasons, including:

• Mr. Mellof's expertise was in the manufacture of log cabins, whereas Mr. Herman's expertise was in the cost of lumber required for the manufacture of log cabins. The difference is significant, as the lumber purchased for log cabins requires further manufacturing in the sense that the logs are customized to meet the specifications of the cabin;

• Mr. Herman readily admitted that he was not qualified to interpret the drawings or specifications ("Drawings") for the Package (Exhibit 1, Tab 2);

• Mr. Herman simply inquired of other manufacturers of log cabins what they would have charged, without any reference to the Drawings;

• Mr. Herman based his calculations on Consumer Price Index Statistics, which include various types of lumber products, rather than providing a specific price for the specialty lumber products called for under the Drawings.

Conclusion

38 In this case, the Package was custom-designed for River Boat, at a Purchase Price which may well have been low, having regard to Mr. Mellof's evidence, and the fact that it was based on the assumption that the Plaintiff would receive publicity as the manufacturer, thereby increasing its sales.

39 However, the cost of manufacturing a custom-designed log cabin is only relevant, in my opinion, if there is a buyer willing to pay that cost.

40 Since River Boat defaulted, the issue to be determined is the price that a willing buyer would have paid the Plaintiff for the Package in 1995.

41 Mr. Collins sold the Package to Mr. Coxson for $23,000.00 (Exhibit 1, Tab 10).

42 Mr. Iozzo testified that River Boat II was interested in the Package at a price between $38,000.00 and $45,000.00. It is also clear from the evidence and I so find, that Mr. Corser's father was at all material times involved, likely financially, in River Boat, as well as River Boat II. I infer that such involvement played a role in River Boat and River Boat II's interest in acquiring the Package.

43 Mr. Corser testified that he would not have sold the Package for less than $45,000.00.

44 In my opinion it is reasonable to conclude, and I so find, that the market value of the Package as at June 30, 1995 was $30,000.00, which is close to the original Purchase Price. I arrive at that conclusion on the basis that the Iozzo price range was still speculative and perhaps represented a somewhat inflated value given the relationship between Corser's father and River Boat II; the Plaintiff agreed to approximately $28,000.00 in 1993 and would undoubtedly have received an advertising benefit wherever the Cabin was erected; the Cabin was sold in 1995 for $23,000.00 and there is no evidence to suggest that the purchaser knew it was "hot"; and if the River Boat II sale had fallen through, there was no evidence that there were any other potential buyers waiting in the wings, other than some golf courses which had expressed interest, but with whom negotiations had not gone far.

Part IV - Mitigation

Jurisprudence

45 Based on the Authorities, the principles relating to mitigation can be summarized as follows:

• There is a responsibility on a party who has been injured by a breach to take all reasonable steps to avoid losses flowing from the breach. Generally, the duty to mitigate arises at the time the loss occurs: *Baud Corp., N.V. v. Brook*, [1979] 1 S.C.R. 633 (S.C.C.), at 647.

• A plaintiff is not entitled to recover for losses which could have been avoided by taking reasonable action: H. McGregor, *McGregor on Damages*, 16th ed. (London: Sweet & Maxwell Limited, 1997) at ¶285; *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Railways Co. of London*, [1912] A.C. 673 (U.K. H.L.) at 689.

• Where the plaintiff does take reasonable steps to mitigate, he or she can recover for losses or expenses incurred in taking those steps: *Granville Savings & Mortgage Corp. v. Campbell*, [1993] 4 S.C.R. 279 (S.C.C.); *Christianson v. North Hill News Inc.* (1993), 106 D.L.R. (4th) 747 (Alta. C.A.); S. M. Waddams, *The Law of Damages* (Toronto: Canada Law Book Limited, Suppl. 1998) at 15.290; *McGregor*, at ¶286.

• The defendant bears the onus of proof to show the plaintiff could, by taking reasonable steps, have avoided all or part of the loss claimed: *Michaels v. Red Deer College* (1975), 57 D.L.R. (3d) 386 (S.C.C.).

• Impecuniosity of the plaintiff is generally no excuse for a failure to mitigate, but if the defendant's breach caused the impecuniosity and it meets the ordinary test of remoteness, the full extent of the losses, including those caused by the impecuniosity will be recoverable: *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670 (S.C.C.); *Freedhoff v. Pomalift Industries Ltd.* (1971), 19 D.L.R. (3d) 153 (Ont. C.A.); *Marigold Holdings Ltd. v. Norem Construction Ltd.* (1988), 89 A.R. 81 (Alta. Q.B.).

• Reasonable mitigation by the plaintiff may also require prompt litigation to protect the plaintiff's interests: *Baud Corp., N.V. v. Brook*. However, this does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party: *Pilkington v. Wood*, [1952] Ch. 770 (Eng. Ch. Div; *Bank of Montreal*. The duty to mitigate does not extend to obliging the plaintiff to make large expenditures for uncertain outcomes: *Baud Corp., N.V. v. Brook*; Waddams, at ¶1201.

• As the defendant is the wrongdoer, the standard of reasonableness on the plaintiff is not high. Thus, the plaintiff has no obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business: *British Westinghouse*, at 689.

Facts and Argument of Defendant

46 It is clear from the evidence, and I so find, that neither the Plaintiff, the Defendant, nor the Trustee commenced any proceedings to recover the Package, or for compensation for the loss of the Package.

47 The Trustee explained that this was due to a lack of funds in the bankrupt's estate. The Plaintiff and the Defendant presumably did not do so on the legal advice of their respective Counsel. In addition, Mr. Corser testified, and I so find, that the Plaintiff's financial position was significantly impacted, in that the supplier of the lumber for the Cabin had commenced legal proceedings, including attachment, against the Plaintiff.

48 The Defendant argues that the Plaintiff had a duty to mitigate its damages by attempting to recover the Package from Mr. Coxson, and/or attempting to recover its loss from Mr. Collins.

Conclusion

49 It seems to me that if the Plaintiff had pursued Coxson and/or Collins, it would have been faced with the same defence of non-ownership put forward by the Defendant in this case. As well, the Plaintiff would have incurred additional costs in doing so, with possibly little likelihood of realizing on its judgment in any event.

50 Further, there was nothing to prevent the Defendant from commencing indemnity proceedings against Coxson and/or Collins.

51 In my opinion, it was reasonable for the Plaintiff, in the circumstances, to proceed as it did. Accordingly, I find that the Plaintiff did not fail to mitigate its loss.

Part V - Over Compensation/Unjust Enrichment

Jurisprudence

52 Based on the Authorities, the principles relating to overcompensation and unjust enrichment can be summarized as follows:

• The general principle for the assessment of damages in tort is to award "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation": *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25 (U.K. H.L.) at 39; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 (S.C.C.); *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.).

• The governing purpose of damages in contract is to put the party whose rights have been violated in the same position, so far as money can do so, as if the contract had been performed: *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528 (Eng. C.A.) at 539

• Whether the action is framed in contract or tort, the losses claimed must be reasonably foreseeable as liable to result from the breach at the time the breach occurred (in tort) or reasonably contemplated as damages at the time the contract was entered into. The test is the same; the difference between 'reasonably foreseeable' and 'reasonably contemplated' is semantic, not substantial: *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co.*, [1977] 2 Lloyd's Rep. 522 (Eng. C.A.) at 529 as cited in *Baud Corp., N.V. v. Brook*, at 646.

Overcompensation

• A plaintiff can recover only what he or she has actually lost and there should not be double recovery. Certain cases have introduced exceptions to this general principle, such as compensation by way of charitable gifts and non-indemnity insurance contracts: *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at 964; *Cooper v. Miller*, [1994] 1 S.C.R. 359 (S.C.C.).

Unjust Enrichment

• For a claim of unjust enrichment to succeed, there must be an enrichment, a corresponding deprivation, and no juristic reason for the enrichment. An underlying moral premise in a claim for unjust enrichment is that in the interests of justice and fairness the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another: *Becker v. Pettkus* (1980), 117 D.L.R. (3d) 257 (S.C.C.); *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.).

Defendant's Position

53 The Defendant argues that the sum of $15,000.00 (Exhibit 1, Tab 16, payment of $15,000.00 on May 4

54 Alternatively, the Defendant argues Plaintiff will be unjustly enriched at the expense of the Defendant.

55 In order to determine the validity of either argument, it is necessary to make a finding as to what the Plaintiff's position would have been absent the breach of duty of the Defendant. Clearly, the Plaintiff received fifty percent of the Purchase Price from River Boat in 1993. However, River Boat's breach in failing to pay the Balance eventually left the Plaintiff in a position where it could have sold the Package anew. It cannot be argued that on such subsequent sale, the Plaintiff would have been obliged to reduce the purchase price by the amount already received. As a result of the Defendant's breach, the Plaintiff lost the market value of the Package. There is no enrichment without juristic reason to the Plaintiff in awarding damages in that amount. Likewise, there is no corresponding detriment to the Defendant. Neither double recovery nor unjust enrichment can be successfully argued by the Defendant in this case.

Part VI - Damages, Cost and Interest

56 The Plaintiff is awarded damages in the amount of $30,000.00, together with costs and interest in accordance with the *Judgment Interest Act*.

Action allowed.

APPENDIX I — Dorico Investments Ltd. v. Weyerhaeuser Canada Ltd./Weyerhaeuser Canada Ltée Authorities

For the Plaintiff

Licence/Bailment

1. *Punch v. Savoy's Jewellers Ltd.* (1986), 26 D.L.R. (4th) 546 (Ont. C.A.).

2. *Heffron v. Imperial Parking Co.* (1974), 3 O.R. (2d) 722 (Ont. C.A.).

3. *Gobeil v. Elliot* (1996), 150 Sask. R. 285 (Sask. Q.B.).

4. *National Trust Co. v. Wong Aviation, Ltd.*, [1969] S.C.R. 481 (S.C.C.).

5. *Chief Construction Co. v. McDonald*, [1987] 3 W.W.R. 38 (Alta Q.B.).

6. *Carpenter v. Cargill Grain Co.* (1982), 19 Alta. L.R. (2d) 354 (Alta. Q.B.).

7. *Sutherland v. Bell* (1911), 18 W.L.R. 521 (Alta. C.A.).

8. *Neff v. St. Catherines Marina Ltd.* (1998), 155 D.L.R. (4th) 647 (Ont. C.A.).

9. *Munroe v. Belinsky* (1995), 103 Man. R. (2d) 12 (Man. Q.B.).

10. *Calgary Transport Services Ltd. v. Pyramid Management Ltd.* (1976), 1 A.R. 320 (Alta. C.A.).

11. *Tri-City Drilling Company Ltd v. Velie* (1960), 32 W.W.R. 716 (Alta. C.A.).

12. N.E. Palmer, *Bailment*, 2nd ed. (London: Law Book Co., 1991).

Transfer of Ownership

13. *Jerome v. Clements Motor Sales Ltd.*, [1958] O.R. 738 (Ont. C.A.).

14. *Underwood Limited v. Bough Castle Brick & Cement Syndicate*, [1922] 1 K.B. 343 (Eng. C.A.).

15. G.H.L. Fridman, *Sale of Goods in Canada*, 4th ed. (Carswell: Toronto, 1995).

16. *Sale of Goods Act*, R.S.A. 1980, c. S-2, ss. 2(3), 20(1), 20(2), 21(3), 21(4), 22.

Damages

17. *Jennings v. Wolfe* (1950), 1 W.W.R. 935 (Alta. S.C.).

Duty to Mitigate

18. *Bank of Montreal v. MacInnis.* (1987), 83 N.B.R. (2d) 342 (N.B. C.A.).

For the Defendant

Licence/Bailment

1. *Ashby v. Tolhurst*, [1937] 2 All E.R. 837 (Eng. K.B.).

2. *Degrace v. Central Garage Sales & Service Limited* (1979), 24 N.B.R. (2d) 557 (B.C. C.A.).

3. *McLennan v. Charlottetown Flying Services* (1979), 24 Nfld. & P.E.I.R. 72 (P.E.I. S.C.).

4. *Gavin v. Douglas Securities Limited.* (1958), 25 W.W.R. 408 (B.C. S.C.).

5. N.E. Palmer, *Bailment*, 2nd ed. (London: Law Book Co., 1991).

Transfer of Ownership

6. *Frebold v. Circle Products Ltd.*, [1970] 1 Lloyd's Rep. 499 (Eng. C.A.).

7. *George Smith Trucking Co. v. Golden Seven Enterprises Inc.* (1989), 55 D.L.R. (4th) 161 (B.C. C.A.).

8. *Purkin v. Miller*, [1938] 2 D.L.R. 323 (Sask. C.A.).

9. *Olbert Metal Sales Ltd. v. Cerescorp Inc.*, [1997] 1 F.C. 899 (Fed. T.D.).

10. *Sale of Goods Act*, R.S.A. 1980, c. S-2, ss. 1, 20, 21, 33.

11. *Black's Law Dictionary*, 6th ed. (West Publishing Co.: St. Paul, 1990).

12. G. H. L. Fridman, *Sale of Goods in Canada*, 4th ed. (Carswell: Toronto, 1995).

13. *Business Corporations Act*, S.A. 1981, c. B-15, ss. 18(d), 18(e).

14. F. Bennett, *Bennett on Bankruptcy*, 5th ed. (North York: CCH Canadian Limited, 1998).

15 L. W. Houlden and G.B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd ed. (Scarborough: Carswell, Supp. 1997).

Damages

16. *Howell v. Armour & Co.* (1913), 9 D.L.R. 125 (Sask. S.C.).

17. *Southern Railway System v. Rochester and Pittsburgh Coal Co. (Canada)* (October 14, 1987), Doc. York 187187/82 (Ont. Div. Ct.).

18. *Brandon v. Leckie*, [1972] 6 W.W.R. 113 (Alta. S.C.).

19. *Cuttell v. Bentz* (1985), 65 B.C.L.R. 273 (B.C. C.A.).

20. *Black's Law Dictionary*, 6th ed. (West Publishing Co.: St. Paul, 1990).

21. *Sale of Goods Act*, R.S.A. 1980, c. S-2, s.24.

For the Court

Transfer of Ownership

Plets v. Irving Pulp and Paper Ltd. (1982), 39 Nfld. & P.E.I.R. 361 (P.E.I. S.C.)

Sanders v. Hedman (1915), 8 W.W.R. 664 (Alta. C.A.) at 667.

R. v. Steel Co. of Canada, [1955] S.C.R. 161 (S.C.C.).

Mitigation

Baud Corp., N.V. v. Brook, [1979] 1 S.C.R. 633 (S.C.C.).

H. McGregor, *McGregor on Damages*, 16th ed. (London: Sweet & Maxwell Limited, 1997).

British Westinghouse Electric & Mfg. Co., Ltd. v. Underground Electric R. Co. of London, Ltd., [1912] A.C. 673 (U.K. H.L.).

Granville Savings & Mortgage Corp. v. Campbell, [1993] 4 S.C.R. 279 (S.C.C.).

Christianson v. North Hill News Inc. (1993), 106 D.L.R. (4th) 747 (Alta. C.A.).

S. M. Waddams, *The Law of Damages* (Toronto: Canada Law Book Limited, Suppl. 1998).

Michaels v. Red Deer College (1975), 57 D.L.R. (3d) 386 (S.C.C.).

General Securities Ltd. v. Don Ingram Ltd., [1940] S.C.R. 670 (S.C.C.).

Freedhoff v. Pomalift Industries Ltd (1971), 19 D.L.R. (3d) 153 (Ont. C.A.).

Marigold Holdings Ltd. v. Norem Construction Ltd. (1988), 89 A.R. 81 (Alta. Q.B.).

Pilkington v. Wood, [1953] Ch. 770 (Eng. Ch. Div.).

Overcompensation and Unjust Enrichment

Becker v. Pettkus, [1980] 2 S.C.R. 834 (S.C.C.).

Rathwell v. Rathwell, [1978] 2 S.C.R. 436 (S.C.C.).

Livingstone v. Rawyards Coal Co. (1880), 5 App. Cas. 25 (U.K. H.L.).

Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd., [1949] 2 K.B. 528 (Eng. C.A.).

Andrews v. Grand & Toy (Alberta.) Ltd., [1978] 2 S.C.R. 2 (S.C.C.).

Athey v. Leonati, [1996] 3 S.C.R. 458 (S.C.C.).

Ratych v. Bloomer, [1990] 1 S.C.R. 940 (S.C.C.)

Cooper v. Miller, [1994] 1 S.C.R. 359 (S.C.C.).

H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co., [1977] 2 Lloyd's Rep. 522 (Eng. C.A.).

Baud Corp., N.V. v. Brook, [1979] 1 S.C.R. 633 (S.C.C.).

Tab 8:

Tarpon Energy Services Ltd. v Lal, 2020 ABQB 317

2020 ABQB 317
Alberta Court of Queen's Bench

Tarpon Energy Services Ltd. v. Lal

2020 CarswellAlta 921, 2020 ABQB 317, [2020] A.W.L.D. 1800, 318 A.C.W.S. (3d) 334

Tarpon Energy Services Ltd. (Plaintiff) and Peter Lal, Peter Lal, operating under the trade name Audio Dynamics, and Jane Doe (Defendants)

K.D. Yamauchi J.

Heard: March 11, 2020; March 12, 2020
Judgment: May 12, 2020
Docket: Calgary 1301-02878

Counsel: Christopher J. Felling, for Plaintiff
Hardeep S. Sangha, for Defendants

***K.D. Yamauchi J.*:**

I. Introduction

1 On September 10, 2010, at 6:15 a.m., a white 2009 GMC Sierra, serial number 1GTHK43639F118994 (the "GMC"), ran into a light standard on Strathcona Boulevard SW, Calgary. The GMC, which was registered in the name of the Plaintiff Tarpon Energy Services Ltd ("Tarpon"), was "totalled," such that it was written off. Although the GMC suffered severe damage, and the GMC's air bags on the driver's side and passenger's side activated, the police did not find the GMC's driver. The police categorized the accident as a "hit and run."

2 At the time of the accident, the GMC was in the possession of the Defendant Peter Lal, who operated under the trade name, Audio Dynamics (collectively, "Mr. Lal").

3 Tarpon commenced an action against Mr. Lal, in which it seeks to have this Court find Mr. Lal liable for the damages it suffered as a result of the damage to the GMC. This Court heard the trial of this matter.

II. Background

4 Mr. Lal operates an automotive repair business. He operates his business, Audio Dynamics, out of his home, which is located in the Altadore district of Calgary. He apprenticed with GSL Chev City, and has 24 years' experience in the automotive repair business. He started operating as Audio Dynamics in 1994, which does "everything auto-related, from tires to sunroof and everything in between."

5 He worked on personal vehicles that a person named Scott McLeod owned. Mr. McLeod became employed with Tarpon. He introduced Mr. Lal to Tarpon's fleet manager sometime in 2010, as an individual who could service Tarpon's trucks. Before their first meeting, the fleet manager asked Mr. Lal to bring his driver's license and driver's abstract to the meeting. Mr. Lal's first job was to clean the fleet manager's truck, which he did. The fleet manager was pleased, so Tarpon continued to use Mr. Lal's services. There was no written agreement. Mr. Lal was simply told what to do with the vehicle and he would do it. He would then render an invoice.

6 Mr. Lal's services progressed from vehicle cleaning to performing some mechanical maintenance on them, such as replacing damaged parts, and arranging for subcontractors to perform services on the trucks, such as replacing broken windshields, or transmission work.

7 Mr. Lal would drive his personal vehicle to Tarpon's premises, leave his vehicle there, and pick up the vehicle on which he was going to work. He would complete the work and return the vehicle, along with his invoice. Along the way, he would put fuel in the truck, as a courtesy, using Tarpon's credit card, which was located in the truck. He would leave the vehicle's keys in the ignition.

8 He knew that he was only entitled to use Tarpon's vehicles to repair them. He could not use them for personal use.

9 He did this for a few months. He performed services on the same vehicles, from time to time, as there were only a limited number of vehicles that Tarpon used.

10 The GMC was one of the vehicles on which he worked. On the occasion in question, he had the GMC for a number of days, as it needed more work than most. It needed its windshield replaced and its transmission needed servicing. Subcontractors performed both of these tasks, which Mr. Lal had arranged. Mr. Lal did the other work on the GMC.

11 Other than when the sub-contractors were performing their work, Mr. Lal kept possession of the keys for the GMC. When he returned the GMC to Tarpon on the occasion in question, someone at Tarpon noticed that a headlight was burned out, so Mr. Lal retained the GMC to fix the headlight. He took the GMC back to his shop to fix it, and was intending on returning the GMC to Tarpon the next day. Mr. Lal's shop was at a residence in Altadore, but, at the time, he was staying with friends in a house on Elmont Bay SW, Calgary. No one at Tarpon knew that Mr. Lal was staying in the Elmont Bay residence. He took the GMC to the Elmont Bay residence once he fixed the headlight.

12 Mr. Lal testified that there was a spare key for the GMC in the centre console of the GMC. This was the first time during this litigation that he indicated that fact to Tarpon.

13 Before he completed his work on the GMC, he, along with a person who was helping him at that time, a woman named "Ricki," went to the car wash. Ricki cleaned the interior of the vehicle and the inside of the windows. Ricki would have known about the spare key in the centre console. Mr. Lal paid Ricki in cash. After they completed their work on the GMC, Mr. Lal dropped Ricki off in the Montgomery area of Calgary, which is some distance from both the Altadore shop and the Elmont Bay residence.

14 Mr. Lal testified that when he retired for the night, he locked the GMC, the windows were up, and the tool box was locked. He had a security device called a "Club," which he said he probably "dummied" on the steering wheel, which means he just placed it there without locking it. In the GMC, he left the credit card and the spare key in the console. He had parked the GMC on the street beside the Elmont Bay residence. It was not in a garage or on a driveway. During cross-examination, he testified that no one else was in the Elmont Bay residence that night. However, during further questioning, he testified that Ricki visited him that night. He and Ricki had a "scruffle" and "she was pretty upset and she was quite impaired." He escorted Ricki outside and told her to leave.

15 Mr. Lal became aware of the collision the next morning when he noticed that the GMC was not where he had left it. He telephoned Tarpon to advise it that the GMC was missing. He did not call the police or attempt to locate the whereabouts of the GMC. Mr. McLeod picked Mr. Lal up later that day and took him to Tarpon's place of business. Mr. Lal gave the GMC's keys to Amanda Robertson. He did not see the GMC at that time.

16 He did see the GMC later that month, as he needed to see whether he had left his wallet in it. His cleaning items were still in the GMC, along with three plastic bags of clothing. His Club was on the floor. He never did find his wallet. He did not see the spare key that was in the centre console. Mr. Lal did not recall any damage to the interior of the GMC, although he did note that the windshield was badly damaged. He thought this was a shame, as he had just replaced it. The GMC had a tarp on

it, so he could not see the whole vehicle. He entered the GMC without difficulty through the driver's side door. As well, he saw that the ignition was not damaged. Nor did he see damage to the other windows, the console, or the dash board.

17 Mr. Lal received a telephone message from the police, as they were trying to make arrangements to meet with him. They played "telephone tag," but never did meet. Mr. Lal was never charged with any offence.

18 This Court qualified Michael Schritt, without any objection from Mr. Lal, as an expert on the functions and operation of the anti-theft system in the GMC, and how it relates to the operation of the GMC. Mr. Schritt has been a parts manager for 27 years at Davis GMC Trucks in Medicine Hat, Alberta. He has worked there for 40 years as a parts counter person, in the service department, and as a service advisor. He apprenticed there and is a journeyman automotive technician. He works on General Motors vehicles.

19 How has he become knowledgeable in the workings of the GMC? He has spent years of working with them, and has studied their service and parts manuals. He has also reviewed and applied technical bulletins, and he is qualified to do servicing work on them, including general work, but also specific work in cutting keys to key code them to a specific vehicle.

20 Mr. Schritt has knowledge of the GMC's theft-deterrent system, which was introduced in this model in 2007. He advises customers on the workings of the system. The theft-deterrent system must communicate with the vehicle before the vehicle will start. He explained the communication system to this Court in great detail, and provided further detail when this Court specifically questioned him. This detail is contained in his expert report dated April 30, 2019. In summary, the GMC cannot be started without a key specifically cut and programmed for that vehicle. Without such a key, the GMC cannot be started or operated.

21 Mr. Schritt also testified that the GMC would have been sold with two keys. The keys would be identical, but the transponder would have a different code. It would not be possible to determine which key started the GMC on a particular occasion.

22 Byron Fedosa is Tarpon's fleet manager. He testified that the GMC was towed to Tarpon's facility after the accident. It then sat at Tarpon's facility for some time while appraisers and an adjuster viewed the GMC. Tarpon got its own estimate to make sure the appraised value of the GMC was correct. Mr. Fedosa viewed the GMC, and noted that it was severely front-end damaged from an abrupt impact. The windshield was fragmented but its other windows were intact. He did not recall if there was any damage to the exterior locks, and there did not appear to be anything abnormal concerning the steering column, except that the driver and passenger air bags had deployed. He saw no other damage to the dashboard. Nor did he notice any damage to the console or the ignition.

23 Mr. Fedosa identified the estimate that Shaw GMC Pontiac Hummer Inc had conducted on Tarpon, along with Economical Insurance's estimate, and an "Autosource Valuation" that Economical Insurance had commissioned. Economical Insurance was Tarpon's insurer. He also identified an invoice from the City of Calgary for its repair to the light standard, which he forwarded to Economical Insurance for payment.

24 Mr. Fedosa was only aware of one set of keys for the GMC, which was the set that Mr. Lal had in his possession. He knew that the GMC came with two sets of keys, but he was not aware of the whereabouts of the second set.

25 After Economical Insurance disposed of the GMC, Tarpon's lessor, Emkay Canada Leasing Corp. ("Emkay") received the full payout less the deductible. The full payout was comprised of the capital cost of the lease amount, which was $47,426.91. This was shown in the lease between Tarpon and Emkay. Emkay, on Tarpon's behalf, executed a bill of sale showing its transfer of the GMC to Economical Insurance for that amount.

26 Graham Campbell played two roles before this Court. In his first role, he was retained by Economical Insurance to appraise the damage to the GMC. His second role was to provide this Court with his expert opinion on the appraisal of the GMC, the value of the damage, and the interpretation of the damage. Without Mr. Lal's objection, this Court qualified Mr. Campbell to provide his expert opinion.

27 Mr. Campbell started his career in the automotive industry in 1973, when he worked for a General Motors dealer. In 1985, he opened an autobody shop, which he sold in 1985 when he started doing automobile insurance appraisals. He purchased JB Appraisals in 2006. He estimates that he has appraised over 10,000 motor vehicles during his career, of all different makes and models.

28 Mr. Campbell is frequently hired by insurance companies, and he is familiar with the insurance claims process. He also knows what insurance companies should recover through salvage auctions.

29 He provided this Court with two documents. The first was his estimate, which estimates the damages to the GMC that he viewed during the time he inspected it. Economical Insurance provides him with the basic information concerning the vehicle, and he completes the rest of the document concerning the repairs necessary to fix the vehicle.

30 The second document he presented to this Court is what is referred to as an Autosource Valuation, which Mr. Campbell would do if a vehicle sustains a near total loss. An Autosource Valuation is, essentially, a database software programme that is operated through an entity known as Audatex. Through it, an appraiser can obtain a specific vehicle's valuation, based on local, fair market values for total loss vehicles. It considers both standard and optional equipment installed in the specific vehicle. It also provides values for comparable vehicles listed in or around the Calgary area. Mr. Campbell would insert information related to the specific vehicle in question, namely the GMC. Mr. Campbell actually inspected the GMC on March 25, 2011. He had no idea who was driving the GMC when it was damaged.

31 His first estimate came from a visual inspection of the exterior of the GMC. He estimated the value to repair the GMC to be $21,071.20. The Shaw GMC Pontiac Buick Hummer Inc estimate to repair the GMC was $22,359.23. He supplemented this with a "tear-down" inspection, which took place after the hood was opened and the fenders were removed. This would allow him to see additional damage. As he stated, he "can't estimate what I can't see." His estimate to repair the GMC after the tear-down was $44,798.27.

32 He was advised that he was inspecting a collision, not a theft. If it were a theft, he would be looking specifically for damage to the door locks and the windows. The door locks were not damaged, but he was not looking at them from the perspective of a theft. When first saw the GMC, he noted the damage to the front-end of the GMC, mostly on the left side. The windows were all intact, and he did not note any damage to the console. The dashboard was not damaged, except for the two airbags that had deployed. He noted no damage to the steering column, but he was not specifically looking at it. He did not look at the ignition.

33 In the affidavit that Mr. Campbell swore in the proceedings at bar, he deposed concerning Mr. Lal's evidence that he placed the Club on the steering wheel of the GMC before retiring for the night, as follows:

> . . . From my review of the [GMC], I saw no indication that the [GMC] had been stolen. I observed that the steering wheel was entirely intact and undamaged, as may be seen in the third photo from the left at the top of page 6 of Exhibit C. I did not quote Economical [Insurance] any cost for repairs to the steering wheel in my estimate on March 29, 2011 as I did not observe any signs of damage or forcible removal of a club.
>
> Mr. Campbell's Affidavit sworn on December 21, 2016, at para 4.

34 The Autosource Valuation provided a total loss value of $48,510. To repair the GMC would have cost $44,798.27. If the damage to the vehicle is 25% of the value of the vehicle, the vehicle is considered to be a total loss. In the case at bar, the GMC is considered a total loss. The insurance company will recover approximately 25% of the value of the vehicle as salvage value.

35 Because this was a total loss, Tarpon sent the GMC to Impact Auction to have it sold for salvage value. The GMC was sold for $10,100 plus goods and services tax. Impact Auction's fees were then removed, so Economical Mutual received a cheque for $9,746.86.

36 Emkay sold the GMC to Economical Insurance for $47,426.91. As Economical Mutual recovered $9,746.86 from the auction, so Economical Insurance's loss is $37,680.05. As well, Tarpon claims a loss for the cost of the light standard, which Economical Insurance paid to the City of Calgary for $7,927.00.

37 This is a subrogated claim, so any loss that Economical Insurance suffered is claimed against Mr. Lal through Tarpon.

III. Discussion

38 This is a case of bailment. Mr. Lal concedes this. In *Punch v. Savoy's Jewellers Ltd.* (1986), 26 D.L.R. (4th) 546 (Ont. C.A.) at 551, (1986), 33 B.L.R. 147 (Ont. C.A.), Cory JA, as he then was, defined bailment as:

> . . . the delivery of personal chattels on trust, usually on a contract, express or implied, that the trust shall be executed and the chattels be delivered in either their original or an altered form as soon as the time for which they were bailed has elapsed. It is to be noted that the legal relationship of bailor and bailee can exist independently of a contract. It is created by the voluntary taking into custody of goods which are the property of another.

39 In the case at bar, Mr. Lal possessed or took the GMC "into custody" on trust. He would perform the repairs, clean the GMC, and return it to Tarpon in its altered or improved form.

40 The trust did not end once Mr. Lal completed the work on the GMC, but continued until Mr. Lal delivered the GMC to Tarpon, or Tarpon relieved Mr. Lal of his contractual obligation: *St-Isidore Asphalte Ltée v. Luminex Signs Ltd. / Enseignes Luminex Ltée* (1996), 176 N.B.R. (2d) 135 (N.B. Q.B.) at 140-41, (1996), 33 C.C.L.I. (2d) 309, 447 A.P.R. 135 (N.B. Q.B.), *affd* 1997 CarswellNB 65, [1997] N.B.J. No. 72 (N.B. C.A.).

41 Once Tarpon establishes that a bailment exists, the burden shifts to Mr. Lal to prove on a balance of probabilities that he met the standard of care required of him: *Letourneau v. Otto Mobiles Edmonton (1984) Ltd.*, 2002 ABQB 609 (Alta. Q.B.) at para 42, (2002), 315 A.R. 232, 8 Alta. L.R. (4th) 385 (Alta. Q.B.). What is the standard of care? In *Punch*, Cory JA said the following:

> The bailee for reward must exercise due care for the safety of the article entrusted to him by taking such care of the goods as would a prudent man of his own possessions. Significantly, a bailee is liable for the loss of goods arising out of his servant's theft on the grounds that he is responsible for the manner in which his servant carries out his duty. In the result, it matters not whether the servant is careless, whether the goods are stolen by a stranger, or if the servant himself steals them.
>
> ***Punch*** at 552.

42 Cory JA refers to a bailee for reward. In *Letourneau*, Johnstone J made the following comment, with which this Court agrees:

> . . . [I]t makes little difference today whether bailment is gratuitous or for reward. The obligation of a bailee in either case is to take the same care of the goods received as a prudent owner, acting reasonably, might be expected to take of his or her own chattels.
>
> ***Letourneau*** at para 46 [emphasis added].
>
> See also *Gaudreau v. Belter*, 2001 ABQB 101 (Alta. Q.B.) at para 3, (2001), 290 A.R. 377 (Alta. Q.B.). In *Dorico Investments Ltd. v. Weyerhaeuser Canada Ltd. / Weyerhaeuser Canada Ltée*, 1999 ABQB 561 (Alta. Q.B.) at para 10, (1999), 249 A.R. 53, 73 Alta. L.R. (3d) 30 (Alta. Q.B.), Binder J said, "[a] bailee is bound to take reasonable care to see that the chattel is in proper custody, to protect it against unexpected danger should it arise, and to recover it, if it be stolen."

43 Once Tarpon has proved that the damage to the GMC occurred while the GMC was in Mr. Lal's possession, there is an inference of negligence on Mr. Lal's part: *Munroe v. Belinsky* (1995), 103 Man. R. (2d) 12 (Man. Q.B.) at para 17. Mr. Lal has the burden to negative negligence by showing that Tarpon's loss was without any fault or misconduct on his part or the part of his

servants: *ibid*; *Letourneau* at para 52. In *Calgary Transport Services Ltd. v. Pyramid Management Ltd.* (1976), 1 A.R. 320 (Alta. C.A.) at para 10, (1976), 71 D.L.R. (3d) 234, [1976] 6 W.W.R. 631 (Alta. C.A.), Prowse JA, for the court said the following:

> . . . [T]he appellant had to establish the bailment and non-return of the bailed goods and this follows from the rule of evidence which is that where goods are damaged or disappear while in the possession of a bailee, who is under a duty to care for them, the bailee must explain or offer a valid excuse for having failed to do so.

44 In *Pyramid*, Prowse JA provided the following quotation from *"Ruapehu" (The), Re* (1925), 21 Ll. L. Rep. 310 (Eng. C.A.) at 315, which appears to be on all fours with the case at bar:

> Before proceeding to discuss the Judge's findings I find it necessary to consider the question of law as to onus of proof in such a case as this. If this were a pure bailment, a delivery of a chattel to a bailee entrusted with the chattel to execute repairs on it and then re-deliver it to the owner, I apprehend that the bailee would be under the obligation to exercise reasonable care and skill in preserving the safety of the chattel. If he failed to deliver the chattel at all the onus would be upon him to show that the non-delivery was not due to absence of care and skill on his part.
>
> ***Pyramid*** at para 12.

45 How must Mr. Lal discharge his onus? In *"Ruapehu" (The), Re*, Lord Justice Atkin said the following:

> The bailee knows all about it: he must explain. He and his servants are the persons in charge; the bailor has no opportunity of knowing what happened. These considerations, coupled with the duty to take care, result in the obligation on the bailee to show that that duty has been discharged.
>
> ***Pyramid*** at para 13.

46 It is interesting to note that in *Letourneau* and *"Ruapehu" (The), Re*, the courts refer to the fact that the bailee must exercise reasonable care and skill, or must act reasonably. Neither case refers to the bailee having to take extraordinary measures to protect the subject of the bailment.

47 In the case at bar, the GMC was at all material times in Mr. Lal's exclusive possession. The GMC did not disappear while it was in the possession of the transmission or windshield repair shop. Those tasks had been completed. The GMC disappeared while it was in Mr. Lal's possession.

48 Mr. Lal argues that the GMC was too large to park in the garage at the Elmont Bay address. He did park it on the street next to the Elmont Bay address, and he testified that he locked the tool box. And he "dummied" the Club device on the steering wheel, which meant it was not locked, but simply placed on the steering wheel.

49 None of the witnesses, including Mr. Lal, testified that the back or side windows of the GMC were damaged before or during the collision. Nor were the steering column or exterior locks damaged. This Court accepts Mr. Schritt's evidence that the only way the GMC's engine could be started was through the use of a key specifically made for the GMC. Mr. Lal concedes that he had a key for the GMC. As well, he testified that he was aware that another key was in the GMC's console.

50 If there was no second key, the only person who could have been driving the GMC at the time it sustained damage was Mr. Lal, as he was the only one who had a key that could start the GMC's engine.

51 Mr. Fedosa testified that he thought there was only one key for the GMC. However, Mr. Schritt testified that a vehicle comes with 2 keys, and Mr. Fedosa was aware of this fact. If there was a second key, Mr. Fedosa was unsure where it would be. He testified that when a driver uses a vehicle and returns to the warehouse, the driver would return the key to the warehouse where it would remain until the next driver retrieved it. But what happened to the other set?

52 Mr. Lal testified that the other set would remain in the vehicle that he had for repair, along with a Tarpon credit card. He would use the credit card to fill up the vehicle, as a courtesy, when he returned the vehicle to Tarpon. Although one might be

inclined to think that this was a rather cavalier attitude to the treatment of a credit card and a spare key, this Court is not here to determine the propriety of such an approach. Mr. Lal's evidence appears to make some sense, because on at least one of the invoices he provided to Tarpon he indicates that he fueled the vehicle.

53 Mr. Lal testified that he recalls seeing an extra key in the console of the GMC. This Court questions whether he has that specific recollection, as some of his evidence, even during his questioning, was equivocal. However, it is possible that Mr. Lal deduced this from his handling of other vehicles where an extra key was in those vehicles, along with a Tarpon credit card.

54 No one from Tarpon knew that Mr. Lal was staying at the Elmont Bay residence. In fact, besides Mr. Lal, no one, except Ricki, knew that Mr. Lal was staying at that residence. Thus, no one from Tarpon could have accessed the GMC if there were an extra key in Tarpon's possession.

55 So, who accessed the GMC and took it on a joy ride which ended when the GMC hit the light standard? It was someone with a key. It could have been Mr. Lal, as he certainly had a key. If there was a key in the console, it could have been Ricki, as she had access to the interior of the GMC when she was cleaning the interior windows and floors of the GMC earlier in the day and might have secreted the key. If Mr. Lal did not secure the GMC before he retired for the night, and there was a key in the console, anyone could have accessed the GMC on the night it was stolen, whether Ricki or some other person. Remember, there was no sign of anyone breaking into the GMC by breaking a window or damaging the exterior locks.

56 If it was Mr. Lal, he would surely be liable for the damages to the GMC. If it was not Mr. Lal, he has not met his onus of to show that the non-delivery of the GMC to Tarpon was not due to absence of care and skill on his part. Nor has he discharged the duty to take care of the GMC. Mr. Lal has the burden to negative negligence by showing that Tarpon's loss was without any fault or misconduct on his part or the part of his servants, in this case Ricki. Mr. Lal's duty was to protect the GMC against unexpected danger should it arise. And, as Binder J said in *Dorico*, "to recover it, if it be stolen." Mr. Lal did not telephone the police when he discovered that the GMC was missing. In fact, he never took the initiative to call the police at all. He responded to telephone calls from the police.

57 In *Sabean v. Moran* (1991), 117 N.B.R. (2d) 329 (N.B. Q.B.), the defendant was able to satisfy the court that he took the necessary care and exercised the required diligence. In that case, the vehicle was locked and the vehicle was vandalized. In the case at bar, this Court is not satisfied, on a balance or probabilities, that the GMC was locked. As well, the GMC was not simply vandalized. It was stolen.

58 Johnstone J also referred to a case *Edelson v. Musty's Service Station & Garage*, [1956] O.J. No. 334, [1956] O.W.N. 848 (Ont. C.A.) for its discussion on contributory negligence. It should be noted that Mr. Lal does not argue strongly that contributory negligence applies in the case at bar, but this Court felt that it should address it. Johnstone J described *Edelson* as follows:

> . . . When the defendant parked the plaintiff's car on the nearby public street, the defendant left the car unlocked but took care to remove the keys and bring them inside the service station. Unbeknownst to the defendant, however, the plaintiff had placed a second set of keys in the locked glove compartment of the car. It was argued by the defendant that the plaintiff had been contributorily negligent in doing so, since the car had been stolen with the use of the second set of keys. The trial judge held the plaintiff was not contributorily negligent. This ruling was upheld on appeal, the Court concluding that the plaintiff was entitled to expect the car would be locked if it was to be left on a public street all day. The Court did note, however, that the plaintiff had locked the keys away in the glove compartment.
>
> ***Letrouneau*** at para 61.

59 She prefaced her discussion of *Edelson* by saying, "[c]ontributory negligence on the part of the bailor is rarely found in bailment cases": *ibid.* In the case at bar, Tarpon was not contributorily negligent, even if it left a second key in the console of the GMC. It could reasonably expect that Mr. Lal would lock the GMC when he was not occupying it, or that he would maintain possession of the extra key if he chose to keep the GMC unlocked when he left it.

60 Tarpon asks this Court to find that Mr. Lal was the person who was driving the GMC when it was damaged. This Court need not make that finding. The point is that the GMC sustained the damage while it was in Mr. Lal's possession and he has not satisfied his burden to negative his negligence. As a result, he is liable for Tarpon's loss.

61 What is the quantum of his liability? Mr. Lal argues that the limit of his liability is the deductible that Tarpon paid to Economical Insurance, which is $2,500. Tarpon argues that this is a subrogated claim. This Court agrees with Tarpon.

62 Mr. Lal provides this Court with *Ramco Sales Inc. v. Gergely*, 2007 ABPC 152 (Alta. Prov. Ct.). In that case, LeGrandeur PCJ said, "[t]he party suffering damages is only entitled to be compensated to the extent of the damage and is not entitled to receive a benefit over and above the damage": *Ramco* at para 52. This Court agrees with that statement. In the case at bar, Tarpon is not seeking anything beyond the damages it (or its insurer) suffered. Again, this is a subrogated claim, so Tarpon would not be retaining the damages that this Court awards, except for the deductible it had to pay to Economical Insurance. There is no double recovery. Economical Insurance, through its insured, Tarpon, receives only the amount necessary to put it in the same position as it would have been had the damage not been sustained: *Dorico* at para 52.

63 The amount for which Mr. Lal is responsible is the amount for which Emkay sold the GMC to Economical Insurance, which was $47,426.91, less the amount Economical Mutual recovered from the auction, which was $9,746.86. This results in a net loss of $37,680.05. Those are the damages for which Mr. Lal is liable, along with pre-judgment interest at the prescribed rate.

64 Although Tarpon claims a loss for the cost of the light standard, its statement of claim did not claim that amount. Between the time it commenced this action to the date of the trial, it had ample opportunity to seek leave to amend its statement of claim. It did not, so this Court will not make an award for that amount.

65 Being the successful party, Tarpon is entitled to costs. This matter should have proceeded in the Provincial Court, and not the Court of Queen's Bench. As a result, this Court awards costs according to the Provincial Court tariff, Column 3, as set forth in Provincial Court Practice Note 2, dated January 2, 2019.

Action allowed.

Tab 9:

Advantage Oil and Gas Ltd. Re, 2019 CarswellAlta 804

2019 CarswellAlta 804
Alberta Utilities Commission

Advantage Oil and Gas Ltd., Re

2019 CarswellAlta 804, [2019] A.W.L.D. 1899

Advantage Oil and Gas Ltd.; Glacier Power Plant Alteration

Anne Michaud V-Chair, Joanne Phillips Member, Kristi Sebalj Member

Judgment: April 26, 2019
Docket: 23756-D01-2019

Counsel: Counsel — not provided

***Anne Michaud V-Chair, Joanne Phillips Member, Kristi Sebalj Member*:**

1 Decision summary

1 In this decision, the Alberta Utilities Commission considers whether to approve an application from Advantage Oil and Gas Ltd. for the alteration of a power plant designated as the Glacier Power Plant, and to connect the power plant to the Alberta Interconnected Electric System through ATCO Electric Ltd.'s 25-kilovolt distribution system.

2 After considering the record of the proceeding, and for the reasons outlined in this decision, the Commission finds that approval of the alterations to the Glacier Power Plant is in the public interest having regard to the social, economic, and other effects of the project, including its effect on the environment.

3 However, the Commission denies Advantage's application to connect the Glacier Power Plant to the Alberta Interconnected Electric System and to export some of the electric energy from the power plant to the system because it is not permitted by the statutory scheme.

2 Application and background

4 Pursuant to Approval 22571-D02-2017,[1] Advantage is the owner of a power plant designated as the Glacier Power Plant and located in the Hythe, Alberta, area. Approval 22571-D02-2017 stipulates that the power plant shall consist of two 1,451-kilowatt (kW) generating units, four 2,200-kW generating units, two 375-kW generating units and one 400-kW generating unit, for a total generating capability of 12.85 megawatts (MW). The power plant is not currently connected to the Alberta Interconnected Electric System (AIES); it only provides power to the adjacent Glacier Sour Gas Processing Plant.

5 Advantage filed a letter of enquiry[2] with the AUC for approval to alter the power plant and connect the power plant to the AIES through ATCO Electric's distribution system. The letter of enquiry was registered on July 30, 2018, as Application 23756-A001.

6 Having regard for the minor nature of the proposed alterations, including the fact that the nearest residence is approximately 6.5 kilometres away from the project, it did not appear to the Commission that its decision on the application would directly and adversely affect the rights of any person. Accordingly, the Commission did not issue a notice of application and did not hold a hearing to consider the application.

3 Legislative scheme

7 The Commission regulates the construction and operation of power plants in Alberta. Section 11 of the *Hydro and Electric Energy Act* states that no person may construct or operate a power plant without prior approval from the Commission. Section 18 of the *Hydro and Electric Energy Act* prohibits an owner or operator of a power plant from connecting the power plant to an electric distribution system without an order from the Commission.

8 When considering an application for a power plant and associated infrastructure, Section 17 of the *Alberta Utilities Commission Act* requires the Commission to consider the public interest:

> **Public interest**
>
> **17(1)** Where the Commission conducts a hearing or other proceeding on an application to construct or operate a hydro development, power plant or transmission line under the *Hydro and Electric Energy Act* or a gas utility pipeline under the *Gas Utilities Act*, it shall, in addition to any other matters it may or must consider in conducting the hearing or other proceeding, give consideration to whether construction or operation of the proposed hydro development, power plant, transmission line or gas utility pipeline is in the public interest, having regard to the social and economic effects of the development, plant, line or pipeline and the effects of the development, plant, line or pipeline on the environment.

9 Section 3 of the *Hydro and Electric Energy Act* requires the Commission to have regard for the purposes of the *Electric Utilities Act* when assessing whether an application to construct or operate a generating unit, or to connect a generating unit to an electric distribution system, is in the public interest under Section 17 of the *Alberta Utilities Commission Act*. The purposes of the *Electric Utilities Act* include the development of an efficient electric industry structure and the development of an electric generation sector guided by competitive market forces. [3]

10 Section 11 of the *Hydro and Electric Energy Regulation* states that unless the Commission directs otherwise, if a person proposes to make minor alterations to a power plant (other than minor alterations that are excluded from the application of Section 11 of the act) the person may apply for an approval by submitting a letter of enquiry to the Commission in accordance with Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments*. Section 12 of the *Hydro and Electric Energy Regulation* lists the information that must be included in a letter of enquiry.

11 Section 1.4.2 of Rule 007 provides guidance to applicants proposing to make minor alterations to a power plant:

> **1.4.2 Minor alterations**
>
> If an applicant is proposing alterations to existing electric facilities and considers the alterations to be minor, the applicant must comply with sections 11, 12 and 18.2 of the *Hydro and Electric Energy Regulation*. The Commission's guidance is provided in the Electric Power Plant Facilities Process Guidelines, as amended, and in the Electric Transmission Facilities Process Guidelines (revised February 1, 2016), as amended.
>
> The guidelines provide direction whether:
>
> (a) The approval holder may proceed with the alterations without an application.
>
> (b) The approval holder must file an enquiry proposal application in which case the proposal would proceed by letter of enquiry.
>
> (c) The approval holder must file an application for a new approval, permit or licence to carry out the proposed alterations.

12 Section 10 of Rule 007 allows an applicant applying for a minor alteration under the letter of enquiry process to meet the Commission's informational and other requirements by submitting a completed checklist in accordance with the Commission's

Electric Power Plant Facilities Process Guidelines. The application must also meet the requirements set out in Rule 012: *Noise Control*, and the applicant must obtain all approvals under other applicable provincial or federal legislation.

4 Power plant alterations application

13 Advantage stated that as part of its proposed alterations to the power plant, it would remove two 375-kW generating units, and that one 1,451-kW generating unit previously on standby would begin operating full time. Upon completion of the alterations, the power plant would consist of two 1,451-kW generating units, four 2,200-kW generating units and one 400-kW generating unit. Advantage explained that the two 1,451-kW generating units are currently used as standby/start up power for the four 2,200-kW generating units that power the Glacier Sour Gas Processing Plant. The power plant's total generating capability after completion of the proposed alterations would be 12.102 MW.

14 Advantage stated that the power plant is located on an existing sour gas processing plant site, there would be no new vegetation clearing or additional footprint required for the alterations, and that Alberta Environment and Parks has no wildlife concerns related to the alterations. Advantage stated that the air emissions associated with the project would comply with all *Alberta Ambient Air Quality Objectives* and that an *Environmental Protection and Enhancement Act* industrial approval amendment issued by the Alberta Energy Regulator considered the proposed alterations.[4] Advantage confirmed that it would comply with all conditions of the approvals associated with the power plant.

15 In Proceeding 22571, which concerned prior amendments to the power plant, Advantage committed to implementing noise control measures to ensure that the power plant complied with the nighttime permissible sound level of 40 dBA, as specified in Rule 012.[5] In response to information requests in this proceeding,[6] Advantage stated that it had not yet implemented those measures because the noise impact assessment that it filed in this proceeding recommended different mitigation measures. Advantage explained that it ultimately decided to proceed with the original noise control measures that it committed to implement in Proceeding 22571, and that it would implement those measures by April 2019, following which the power plant would comply with the nighttime maximum permissible sound level of 40 dBA. Advantage also indicated that the nearest residence was approximately 6.5 kilometres away.

4.1 Power plant findings

16 The Commission is satisfied that the application to make minor alterations to the power plant, supplemented by Advantage's responses to information requests, meets the information requirements for a letter of enquiry stipulated in Section 12 of the *Hydro and Electric Energy Regulation*, and sections 1.4.2 and 10 of Rule 007.

17 The Commission finds that the noise impact assessment submitted by Advantage fulfills the requirements of Rule 012 and the power plant is not expected to exceed the permissible sound levels after Advantage implements the noise control measures identified in Proceeding 22571. In this regard, Advantage confirmed in this proceeding, its commitment made in Proceeding 22571 to implement those noise control measures and indicated that it expected to do so by April 2019.[7] The Commission expects Advantage to address its commitment as soon as practicable.

18 The Commission is satisfied that minimal environmental impacts are expected from the proposed alterations to the power plant. It also accepts that no additional footprint or vegetation clearing is required for the alterations and that air emissions from the power plant are expected to remain compliant with the *Alberta Ambient Air Quality Objectives*.

19 The Commission has determined that the technical, siting, emissions, environmental and noise aspects of the power plant alterations meet the Commission's requirements.

20 Based on the foregoing, the Commission considers the alterations to the power plant to be in the public interest in accordance with Section 17 of the *Alberta Utilities Commission Act*.

5 Interconnection application

21 Advantage requested approval to connect the power plant to the AIES using ATCO Electric's 25-kilovolt distribution system. It submitted that the power plant would continue to supply power to the Glacier Sour Gas Processing Plant but would also export excess electricity to the AIES. [8] More precisely, the four 2,200-kW generating units would be used to provide power to the processing plant while the two 1,451-kW generating units would export excess electricity. Advantage indicated that the two 1,451-kW generators currently used for standby/start up produce excess energy as the load requirement varies, and that the generators operate best at a load greater than 70 per cent. On this basis, Advantage considered two options: either tying the load differential into a load bank which would waste the energy, or connecting the power plant to the grid and exporting the excess energy. Advantage is of the view that connecting the two 1,451-kW generators to the grid is the best alternative.

22 Advantage stated that ATCO Electric agreed to connect the power plant to its distribution system and filed a copy of the cost proposal, accepted by ATCO Electric, for a Distributed Generation Connection to export the electricity produced by the two 1,451-kW synchronous generators. [9]

23 Advantage submitted that its proposal to consume a portion of the electric energy produced by the power plant and export the remaining energy to the AIES complies with the legislative scheme under the *Electric Utilities Act* and the *Hydro and Electric Energy Act*. It added that the electric energy produced by the two 1,451-kW generators and consumed by the Glacier Sour Gas Processing Plant is exempt from the provisions of the *Electric Utilities Act* pursuant to Subsection 2(1)(b) of that act, which provides that the statute "does not apply to 'electric energy produced on property of which a person is the owner or a tenant, and consumed solely by that person and solely on that property.'" [10] According to Advantage, this means that the energy produced and consumed on site is not required to be exchanged through the wholesale market and would require no distribution service from ATCO Electric, and that distribution service would only be required for the portion of energy produced on site that is exported by way of ATCO Electric's distribution system. Advantage explained that although it would install bi-directional meters at the site, it would only supply electric energy to the grid and would not buy any electric energy from the grid. It also submitted that all applicable requirements of the *Electric Utilities Act* would apply to the electric energy that it would export to the grid.

5.1 Interconnection findings

24 In Decision 23418-D01-2019, [11] the Commission addressed the issue of whether the statutory scheme allows a market participant to generate electricity for the purposes of self-supply and export to the AIES. In that proceeding, a market participant proposed to construct a 12-MW solar plant and to consume approximately 70 per cent of the electricity it produced on site while exporting the remainder to the AIES. The Commission found, for the reasons set out in paragraphs 75 to 102 of that decision, that the statutory scheme did not permit such conduct.

25 The Commission finds that Advantage's proposal to use generating units located on a site that it owns for both self-supply and export is prohibited by the statutory scheme for the reasons provided in Decision 23418-D01-2019. As set out in that decision, the Commission's conclusion on this issue arises from its interpretation of sections 101, 18 and 2 of the *Electric Utilities Act* and Section 2(f) of the *Fair, Efficient and Open Competition Regulation*.

26 Section 101(1) of the *Electric Utilities Act* provides direction to persons on how they must obtain electricity in Alberta. It states that a person wishing to obtain electricity for use on a property must make arrangements for the purchase of electric distribution service from the owner of the electric distribution system in whose service area the property is located. In the case of Advantage, Section 101(1) would require it to make arrangements with ATCO Electric (the owner of the electric distribution system in whose service area Advantage's property is located) to obtain the electricity it uses, unless it can demonstrate that it is exempt from the operation of Section 101.

27 Section 18(2) of the *Electric Utilities Act* and Subsection 2(f)(i) of the *Fair, Efficient and Open Competition Regulation* provide direction on how electricity generated in Alberta can be transacted (exported) through the AIES and the Power Pool.

Section 18(2) states that all electric energy entering or leaving the AIES must be exchanged through the Power Pool of Alberta unless regulations made under sections 41, 99 or 142 provide otherwise.

28 Section 2(f) of the *Fair, Efficient and Open Competition Regulation* complements and supports Section 18(2). It provides that, subject to certain exceptions, not offering to the power pool all electric energy from a generating unit that is capable of operating is conduct that does not support the fair, efficient and openly competitive operation of the electricity market. One of the exceptions to Section 2(f) is electric energy used on property for the market participant's own use.

29 Advantage is proposing to use generating units located on a site that it owns to both obtain electricity for its own use (self-supply) and export electricity to the AIES. To do this, it must demonstrate that it is exempt from the requirements set out in sections 101 and 18(2) of the *Electric Utilities Act* and 2(f)(i) of the *Fair, Efficient and Open Competition Regulation*.

30 Section 2(1) of the *Electric Utilities Act* sets out the forms or types of electric energy that are exempt from the operation of the act, including sections 18 and 101. Section 2(1)(b), which sets out the "self-supply exemption," states:

> **2(1)** This Act does not apply to
>
> (b) electric energy produced on property of which a person is the owner or a tenant, and consumed solely by that person and solely on that property;

31 In Decision 23418-D01-2019 the Commission found that based on its plain and ordinary meaning, Subsection 2(1)(b) establishes three pre-conditions for the self-supply exemption. In the current application, Advantage would have to satisfy all three pre-conditions to qualify for the self-supply exemption, as follows:

- The electric energy must be produced on Advantage's property;
- The electric energy must be consumed solely by Advantage; and
- The electric energy must be consumed solely on Advantage's property.

32 In Decision 23418-D01-2019, the Commission also found support for this interpretation in a number of other provisions in the statutory scheme. In particular, it examined Section 13 of the *Hydro and Electric Energy Act*, Section 6 of the *Isolated Generating Units and Customer Choice Regulation*, and Subsection 2(f)(i) of the *Fair, Efficient and Open Competition Regulation*, and concluded as follows:

> The Commission considers it reasonable to conclude that these provisions all share the same target: on-site generation developed for the express purpose of self-supply. When read together, these provisions reflect the legislature's intention to allow a person to build and operate a generating unit on land a person owns or leases, and to exempt the generating unit and the electric energy produced by it from the statutory scheme if the electric energy is intended only for the person's own use, consumed solely by the person, and solely on the person's property. The Commission finds that these exemptions reflect the "closed loop" nature of a self-supply arrangement; because the person is not using market infrastructure and is not transacting in the market, neither the person, the unit, nor the output is bound by the market's rules. [12]

33 The Commission also noted in that decision that there are provisions in the statutory scheme that expressly allow micro-generation units and generating units that are part of an industrial system designation to both self-supply and export. It stated:

> ...the Commission is satisfied that the statutory scheme expressly authorizes the owners of industrial systems and micro-generators to self-supply and transact any electric energy that is in excess of their own use through the interconnected electric system. Absent from the statutory scheme, however, is any express authorization for a party that relies upon the exemption in subsection 2(1)(b) to export electric energy that is in excess of the person's own use on the property. Given that such express authorization exists for the other two self-supply mechanisms, the Commission considers its omission

for subsection 2(1)(b) operations to be intentional and reflective of the drafter's intent to require that all the electricity produced on site be consumed on site. [13]

34 In an information request, the Commission asked Advantage to identify the factors that differentiate its proposed Glacier Power Plant export position from that of EPCOR Water Services Inc.'s proposed E.L. Smith Power Plant in Proceeding 23418, such that Advantage could demonstrate compliance with the statutory scheme. Advantage responded that its application was similar to the application in Proceeding 23418 in that both power plants have excess power that the owners want to supply to the grid. The Commission agrees with that assessment and finds that, similar to the proposal made in Proceeding 23418, Advantage's proposal to supply excess power to the AIES does not comply with the statutory scheme. The electric energy produced on Advantage's property will not be consumed solely by Advantage, and will not be consumed solely on Advantage's property. Consequently, two of the three pre-conditions required for the exemption in Subsection 2(1)(b) to apply are not met.

35 Advantage seeks a connection order pursuant to Section 18 of the *Hydro and Electric Energy Act* to enable it to exchange electric energy produced by the power plant with the interconnected electric system. Advantage requested approval to interconnect only two of its power plant's seven generating units to the interconnected electric system, however, these two units are only part of the entire power plant for which the interconnection order is sought. As a result, the Commission finds that Advantage's application is to connect not only the two 1,451-kW generating units that are the subject of its agreement with ATCO Electric, but also the four 2,200-kW generating units that serve the sour gas processing plant. From a technical perspective, the Commission is satisfied that the proposed connection would function as planned and would facilitate the efficient exchange of electric energy produced by the power plant with the interconnected electric system. However, in the issuance of a connection order, it is implicit that market participants must exchange electric energy on the interconnected electric system in accordance with the duties and obligations set forth in the *Electric Utilities Act* and in other related statutory instruments.

36 Having regard to the foregoing, the Commission finds that the exemption in Subsection 2(1)(b) of the *Electric Utilities Act* does not apply to the excess electric energy Advantage proposes to export to the AIES because this electric energy will not be consumed solely by Advantage and solely on Advantage's property. Accordingly, sections 18 and 101 of the *Electric Utilities Act* and Subsection 2(f)(i) of the *Fair, Efficient and Open Competition Regulation* apply to the electric energy produced by the power plant. The Commission is not satisfied that, as proposed, the configuration of the connection and power plant would be able to operate in accordance with the duties and obligations set forth in the *Electric Utilities Act*. Accordingly, the Commission denies Advantage's interconnection application. The power plant, including the alterations approved in this decision, may continue to operate and provide electric energy to the Glacier Sour Gas Processing Plant. However, Advantage cannot connect and export electric energy to the interconnected electric system in the manner proposed.

37 In making this finding, the Commission acknowledges that Advantage's proposal is based on its interpretation and understanding of the statutory scheme, and is not suggesting that Advantage is intentionally seeking to engage in conduct that is inconsistent with the statutory scheme.

38 The Commission's denial of the interconnection application is without prejudice to any future application in which Advantage proposes to interconnect the power plant in a manner consistent with the statutory scheme.

6 Decision

39 Pursuant to Section 11 of the *Hydro and Electric Energy Act*, the Commission approves the alteration to the Glacier Power Plant and grants Advantage Oil and Gas Ltd. the approval set out in Appendix 1 — Power Plant Approval 23756-D02-2019 — April 26, 2019, to alter and operate the power plant (Appendix 1 will be distributed separately).

Footnotes

1 Power Plant Approval 22571-D02-2017, Proceeding 22571, Application 22571-A001, October 13, 2017.

2 *Hydro and Electric Energy Regulation*, Section 11, provides that a person proposing to make minor alterations to a power plant may apply for an amendment to an approval by submitting a letter of enquiry to the Commission in accordance with Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, and Hydro Developments*.

3 *Electric Utilities Act*, SA 2003, c E-5.1, Section 5.

4 Exhibit 23756-X0013, ERCS — AUC-SIR #1 Audit Response, page 3.

5 Decision 22571-D01-2017: Advantage Oil and Gas Ltd. - Glacier Power Plant, Proceeding 22571, October 13, 2017, paragraph 4.

6 Exhibit 23756-X0013, ERCS — AUC-SIR #1 Audit Response - with appendices, page 5.

7 Exhibit 23756-X0013, ERCS - AUC-SIR #1 Audit Response - with appendices, page 5.

8 Exhibit 23756-X0013, ERCS — AUC-SIR #1 Audit Response, PDF page 6.

9 Exhibit 23756-X0013, ERCS — AUC-SIR #1 Audit Response, PDF page 16.

10 Exhibit 23756-X0023, ERCS — AUC-SIR #3 Audit Response, PDF page 2.

11 Decision 23418-D01-2019, *EPCOR Water Services Inc., Re* [2019 CarswellAlta 387 (Alta. U.C.)], February 20, 2019.

12 *Ibid*, paragraph 92.

13 *Ibid*, paragraph 101.

Tab 10:

EPCOR Water Services Inc. Re, 2019 CarswellAlta 387

2019 CarswellAlta 387
Alberta Utilities Commission

EPCOR Water Services Inc., Re

2019 CarswellAlta 387, [2019] A.W.L.D. 1272

EPCOR Water Services Inc.

E.L. Smith Solar Power Plant

Anne Michaud V-Chair, Joanne Phillips Member, Kristi Sebalj Member

Judgment: February 20, 2019
Docket: 23418-D01-2019

Counsel: Counsel — not provided

***Anne Michaud V-Chair, Joanne Phillips Member, Kristi Sebalj Member*:**

1 Decision summary

1 In this decision, the Alberta Utilities Commission must decide whether to approve an application from EPCOR Water Services Inc. to construct and operate a power plant designated as the E.L. Smith Solar Power Plant and an application to interconnect the power plant to the Alberta Interconnected Electric System (the project). After consideration of the record of the proceeding, and for the reasons outlined in this decision, the Commission finds that approval of the project is in the public interest having regard to the social, economic, and other effects of the project, including its effect on the environment.

2 Although the Commission recognizes that the North Saskatchewan River valley, the location proposed for the project, is an important resource for the City of Edmonton and its citizens, upon consideration of the current land-use of the site, combined with the mitigation measures proposed and commitments made by EPCOR Water, it is satisfied that the social and environmental impacts would not be significant.

3 The Commission finds that EPCOR Water's proposal to provide a portion of the energy produced by the project to the adjacent water treatment plant and to export the excess energy to the Alberta Interconnected Electric System is not contemplated by the legislative scheme. However, the Commission approves the interconnection of the power plant on the basis that EPCOR Water's intended purpose can be achieved through alternative means contemplated by the legislative scheme.

2 Introduction

4 EPCOR Water filed applications with the AUC for approval to construct and operate a 12-megawatt (MW) solar power plant in the City of Edmonton, pursuant to Section 11 of the *Hydro and Electric Energy Act*, and to interconnect the power plant to the Alberta Interconnected Electric System (AIES), pursuant to Section 18 of the *Hydro and Electric Energy Act*. These applications were registered on March 14, 2018, as applications 23418-A001 and 23418-A002, respectively.

5 The Commission issued a notice of applications for the project on April 23, 2018. The notice was mailed directly to potentially affected stakeholders within 2,000 metres of the project. It was also published on the AUC website, and a notice alert was sent through the AUC's eFiling System.[1] The notice was also published in the Edmonton Journal and Edmonton Sun on April 26, 2018.

6 In response to the notice, the Commission received statements of intent to participate from Howell Mayhew Engineering Inc., Vince Paniak, Ron Gauvreau, Roman Wozniak, the Edmonton and Area Land Trust (EALT), and D. Gordon Bentham.

7 On June 20, 2018, the Commission issued a ruling on standing.[2] Mr. Paniak and the EALT indicated they did not intend to participate if a hearing was held; as a result, the Commission did not find it necessary to assess their standing. The Commission found that Howell Mayhew Engineering Inc., Mr. Wozniak, and Mr. Bentham did not provide any information indicating that they held a legally recognized right that would be directly and adversely affected by the Commission's decision. The Commission granted the parties participatory rights to file a brief written submission or make a brief oral submission if an oral hearing was held. The ruling granted standing to Mr. Gauvreau only and requested that he indicate whether he would prefer to participate via a written or an oral hearing process.

8 On July 16, 2018, Mr. Gauvreau indicated to the Commission that he no longer wished to participate in the proceeding.

9 After the Commission issued its standing ruling, Eric Gormley, on behalf of the Edmonton River Valley Conservation Coalition (ERVCC), filed a statement of intent to participate.

10 The Commission issued a second ruling on standing which determined that the ERVCC did not have standing. The Commission granted participatory rights to the ERVCC and indicated that it, and the other parties that were granted participatory rights in the initial standing ruling, could file a written submission to supplement their statements of intent to participate. The Commission also provided an opportunity for EPCOR Water to respond to these submissions.

11 The Commission also received a submission from the Tsuut'ina Nation on May 24, 2018, stating that it was seeking further information on the project. On June 7, 2018, the Commission issued a letter requesting that the Tsuut'ina Nation clarify, by June 28, 2018, whether it intended to participate in the proceeding. The Tsuut'ina Nation responded that it had contacted EPCOR Water and indicated it needed additional time to meet with the proponent and formulate its position. The Commission subsequently issued a second request to the Tsuut'ina Nation to clarify whether it intended to participate in the proceeding but did not receive a response by the requested deadline.

3 Legislative scheme

12 The Commission regulates the construction and operation of power plants in Alberta. Section 11 of the *Hydro and Electric Energy Act* states that no person may construct or operate a power plant without prior approval from the Commission.

13 When considering an application for a power plant and associated infrastructure, the Commission is guided by sections 2 and 3 of the *Hydro and Electric Energy Act*, and Section 17 of the *Alberta Utilities Commission Act*.

14 Section 2 lists the purposes of the *Hydro and Electric Energy Act*. Those purposes include:

- To provide for the economic, orderly and efficient development and operation, in the public interest, of the generation of electric energy in Alberta.
- To secure the observance of safe and efficient practices in the public interest in the generation of electric energy in Alberta.
- To assist the government in controlling pollution and ensuring environment conservation in the generation of electric energy in Alberta.

15 Section 3 of the *Hydro and Electric Energy Act* requires the Commission to have regard for the purposes of the *Electric Utilities Act* when assessing whether a proposed power plant and associated infrastructure is in the public interest under Section 17 of the *Alberta Utilities Commission Act*. The purposes of the *Electric Utilities Act* include the development of an efficient electric industry structure and the development of an electric generation sector guided by competitive market forces.[3]

16 In Alberta, the legislature expressed its clear intention that electric generation is to be developed through the mechanism of a competitive, deregulated electric generation market. Section 3 of the *Hydro and Electric Energy Act* directs that the Commission shall not have regard to whether the proposed power plant, "...is an economic source of electric energy in Alberta or to whether there is a need for the electric energy to be produced by such a facility in meeting the requirements for electric energy in Alberta or outside of Alberta." Accordingly, in considering an application before it, the Commission does not take into account the potential need and cost of a project.

17 The Commission's public interest mandate is described in Section 17 of the *Alberta Utilities Commission Act*, which states:

> **Public interest**
>
> **17(1)** Where the Commission conducts a hearing or other proceeding on an application to construct or operate a hydro development, power plant or transmission line under the *Hydro and Electric Energy Act* or a gas utility pipeline under the *Gas Utilities Act*, it shall, in addition to any other matters it may or must consider in conducting the hearing or other proceeding, give consideration to whether construction or operation of the proposed hydro development, power plant, transmission line or gas utility pipeline is in the public interest, having regard to the social and economic effects of the development, plant, line or pipeline and the effects of the development, plant, line or pipeline on the environment.

18 AUC Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments* applies to the construction and operation of power plants, substations and transmission lines, which are governed by the *Hydro and Electric Energy Act*. The application must meet the informational and other requirements set out in Rule 007. Specifically, an applicant must provide technical and functional specifications, information on public consultation, environmental and land-use information, including a noise impact assessment. The application must also meet the requirements set out in AUC Rule 012: *Noise Control*. Further, an applicant must obtain all approvals under other applicable provincial or federal legislation.

19 Pursuant to Section 18 of the *Hydro and Electric Energy Act*, no party shall connect a power plant to the electric distribution system without an order from the Commission.

4 Power plant application

20 EPCOR Water proposed to construct and operate a 12-MW solar power plant that would consist of up to 45,000 solar panels, six inverters, and four padmount transformers. EPCOR Water submitted that the power plant equipment, including solar panels, inverters and transformers, and the exact locations of the equipment within the site, may be adjusted once the detailed design and procurement phases were completed. It stated that no changes would result in exceeding the proposed physical footprint or the proposed 12-MW capacity.

21 EPCOR Water stated the project would be located at 3900 E.L. Smith Road in the City of Edmonton, on EPCOR Water's property, south of the E.L. Smith Water Treatment Plant. The power plant would be located within the valley of the North Saskatchewan River on land that was previously used as farmland and is now primarily an empty field covered in grasses.

22 EPCOR Water submitted that it had committed to replacing at least 10 per cent of its conventional power consumption with locally-produced renewable energy. It stated that it considered other alternatives to the E.L. Smith site to reach this commitment, including roof-mounted solar panels on other EPCOR Water facilities, and entering into a power purchase agreement with a third party to build a solar power plant. EPCOR Water stated that the proposed power plant was the lowest cost option due largely to the availability of sufficiently-sized EPCOR Water-owned land adjacent to the E.L. Smith Water Treatment Plant.

23 EPCOR Water submitted that future water treatment operations are planned for the power plant site, but that because of increases in efficiency of treatment processes and infrastructure and the use of more water-efficient appliances within homes, it does not expect that expansion of the water treatment plant will be required until after the power plant's anticipated 30-year lifetime.

24 EPCOR Water retained Solas Energy Consulting Inc. (Solas) to conduct a glare analysis for observation points near the project site. Solas conducted an analysis at 16 points including residences, pathways and roads in the area. The analysis concluded that the power plant would have a low potential to result in hazardous glare conditions. [4] EPCOR Water submitted that the power plant "is expected to have either no glare or low levels of glare at most locations, including the residences along the east and west ridges of the North Saskatchewan River Valley." [5]

25 EPCOR Water retained Stantec Consulting Ltd. to evaluate the noise impacts of the power plant. Stantec completed a noise impact assessment (NIA) summary form in which it concluded that the predicted cumulative sound level at the most impacted dwelling would be below the permissible sound levels by a margin of three dBA. Accordingly, EPCOR Water submitted that the power plant would comply with Rule 012.

26 EPCOR Water retained Stantec to prepare an environmental evaluation of the project. [6] The evaluation examined the potential effects of the construction and operation of the power plant on the environment including terrain and soils, surface water bodies and hydrology, vegetation species and communities, and wildlife species and habitat. [7] The environmental evaluation recommended a number of mitigation measures to reduce potential environmental effects, including measures to control water and wind erosion, surface water runoff, vegetation management activities including weed management, and timing of construction, fencing and angling of panels to mitigate wildlife impacts. The environmental evaluation concluded that the potential adverse effects of the project can be avoided, reduced or controlled with implementation of the standard and project-specific mitigation measures outlined in the environmental evaluation. Provided that these mitigation measures are implemented, the environmental evaluation concluded that the potential effects of the project on the environment would not be significant, but that monitoring would be implemented during and after construction to evaluate the effectiveness of mitigation measures and adapt those measures as required.

27 EPCOR Water consulted with Alberta Environment and Parks (AEP), which determined that a referral report was not required because the project is proposed to be in an urban location and that the 2017 *Wildlife Directive for Alberta Solar Energy Projects* (the Directive) is not applicable to the project. Although the Directive does not apply to the project, EPCOR Water confirmed that it applied the standards and best management practices of the Directive for the project where practical. [8] EPCOR Water also filed a letter from AEP confirming that an environmental impact assessment is not required under provincial legislation, [9] and a letter from the Canadian Environmental Assessment Agency confirming that an environmental assessment is not required under federal legislation. [10]

28 EPCOR Water stated that it would develop an environmental protection plan prior to construction that would include mitigation measures, and committed to implementing the mitigation measures recommended in the environmental evaluation prepared by Stantec.

29 EPCOR Water further confirmed that it would develop a post-construction wildlife mortality monitoring plan in consultation with AEP, and that it would file a copy of this plan with the Commission once completed.

30 EPCOR Water submitted that the power plant would be situated on lands designated with high potential for both archaeological and paleontological sites and that it had applied to Alberta Culture and Tourism for *Historical Resources Act* clearance. EPCOR Water conducted a historical resource impact assessment in response to Alberta Culture and Tourism requirements which identified a newly-designated archaeological site. It stated that it also consulted with Alberta Culture and Tourism to complete field studies and mitigation work. On September 19, 2018, EPCOR Water provided a copy of the project's *Historical Resources Act* clearance from Alberta Culture and Tourism.

31 EPCOR Water submitted a land development application to the City of Edmonton, and stated that it would submit a development permit application after completion of the land development application. EPCOR Water indicated that the project would be subject to the City's North Saskatchewan River Valley Area Redevelopment Plan. In response to intervener submissions, EPCOR Water submitted that the project aligns with the City of Edmonton's strategies such as "The Way Ahead /

The Way We Green: Environmental Strategic Plan," the "Energy Transition Strategy," the draft "Greenhouse Gas Management Plan for Civic Operations 2019-2030," the 2018 draft "Breathe / Ribbon of Green" and the River Valley Alliance's "Plan of Action for Capital Region River Valley Park." [11]

32 EPCOR Water conducted a participant involvement program with the objective of providing parties with information about the project and opportunities to express concerns, ask questions, provide input, and discuss options, alternatives and mitigation measures. EPCOR Water stated that its participant involvement program aligned with the AUC's participant involvement guidelines as well as the City of Edmonton's Public Engagement Policy.

33 EPCOR Water notified landowners, occupants, and residents within 2,000 metres of the power plant boundary and consulted with parties located within 800 metres of the power plant boundary. EPCOR Water's participant involvement program also included "Indigenous communities, community leagues and organizations, special interest groups (e.g., River Valley Alliance, Sierra Club, North Saskatchewan River Valley Conservation Society), local businesses, elected officials, government agencies and the general public." [12] EPCOR Water hosted an open house in July 2017, and participated in a City of Edmonton-hosted open house in February 2018.

34 EPCOR Water submitted that in response to concerns expressed by parties during its participant involvement program, it reduced the footprint of the project to increase the separation between the project and the North Saskatchewan River, submitting that at its narrowest point, the fence line will be set back approximately 100 metres from the river. In response to submissions that the site should be used for recreational purposes due to its proximity to the City of Edmonton's river valley trail system, EPCOR Water agreed to provide public access through its property, outside the power plant fence line, for future recreational trails. Currently, none of the site is publicly accessible.

35 Stantec, on behalf of EPCOR Water, produced artistic renderings of the power plant to assist in communicating the potential visual impacts of the project. EPCOR Water shared these depictions at open houses and included them in project newsletters. To enhance the project aesthetics and the natural landscape of the area, EPCOR Water "committed to replace the grasses removed for the Project by replanting with City approved native seed mix to help improve the aesthetics and surrounding habitat in the area." [13]

36 EPCOR Water stated that the power plant would comply with Section 95(9) of the *Electric Utilities Act*, which states:

> A municipality or a subsidiary of a municipality may hold an interest in a generating unit located within the boundaries of the municipality on property of which the municipality or subsidiary is the owner or tenant if a majority of the electric energy produced annually by the unit is used by the municipality or subsidiary on that property.

37 Howell Mayhew Engineering Inc. submitted that it supported the development of solar photovoltaic generating units, but wanted to better understand the performance of the proposed power plant.

38 Mr. Paniak submitted that he was a resident across the river from the project and that he supported EPCOR Water's efforts to use solar power.

39 Mr. Wozniak expressed concerns that the cost of the power plant would be paid by City of Edmonton homeowners and that as the solar panels lose their efficiency over time, the costs would increase.

40 Mr. Bentham opposed the project's location within the river valley. He submitted that this land is precious and cannot be replaced, and encouraged that alternative locations, such as rooftops, be considered.

41 Prior to withdrawing from the proceeding, Mr. Gauvreau submitted that he owns land near the project and that the project would affect his property value. He also submitted that the project does not conform with the current land use, and that the area was not intended for commercial development.

42 The EALT stated that it supports the use of alternative and sustainable sources of energy but was opposed to the project's location within the river valley. It submitted that the river valley is constantly under pressure from development proposals that threaten the area's biodiversity and ecological integrity, as well as the opportunity for recreation.

43 The EALT submitted that the project would result in further compromise and depreciation of the river valley. It encouraged that the project not be evaluated in isolation; rather, the cumulative impacts of all non-conforming incursions in the city's network of green areas should be considered. It stated that there will be growth in linear recreational use of the area due to the ongoing development of the trail system, as well as increased adjacent residential development. The EALT submitted that this leads to growing conflict between people and wildlife, and environmental deterioration, and that the proposal will make the area a vulnerable "pinch point" in the ecological network of the river valley. [14]

44 The EALT further submitted that the river valley serves as an important recreational green space that will become increasingly important as the population of the City of Edmonton increases and the amount of large green space within the city decreases. It stated that access to large green spaces is an important factor for the wellness of the city's residents and that this project will compromise opportunities for outdoor recreation. The EALT also expressed concerns about the visual impacts of the power plant, submitting that the project would detract from the natural landscape character of the North Saskatchewan River valley.

45 The ERVCC submitted that it also supports renewable energy but objected to the proposed location of the power plant. It stated that the City of Edmonton's river valley is a cherished riparian area which holds great ecological value as a wildlife habitat. The ERVCC outlined the long history of efforts to preserve the river valley. It noted that the river valley is special parkland with great amenity value for humans and ecological value for wildlife habitat, and the project's location is an important link in this chain. [15]

46 The ERVCC stated that with its security fencing and inverter stations, the power plant will have a negative impact on the visual experiences of area residents and trail users. It submitted that the power plant's proposed site "is located in an attractive part of the river valley — a plain in a bend of the river with bluffs on both sides of the river" that is visible from many parts of the trail system. [16] It submitted that EPCOR Water largely ignored the project's impact on trail uses, as its glare analysis measured potential glare from 16 locations, only one of which is a pathway. ERVCC advocated for alternate locations for the solar panels, such as rooftops or brownfield sites.

47 The ERVCC further submitted that the proposed location is not currently zoned for solar development, and indicated that 828 people had signed a petition urging the City of Edmonton's council to preserve Edmonton's river valley by rejecting the rezoning of the land for the power plant. The ERVCC concluded that the river valley park system is rooted in the natural world and forms part of a major ecological corridor across Alberta. The ERVCC requested that the Commission consider the history of the City of Edmonton's attempt to acquire and protect parkland in the river valley and the best practices for siting solar farms and deny the application to build the project on river valley land.

48 EPCOR Water expressed its commitment "to taking action to reduce its own emissions and energy consumption" [17] and explained that "this Project provides an opportunity to directly reduce [EPCOR Water's] conventional electricity consumption from the grid at the E.L. Smith Water Treatment Plant. If the Project is approved, [EPCOR Water] will be providing clean water made with clean energy from the solar farm." [18] At the direction of the City of Edmonton, EPCOR Water conducted a triple bottom line analysis [19] to ensure that the cost savings of using the E.L. Smith Water Treatment Plant site were not outweighed by social and environmental considerations. EPCOR Water retained HDR Corporation (HDR) to analyze five alternatives on a triple bottom line basis. HDR considered the following alternatives:

1) **Grid Supply** — purchase of conventional power from the grid

2) **Grid Supply + Generic Market Renewable Energy Credit (REC)s** — purchase of conventional power from the grid and generic (non-additional) RECs available in the market.

3) **Offsite Wind Farm** — cost to build and operate (or contract to purchase power) an offsite wind farm in southern Alberta.

4) **E.L. Smith Solar Project** — cost to build and operate the proposed E.L. Smith Solar Project.

5) **Offsite Local Solar Farm** — cost to build and operate (or contract to purchase power) an offsite solar farm within 40 kilometers of the city of Edmonton and connect to the grid, but not tied directly to any of [EPCOR Water's] operating sites. [20]

49 HDR prepared a report entitled "Sustainability Value Analysis of the E.L. Smith Solar Farm Project." [21] The report concluded that if having an additional renewable resource and local generation are required, only the E.L. Smith project or an offsite local solar farm are viable alternatives. The HDR report stated that the E.L. Smith project could be developed at a much lower financial cost than an offsite local solar farm, with both alternatives providing equivalent emission reduction benefits, and that it was unlikely that the project would result in very significant ecosystem damages given the findings of the project's environmental evaluation.

50 EPCOR Water submitted that the project remains the best and lowest cost option to satisfy its stated environmental goals, even after factoring in environmental and social considerations through the triple bottom line analysis. EPCOR Water stated that the project would not have a significant impact on the environment and that the land would be available for re-use when the project is decommissioned. [22]

51 EPCOR Water stated that in addition to the economic benefits of the site, it intends to leverage the environmental, social and recreational value of the site by developing community integration objective options for the project.

52 EPCOR Water submitted that these objectives include enhancing the project aesthetics and natural landscape; integrating the project into the North Saskatchewan River valley and planning for future trails proposed in the City of Edmonton's "Breathe / Ribbon of Green" strategy; providing educational opportunities respecting the history and cultural resources of the land in collaboration with Indigenous communities; constructing an interactive public demonstration site to showcase the project and provide education and awareness about solar technology; and establishing long-term partnerships to support educational and research opportunities associated with solar energy generation. [23] EPCOR Water included a number of specific ideas which may help achieve these objectives, such as planting native plant species to attract and sustain local pollinator populations, installing permanent displays and art in proximity to the project to showcase the region's history, and conducting tours of the facility for hands-on learning experiences for nearby schools. In addition, EPCOR Water indicated that it has entered into discussions with the University of Alberta and the Northern Alberta Institute of Technology to allow equipment alterations and data monitoring for testing purposes.

5 Interconnection application

53 EPCOR Water submitted that the power plant is intended to supply power to the E.L. Smith Water Treatment Plant. It predicted that the power plant would generate approximately 20,000 MW hours of electricity annually, 70 per cent of which is expected to serve the water treatment plant, and that the remaining 30 per cent would be exported to the Alberta Interconnected Electric System through two metering points at the plant and sold into the wholesale market.

54 EPCOR Water submitted that the power plant would connect to the AIES via EPCOR Distribution & Transmission Inc.'s distribution system using two 13.8-kilovolt feeders originating from Petrolia 816S Substation. EPCOR Water provided a letter from EPCOR Distribution & Transmission Inc. indicating that it was prepared to allow the interconnection of the power

plant. The point of interconnection would be located in the southwest quarter of Section 10, Township 52, Range 25, west of the Fourth Meridian.

55 In response to Commission requests for further information on how the project's self-supply and export proposal falls within the legislative scheme, EPCOR Water stated that its proposal would not result in uneconomic bypass of the AIES and that the project's proposed use is contemplated and consistent with the legislative framework under the *Electric Utilities Act* and the *Hydro and Electric Energy Act*. EPCOR Water explained that it will continue to take electric distribution service from EPCOR Distribution & Transmission Inc., and the amounts paid under its contract for distribution access service are not expected to change materially as a result of the project.

56 EPCOR Water submitted that Section 2(1)(b) of the *Electric Utilities Act* provides an exemption from the scheme for "electric energy produced on property of which a person is the owner or a tenant, and consumed solely by that person and solely on that property;" therefore, the energy produced and consumed on site will not be required to be exchanged through the wholesale electricity market.[24] EPCOR Water submitted that on a plain reading of Section 2(1)(b), the exemption applies "to *any and all* electric energy that meets the criteria in that section." EPCOR Water's position is that Section 2(1)(b) makes it clear that the legislature intended the exemption to apply to any portion of the total electricity "produced on property of which a person is the owner or a tenant, and consumed solely by that person and solely on that property." As a result, the 70 per cent of the annual power generated by the project and consumed on site would be exempt from the operation of the *Electric Utilities Act*.

6 Commission findings

6.1 Findings on the power plant

57 The Commission has determined that the technical, siting, emissions, environmental and noise aspects of the power plant have been met.

58 The Commission finds that the participant involvement program for the project is adequate and meets the requirements set out in Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments*.

59 The Commission recognizes that the power plant would be located within the North Saskatchewan River valley, a valley of significant importance to the citizens of the City of Edmonton. The river valley is a limited resource and the importance of protecting that resource is evident from the submissions of individuals and groups such as the ERVCC and EALT. Multiple stakeholders filed submissions indicating they did not oppose EPCOR Water's development of a solar project, only its decision to site it within the river valley.

60 The Commission finds EPCOR Water's alterations to the project to reduce the footprint, increase the separation from the river, and allow access to its property to enhance the river valley's trail system demonstrate EPCOR Water's willingness to adapt its project in response to concerns raised by stakeholders. In assessing the social and environmental effects of the project, the Commission has relied upon EPCOR Water's commitments to integrate the trail system into its project.

61 Taking into account the submissions by interveners and groups such as the ERVCC and EALT, and considering the various mitigation measures and plans proposed by EPCOR Water, the Commission is satisfied that the power plant would not result in negative social or environmental impacts.

62 The Commission finds that the interveners' concerns about the importance of access to green space and protection of that green space are important considerations in its assessment of whether this project is in the public interest, but that those concerns are mitigated in these circumstances because the site is not currently accessible to the public, has been previously disturbed, and is intended to be used for the expansion of EPCOR Water's water treatment plant in the long term. In contrast, the Commission considers that EPCOR Water's commitment to allow access to its property for the development of additional trails along the river valley will result in a benefit in terms of public access to green space in that portion of the river valley.

63 The Commission considers that EPCOR Water's community integration objectives to develop opportunities for social benefits, including educational opportunities around historical and cultural resources and solar power, would further mitigate or offset the social impacts that would occur. Although EPCOR Water did not formally commit to some of these endeavours or present specific plans to achieve some of the identified objectives, the Commission considers that EPCOR Water's commitment to incorporating those objectives plays a significant role in its assessment of the project's ability to mitigate social impacts. The Commission accordingly expects EPCOR Water to follow through on its commitment to developing those opportunities.

64 The Commission finds that concerns with the potential visual impacts of the project will be mitigated to an extent because the site is located adjacent to the water treatment plant, has been previously disturbed, and is currently an empty field with no public access. While the Commission recognizes that the presence of solar panels will have a different visual impact than its existing use, the Commission considers that EPCOR Water's plans to enhance the natural aesthetics of the site using fence design, natural screening and other landscaping will help mitigate the visual impacts of the power plant.

65 The Commission notes that no intervener submitted evidence that the project will have an effect on the value of land in the surrounding area. In its reply submissions, EPCOR Water noted that the project involves the installation and operation of a solar facility at an existing water treatment plant that has occupied the area for more than 40 years. The land has been included in City of Edmonton plans for expansion of the water treatment plant for a number of years. Finally, EPCOR Water submitted that it is not aware of any evidence to suggest that large-scale ground mounted solar panels will have any meaningful impact on the value of nearby properties. Moreover, there is no evidence before the Commission that the project will have a negative impact on surrounding property values, such that the project would not be in the public interest.

66 The Commission accepts as reasonable the findings of the Solas analysis that the project has a low potential to result in hazardous glare conditions at any of the measured points surrounding the project, including residences, pathways, and roads in the area.

67 The Commission acknowledges that EPCOR Water is working through the City of Edmonton's process for rezoning the land and for a development permit for the application.

68 Upon a review of the environmental evaluation produced by Stantec and the various mitigation measures proposed within it, the Commission accepts EPCOR Water's commitments to develop an environmental protection plan prior to construction that will include mitigation measures, and to implement the mitigation measures outlined in the environmental evaluation. The Commission also accepts EPCOR Water's commitment to develop a post-construction wildlife mortality monitoring plan in consultation with AEP and to file that plan with the Commission once completed. Following completion of that program, the Commission expects that EPCOR Water will promptly notify AEP of the discovery of any carcasses of provincially or federally-threatened or endangered species that may be attributable to the project.

69 The Commission accepts the environmental evaluation's conclusion that the potential environmental effects of the project would be "not significant" and that the environmental impacts of the project can be adequately mitigated, given diligent implementation of the mitigation measures proposed in the evaluation and having regard for the additional commitments made by EPCOR Water.

70 The *Conservation and Reclamation Regulation* was recently amended to specifically address the reclamation of solar projects in Alberta. The effect of these amendments is that "renewable energy operations", which include solar plants, are now expressly subject to the reclamation obligations set out in Section 137 of the *Environmental Protection and Enhancement Act*. Operators of renewable energy operations are now required to obtain a reclamation certificate, a process that is managed by AEP pursuant to the *Conservation and Reclamation Directive for Renewable Energy Operations* and provides more detailed information on conservation and reclamation planning and reclamation certificate requirements for renewable energy operators in Alberta.

71 EPCOR Water made efforts to consider multiple alternatives to reach its goal of increasing the amount of renewable energy it utilizes. The Commission finds that EPCOR Water's assessment of the alternatives and its retention of HDR to conduct

a triple bottom line analysis demonstrate its commitment to achieving its goal in a manner that will minimize environmental, social and economic impacts.

72 The Commission is satisfied that the NIA summary form demonstrates that cumulative sound levels for the project will be below the daytime and nighttime permissible sound levels as required in Rule 012.

73 Finally, the Commission is satisfied that EPCOR Water, as a municipal subsidiary, may hold an interest in the power plant in accordance with Section 95(9) of the *Electric Utilities Act* based on its intention to utilize the majority of the electric energy produced annually on site. The Commission has assessed whether the project is in the public interest, having regard to its social, economic and environmental effects in keeping with its mandate in Section 17 of the *Alberta Utilities Commission Act*. In making its decision, the Commission has considered those effects and also that the potential rate impacts of the project are outside the scope of this proceeding.

74 Based on the foregoing, the Commission considers the power plant to be in the public interest in accordance with Section 17 of the *Alberta Utilities Commission Act*.

6.2 Findings on the interconnection

6.2.1 Introduction

75 While the Commission is satisfied that approval of EPCOR Water's power plant is in the public interest and should be approved, it finds that EPCOR Water's proposal to directly consume approximately 70 per cent of the power plant's annual output on-site and export the remaining 30 per cent to the wholesale market is inconsistent with sections 18 and 101 of the *Electric Utilities Act* and Section 2(f) of the *Fair, Efficient and Open Competition Regulation*.

76 Section 18(2) of the *Electric Utilities Act* provides that all electric energy entering or leaving the Alberta Interconnected Electric System must be exchanged through the Power Pool of Alberta unless regulations made under sections 41, 99 or 142 provide otherwise.

77 Section 101(1) of the *Electric Utilities Act* states that a person wishing to obtain electricity for use on a property must make arrangements for the purchase of electric distribution service from the owner of the electric distribution system in whose service area the property is located.

78 Section 2(1) of the *Electric Utilities Act* sets the forms or types of electric energy that are exempt from the operation of the Act. EPCOR Water argues that the electricity produced on site that it intends to consume on-site is exempt from the *Electric Utilities Act* in accordance with the exemption found in subsection 2(1)(b).

79 Section 2(1)(b) states:

> **2(1)** This Act does not apply to
>
> (b) electric energy produced on property of which a person is the owner or a tenant, and consumed solely by that person and solely on that property;

80 Section 2(f) of the *Fair, Efficient and Open Competition Regulation* compliments subsection 2(1)(b) of the *Electric Utilities Act*. That section provides that "not offering to the power pool all electric energy from a generating unit that is capable of operating, except where the electric energy is used on property for the market participant's own use" is conduct that does not support the fair, efficient and openly competitive operation of the electricity market.

81 For the reasons that follow, the Commission finds that the exemption in subsection 2(1)(b) of the *Electric Utilities Act* does not apply to the power plant because the electric energy produced by the power plant will not be consumed solely by EPCOR Water and solely on EPCOR Water's property. Accordingly, sections 18 and 101 of the *Electric Utilities Act* apply to the electric energy produced by the plant.

82 In making this finding, the Commission is not concluding, nor is it suggesting in any way, that EPCOR Water is intentionally seeking to engage in conduct that is inconsistent with the statutory scheme. Rather, the Commission acknowledges that EPCOR Water's proposal is based upon its interpretation and understanding of the statutory scheme. It also acknowledges that EPCOR Water's stated goal in developing the facility is to increase the amount of renewable energy it uses. The Commission considers this goal to be laudable and consistent with current legislated policy objectives surrounding increases in renewable electricity generation. [25]

6.2.2 Interpreting Section 2(1)(b) of the Electric Utilities Act

83 EPCOR Water relied upon the exemption set out in subsection 2(1)(b) in support of its contention that it is entitled to both self-supply and export electric energy from its power plant. It argued that based on the plain and ordinary meaning of the provision, "the exemption applies to *any and all* electric energy that meets the criteria in the section; that is, any and all electricity 'produced on property of which a person is the owner or a tenant, and consumed solely by that person and solely on that property.'" [26] It submitted that the legislature intended that the exemption would apply "to any portion of the total electricity that may be 'produced on property of which a person is the owner or a tenant, and consumed solely by that person and solely on that property.'" [27] Accordingly, EPCOR Water's position is that the 70 per cent of annual power generated by the project that would be consumed on-site is exempt from the provisions of the *Electric Utilities Act*.

84 The starting point for interpreting Section 2(1)(b) is Driedger's modern principle of statutory interpretation. The Supreme Court of Canada explained Driedger's principle and its application to the statutory scheme administered by the Commission in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*. [28] The Court stated that the principle requires that "the words of an act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament." [29] The court clarified that it looks first at the grammatical and ordinary meaning of a provision and then examines the entire statutory context and legislative intent. The Court concluded: "the ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme." [30]

85 The interpretation of regulations is governed by the same principles that govern the interpretation of statutes. [31] As stated by the Commission in Decision 2014-110, "[r]egulations too must be read in the context of their enabling statute, having regard to the language and purpose of the act in general and more particularly the language and purpose of the relevant enabling provisions." [32]

86 In accordance with its plain and ordinary meaning, the Commission finds that subsection 2(1)(b) establishes three pre-conditions for the exemption to apply:

- The electric energy must be produced on EPCOR Water's property;
- The electric energy must be consumed solely by EPCOR Water; and
- The electric energy must be consumed solely on EPCOR Water's property.

87 The Commission understands EPCOR Water's interpretation of subsection 2(1)(b) to be that the exemption applies to the portion of the electric energy produced and consumed by EPCOR Water on its property (i.e., the 70 per cent), but that it does not apply to electric energy produced on its property but consumed off-site (i.e., the 30 per cent). The effect of this interpretation is that two of the pre-conditions to the exemption are not satisfied: the electric energy produced on EPCOR Water's property will not be consumed solely by EPCOR Water, and will not be consumed solely on EPCOR Water's property. In the Commission's view, this interpretation is entirely at odds with the plain and ordinary meaning of the provision.

88 Analysis of the broader statutory scheme supports the Commission's interpretation of subsection 2(1)(b).

89 Section 2(1)(b) is one of a number of provisions in the scheme that directly addresses on-site generation for the purpose of self-supply.[33] Section 13 of the *Hydro and Electric Energy Act* provides that a person generating or proposing to generate electric energy *solely for the person's own use* does not require approval from the Commission to construct and operate the generating unit.

90 Section 6 of the *Isolated Generating Units and Customer Choice Regulation* addresses self supply in the context of self supply within an industrial area. That section states:

> [a] customer in an industrial area may use electric energy that is produced on the customer's premises by a supplier of the customer's choice if the electric energy is consumed only on the customer's premises.

91 Subsection 2(f)(i) of the *Fair, Efficient and Open Competition Regulation* states:

> **2** Conduct by a market participant that does not support the fair, efficient and openly competitive operation of the market includes the following:
>
> (f) not offering to the power pool all electric energy from a generating unit that is capable of operating, except where
>
> (i) the electric energy is used on property for the market participant's own use,

92 The Commission considers it reasonable to conclude that these provisions all share the same target: on-site generation developed for the express purpose of self-supply. When read together, these provisions reflect the legislature's intention to allow a person to build and operate a generating unit on land a person owns or leases, and to exempt the generating unit and the electric energy produced by it from the statutory scheme if the electric energy is intended only for the person's own use, consumed solely by the person, and solely on the person's property. The Commission finds that these exemptions reflect the "closed loop" nature of a self-supply arrangement; because the person is not using market infrastructure and is not transacting in the market, neither the person, the unit, nor the output is bound by the market's rules.

93 The *Micro-generation Regulation* and subsection 2(1)(d) of the *Electric Utilities Act* address two other types of self-supply mechanisms: micro-generation and industrial system designations. Each of these mechanisms expressly allow a person to self-supply electric energy for their own use and to export electric energy in excess of what is required for their use through the interconnected electric system, provided they meet certain eligibility requirements. Sections 99 and 117 of the *Electric Utilities Act*, respectively, enable these mechanisms.

94 Section 99 of the *Electric Utilities Act* authorizes the Minister to make regulations specifying which provisions of that Act and the regulations do not apply to micro-generation generating units. The *Micro-generation Regulation* allows customers to own and operate a certain class of small generators (5 MW or less and powered exclusively by renewable or alternative energy) and to consume the electricity produced by that generator on site. Under this regulation, electric energy produced by a micro-generation generating unit that is in excess of the customer's on-site needs is exported to the interconnected electric system through a net billing mechanism.

95 The *Micro-generation Regulation* requires a customer to size the micro-generator so that it meets all or a portion of the customer's total annual energy consumption on site. Section 6 of the *Micro-generation Regulation* specifically excludes micro-generators from the obligation established by Section 18 of the *Electric Utilities Act* to exchange the excess electric energy through the Power Pool of Alberta. Instead, in the limited circumstances of micro-generation, the micro-generator's service provider acts as the electricity market participant in respect of the energy generated by the micro-generator. The *Micro-generation Regulation* also explicitly requires that the distribution tariff charged to a micro-generator must be the same as the tariff that would apply if that customer were not a micro-generator.

96 For industrial system designations, Section 2(1)(d) states that the *Electric Utilities Act* does not apply to electric energy exempted by the Commission in accordance with the rules made under Section 117 of that Act. Section 117(1) allows the AUC

to (a) exempt facilities or classes of facilities from the definition of electric utility, and (b) exempt the electric energy produced from and consumed by an industrial system from all or any provisions of the *Electric Utilities Act*.

97 Designated industrial systems are permitted to self-supply and are exempt from the obligation to obtain electric energy through the distribution or transmission system. In accordance with Section 117(1) of the *Electric Utilities Act*, each industrial system designation order issued by the Commission includes a condition specifying that the electric energy produced from and consumed by the subject industrial system is exempt from the operation of the *Electric Utilities Act*.

98 Designated industrial systems are entitled to export the electric energy that is in excess of the industrial system's requirements because such export is expressly contemplated by subsection 4(2)(b)(ii) of the *Hydro and Electric Energy Act*. That provision states that if an electric system is designated as an industrial system, that designation *must* support the efficient exchange, with the interconnected electric system, of electric energy that is in excess of the industrial system's own requirements.

99 The government of Alberta released a policy paper outlining the industrial system designation and the policy objectives and implications of exempting those systems from the *Electric Utilities Act*. [34] The stated objective of the exemption is "similar to the EUA section 2(b) self-generation exemption" to "provide the correct economic signals which enable integrated industrial processes to develop their own internal electricity supply where that is the most economic source of generation." The exemption is explicitly "not intended to facilitate development of independent electricity systems driven by avoidance of system costs." [35] The paper also explains that the exemption "fits in a continuum" between the self-generation contemplated by Section 2(b) of the *Electric Utilities Act* and a distribution system. [36] The legislature's intention with respect to the effect of the exemption is clearly outlined in its policy that only the electric energy "that is generated and consumed by the industrial system is exempt from the EUA." [37] For the exempted electric energy, the industrial system is not required to, among other things:

- Exchange the exempted electric energy through the Power Pool of Alberta if the electric energy produced by the industrial system is not transmitted via facilities of the interconnected electric system; and
- Purchase the exempted electric energy from the owner of the electric distribution system in whose service area the industrial system is located. [38]

100 The objectives outlined in the government of Alberta's policy document are reflected in the criteria in Section 4 of the *Hydro and Electric Energy Act*, and collectively demonstrate the purpose of the limited industrial system designation exemption. The exemption allows circumstances of partial self-supply and partial export to the grid in very limited circumstances, provided that the applicant meets the prescriptive criteria in that section.

101 Based on the above, the Commission is satisfied that the statutory scheme expressly authorizes the owners of industrial systems and micro-generators to self-supply and transact any electric energy that is in excess of their own use through the interconnected electric system. Absent from the statutory scheme, however, is any express authorization for a party that relies upon the exemption in subsection 2(1)(b) to export electric energy that is in excess of the person's own use on the property. Given that such express authorization exists for the other two self-supply mechanisms, the Commission considers its omission for subsection 2(1)(b) operations to be intentional and reflective of the drafter's intent to require that all the electricity produced on site be consumed on site.

102 As part of its consideration of the self-supply and export issue arising in this decision, the Commission reviewed its previous treatment of similar applications. The Commission identified instances where it previously approved power plant and connection applications in which the applicants' stated intention was to consume most of the electric energy on site but exchange the excess through Alberta's electricity market. Notwithstanding that the issue of whether such conduct complies with the statutory scheme was not raised in those proceedings, the Commission recognizes that its determination on this issue in this proceeding represents a departure from that in previous decisions. The Commission acknowledges that its statutory interpretation of the legislative provisions pertaining to self-supply and export may have ramifications for existing approval holders and future applicants. However, the Commission cannot address those ramifications within the scope of this proceeding.

6.2.3 Interconnection decision

103 EPCOR Water seeks a connection order pursuant to Section 18 of the *Hydro and Electric Energy Act* to enable it to exchange electric energy produced by the power plant with the interconnected electric system. From a technical perspective, the Commission is satisfied that the proposed connection order will function as planned and will facilitate the efficient exchange of electric energy produced by the power plant to the interconnected electric system. However, in the issuance of a connection order, it is implicit that market participants must exchange electric energy on the interconnected electric system in accordance with the duties and obligations set forth in the *Electric Utilities Act* and in other related statutory instruments.

104 For the reasons articulated above, the Commission finds that the exemption under subsection 2(1)(b) would not apply to the electric energy produced by the power plant if EPCOR Water proceeds with its proposal to directly consume a majority of the plant's output while exporting the excess energy to the interconnected electric system. Notwithstanding this conclusion, the Commission recognizes that EPCOR Water is not precluded from pursuing other alternative arrangements consistent with the statutory scheme that could allow it to meet its on-site power needs while still satisfying the requirements of Section 95(9) of the *Electric Utilities Act*. [39]

105 Having regard to the foregoing, the Commission will issue the connection order requested by EPCOR Water on the basis that EPCOR Water, as a market participant, must comply with the obligations set out in the *Electric Utilities Act* and is obliged to conduct itself in a manner that supports the fair, efficient and openly competitive operation of the electricity market. The Commission therefore conditions the interconnection approval on the following:

- As of the interconnection date of the project, EPCOR Water is required to file a compliance plan, endorsed by its chief executive officer, consisting of a written confirmation of statutory compliance and a detailed written description of the mechanism it is using to ensure compliance with the statutory scheme.

7 Decision

106 Pursuant to Section 11 of the *Hydro and Electric Energy Act*, the Commission approves the application and grants EPCOR Water the approval set out in Appendix 1 — 12-MW E.L. Smith Solar Power Plant — Approval 23418-D02-2019 — February 20, 2019 (Appendix 1 will be distributed separately).

107 Pursuant to Section 18 of the *Hydro and Electric Energy Act*, the Commission approves the application and grants EPCOR Water the approval set out in Appendix 2 — Connect E.L. Smith Solar Power Plant to EPCOR Distribution &Transmission Inc.'s distribution system — Approval 23418-D03-2019 — February 20, 2019 (Appendix 2 will be distributed separately), subject to the following condition:

- As of the interconnection date of the project, EPCOR Water is required to file a compliance plan, endorsed by its chief executive officer, consisting of a written confirmation of statutory compliance and a detailed written description of the mechanism it is using to ensure compliance with the statutory scheme.

Footnotes

1 The AUC's eFiling system will send an email notification to persons who have signed up to receive AUC notices and to persons registered in the proceeding.

2 Exhibit 23418-X0057, AUC ruling on standing.

3 *Electric Utilities Act*, SA 2003, c E-5.1, Section 5.

4 Exhibit 23418-X0024, Attachment 7, Glare Study.

5 Exhibit 23418-X0001, EWSI Facility Application EL Smith Solar Farm, PDF page 7.

6 Exhibit 23418-X0033, Attachment 13 Environmental Evaluation.

7 Exhibit 23418-X0001, EWSI Facility Application EL Smith Solar Farm, PDF page 6.

8 Exhibit 23418-X0033, Attachment 13 Environmental Evaluation, PDF page 11.

9 Exhibit 23418-X0022, Attachment 5 Alberta Environment and Parks - No EIA Confirmation Letter.

10 Exhibit 23418-X0023, Attachment 6 Canadian Environmental Assessment Agency Letter.

11 Exhibit 23418-X0065, EWSI Response to Intervener Submissions 8-14-2018, PDF pages 2-5.

12 Exhibit 23418-X0001, Application, PDF page 26, paragraph 76.

13 Exhibit 23418-X0065, EWSI Response to Intervener Submissions, PDF page 11.

14 Exhibit 23418-X0050, EALT submission to AUC re EPCOR solar plant, PDF page 3.

15 Exhibit 23418-X0064, Edmonton River Valley Conservation Coalition Brief opposing EPCOR's proposed solar plant, PDF page 1.

16 Exhibit 23418-X0064.02, Edmonton River Valley Conservation Coalition Brief opposing EPCOR's proposed solar plant, PDF page 5.

17 Exhibit 23418-X0001, EWSI Facility Application EL Smith Solar Farm, PDF page 5.

18 Exhibit 23418-X0001, EWSI Facility Application EL Smith Solar Farm, PDF page 5.

19 HDR explained that a triple bottom line analysis provides an overview of the economic, social and environmental impacts of the project.

20 Exhibit 23418-X0065, EWSI Response to Intervener Submissions, PDF page 7.

21 Exhibit 23418-X0066, Attachment 1 - HDR Sustainability Value Analysis.

22 Exhibit 23418-X0065, EWSI Response to Intervener Submissions 8-14-2018, PDF page 9.

23 Exhibit 23418-X0065, EWSI Response to Intervener Submissions 8-14-2018, PDF page 11.

24 23418-X0075, EWSI Response to AUC Request 12-21-2018, PDF page 3.

25 *Renewable Electricity Act*, SA 2016, c R-16.5, s 2(1).

26 Exhibit 23418-X0075, EWSI Response to AUC Request 12-21-2018, paragraph 6.

27 *Ibid*.

28 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (S.C.C.), paragraph 37.

29 *Ibid*.

30 *Ibid*, paragraph 49.

31 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., page 368; *Interpretation Act*, SA 2000, c I-8, s 13.

32 Decision 2014-110: *Alberta Electric System Operator, Re* [2014 CarswellAlta 648 (Alta. U.C.)], April 16, 2014, page 12, paragraph 43, citing *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26 (S.C.C.).

33 There are other exemptions from the general requirement to take distribution service from the applicable distribution facility owner that do not deal directly with self-generation activities, including self-distribution in certain circumstances under Section 24(1) of the *Hydro and Electric Energy Act* and direct service from the transmission system under Section 101(2) of the *Electric Utilities Act*.

34 *Government of Alberta*, Industrial Systems Policy Statement, June 1997, online: <https://open.alberta.ca/dataset/472de409-6000-4941-a37b-f9a301f5b7a3/resource/71e5c77d-7508-48f3-af2c-15998d360de3/download/industrialsystemspol97.pdf>.

35 Ibid, page 1.

36 Ibid, page 2.

37 Ibid, page 4.

38 Ibid.

39 See, for example, the Municipal Own-Use Generation Regulation.