March 7, 2007

Mr. Robert J. Pellatt
Commission Secretary
British Columbia Utilities Commission
Sixth Floor – 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Mr. Pellatt:

RE: British Columbia Utilities Commission
    Project No. 3698419
    British Columbia Hydro and Power Authority (BC Hydro)
    2006 Integrated Electricity Plan & Long Term Acquisition Plan

Enclosed is BC Hydro’s Reply Argument with respect to the above referenced proceeding.

Yours sincerely,

Joanna Sofield
Chief Regulatory Officer

Enclosure

c. Project 3698419 Intervenors
BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF THE UTILITIES COMMISSION ACT
R.S.B.C. 1996, Chapter 473

and

British Columbia Hydro and Power Authority
Project No. 3698419/BCUC Order No. G-37-06
2006 Integrated Electricity Plan and
Long-Term Acquisition Plan

Counsel’s Reply Argument
on Behalf of
British Columbia Hydro and Power Authority

March 7, 2007
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I. INTRODUCTION TO REPLY ARGUMENT

A. Introduction

On March 29, 2006, British Columbia Hydro and Power Authority (BC Hydro) filed its 2006 Integrated Electricity Plan (IEP) and Long-Term Acquisition Plan (LTAP) (collectively, the Application) with the British Columbia Utilities Commission (BCUC) pursuant to section 45(6.1) of the Utilities Commission Act¹ (UCA).

Eleven intervenors filed Argument in this proceeding on February 23, 2007:

- BC Old Age Pensioners Organization et al. (BCOAPO);
- British Columbia Transmission Corporation (BCTC);
- Commercial Energy Consumers Association of British Columbia (CEC);
- Columbia Power Corporation (CPC);
- ESVI Energy Solutions for Vancouver Island Society (ESVI);
- Independent Power Producers Association of British Columbia (IPPBC);
- Joint Industry Electricity Steering Committee (JIESC);
- Sierra Club of Canada (B.C. Chapter), B.C. Sustainable Energy Association and Peace Valley Environment Association (SCCBC);
- Terasen Gas Inc., Terasen Gas (Vancouver Island ) Inc. and Terasen Gas (Whistler) Inc. (Terasen);

¹ R.S.B.C. 1996, c.473. A copy of the UCA is found in BC Hydro’s Book of Authorities, Schedule B to the BC Hydro Argument, Tab 2.
1. Vanport Sterilizers Inc. (Vanport); and
2. World Federalists of Canada (Victoria Branch) (WFC).

With only one minor exception, no intervenor opposed the granting of the Order sought or the specific determinations requested by BC Hydro in the Application. All of the customer groups (BCAOPO, CEC and JIESC), CPC, SCCBC and Terasen generally support the Application. There is also general agreement amongst the parties that:

1) The action items contained in the LTAP are, to use JIESC’s words, “urgent and necessary” and should be dealt with by the BCUC now;

2) An evidentiary cut off date is required; and

3) The Lieutenant Governor of British Columbia’s (BC) 2007 Speech from the Throne (Throne Speech) and the recently released Energy Plan: A Vision for Clean Energy Leadership (Energy Plan II) are more appropriately dealt with as part of the next LTAP.

BC Hydro is encouraged by the submissions of BCOAPO and CEC concerning the Application, namely that it marks a significant improvement over previous applications, including “exhaustive efforts” made to review the planning process.
diligence in examining climate change and considerable lengths undertaken to engage stakeholders. BC Hydro agrees with BCOAPO that the regulatory review of the 2006 IEP/LTAP was a valuable step, but is also cognizant of JIESC’s comments that ways should be considered to streamline future IEP/LTAP proceedings. BC Hydro is of the view that its proposal for the regulatory review of future IEPs and LTAPs is a step in this direction, and is committed to engaging with intervenors on the topic of exploring additional efficiencies through the regulatory reform workshops envisioned by the F07/F08 Revenue Requirement Application (RRA) Negotiated Settlement Agreement and otherwise.

B. Reply Argument Outline

The Reply Argument is divided into three parts. Part I provides the introduction to BC Hydro’s Reply concerning the Application, and addresses the new evidence sought to be introduced by certain intervenors through their Arguments.

Part II focuses on the Throne Speech, and the implications of the Throne Speech on the LTAP action items specifically and BC Hydro’s activities more generally. Part II also identifies those items that BC Hydro anticipates addressing as part of the next LTAP filing.

In Part III of this Reply Argument BC Hydro responds to specific intervenor submissions that were not addressed in BC Hydro’s Argument of February 2, 2007 (BC Hydro Argument). Part III of the Reply, where possible, follows the textual (but not necessarily the numeric) headings in the BC Hydro Argument.

Where this Reply does not directly respond to an intervenor’s Argument, BC Hydro relies on the BC Hydro Argument, the Application, BC Hydro’s responses to

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7 Ibid, pg. 77.
8 Ibid, pgs. 7-8.
9 BCOAPO Argument, pg. 20, para. 120.
10 JIESC Argument, pg. 7.
11 Section 30 of the F07/F08 RRA Negotiated Settlement Agreement, attached to and approved pursuant to BCUC Order No. G-143-06.
Information Requests and the other exhibits filed in this proceeding in support of its position.

C. Introduction of New Evidence

Several intervenors have improperly attempted to introduce new evidence through final Argument. Examples include the following:

• IPPBC’s:
  ▶ Pronouncement that the IPPBC Board of Directors has reaffirmed its position that the 2007 Call evaluation criteria and electricity purchase agreements (EPAs) must be prepared and circulated to interested parties prior to the commencement of the negotiated settlement process (NSP);¹²

  ▶ Statements concerning the roles of Mr. Weimer and Mr. Davis in reviewing the proposed Alcan Inc. Amended and Restated Long Term Electricity Purchase Agreement (LTEPA+) term sheet, and in particular IPPBC’s assertion that the term sheet did not provide sufficient detail required for a commercial understanding of the LTEPA+ transaction;¹³ and

  ▶ Reference to the status of the establishment of noise emissions standards for wind turbines;¹⁴

• SCCBC’s assertion that carbon sequestration is not a “commercially viable established process”;¹⁵

• BCOAPO’s assertion that:

¹³ Ibid, pg. 25.
¹⁴ Ibid, pg. 46.
¹⁵ SCCBC Argument, pg. 5.
California recently adopted an allowed greenhouse gas (GHG) target for electricity production based on that produced by a modern combined cycle gas turbine (CCGT) plant, approximately .36 tonne/MWh. Powerex Corp. (Powerex) will make more than $200 million in trade income this year, and there has never been a twenty-year period of sustained strong economic growth in Canada.

While it may be that some of the new evidence adduced is relatively innocuous, nevertheless, as IPPBC, SCCBC and BCOAPO and others are surely aware, final Argument is not the place to introduce new evidence. Attempting to do so is particularly egregious where, as in the case of IPPBC, the new evidence directly contradicts the testimony provided by the intervenor’s own witnesses during the proceeding. The IPPBC Panel, comprised of three IPPBC directors, was visibly divided on the issue of grounding a NSP on pro forma EPAs. IPPBC’s assertions concerning the recent position adopted by its Board and the LTEPA+ term sheet are dealt with in more detail in Part III.A.2.a of the Reply. As no intervenor has requested that the record be re-opened to include the new evidence adduced, all such evidence does not properly form part of the record and accordingly should be given no weight by the BCUC in rendering its decision on the Application.

The Vanport submissions deserve specific comment in this regard. Mr. Tennant, on behalf of Vanport, expressly sought and was denied permission to file evidence related to the Jordan River pumped storage project. Vanport now seeks to adduce through final Argument project-specific evidence related to the Jordan River facilities:

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16 BCOAPO Argument, pg. 14, para 74.
17 Ibid, pg. 12, para 64.
19 See Tr. 23, pg. 3723, Ins. 2-10 and additional references set out in Part III.A.2.a of this Reply.
21 Tr. 8, p.863, ln. 6-15.
declared to be inadmissible in the evidentiary portion of the proceeding. This is highly improper and should not be permitted. Vanport further seeks to adduce evidence of asserted deficiencies in relation to the F2006 Call EPA executed between BC Hydro and Green Island Energy Ltd.\textsuperscript{22} With respect, Vanport’s opportunity to raise concerns in relation to that EPA was during the BCUC section 71 review of the F2006 Call EPAs. The BCUC accepted the F2006 Call EPAs for filing pursuant to section 71 of the \textit{UCA} on September 21, 2006.\textsuperscript{23} As such, issues related to a specific F2006 Call EPA are out of scope for this proceeding. BC Hydro respectfully submits that the Vanport Argument should be given no weight by the BCUC in rendering its decision on the Application.

\textsuperscript{22} Vanport Argument, pg. 3.

\textsuperscript{23} BCUC Order No. E-7-06. A copy of the BCUC’s \textit{Reasons for Decision: F2006 Call for Tenders Electricity Purchase Agreements} (September 21, 2006) (\textbf{F2006 Call Decision}) is found at Schedule B to the BC Hydro Argument, Tab 14.
II. THRONE SPEECH

On February 13, 2007, the Third Session of the 38th Parliament of the Province of BC opened with the Throne Speech. In that speech, the Lieutenant-Governor of BC outlined key elements of the Provincial Government’s agenda for the coming decade.

Relevant Throne Speech pronouncements include the following:

• “[The Province] will aim to reduce greenhouse gas emissions by at least 33 per cent below current levels by 2020”\(^\text{25}\)

• “The new energy plan will require British Columbia to be electricity self-sufficient by 2016”\(^\text{26}\)

• “All new and existing electricity produced in B.C. will be required to have net zero greenhouse gas emissions by 2016”\(^\text{27}\)

• “The energy plan will require that at least 90 per cent of [B.C.’s] electricity come from clean, renewable sources”\(^\text{28}\)

• “Effective immediately, B.C. will become the first jurisdiction in North America, if not the world, to require 100 per cent carbon sequestration for any coal-fired electricity project”\(^\text{29}\)

• “Your government will pursue British Columbia’s potential as a net exporter of clean, renewable energy”\(^\text{30}\)

\(^{24}\) Ex. A2-26.
\(^{26}\) Ibid, pg.16.
\(^{27}\) Ibid, pg. 17.
\(^{28}\) Ibid.
\(^{29}\) Ibid, pg. 17.
\(^{30}\) Ibid, pg.18.
• “Trees infested by the mountain pine beetle will be used to create new clean energy”\(^{31}\)

Demand side management (DSM)-related announcements include the following:

• “A new personal conservation ethic will form the core of citizen actions in the years ahead”\(^{32}\)

• “Incentives will be implemented to retrofit existing homes and buildings to make them more energy efficient”\(^{33}\)

• “New measures will be taken to help homeowners undertake ‘energy audits’ to show them where and how savings can be achieved”\(^{34}\)

• “A new unified BC Green Building Code will be developed over the next year with industry, professional, and community representatives”\(^{35}\)

• “New real-time, in-home smart metering will be launched to help homeowners measure and reduce their energy consumption”\(^{36}\)

A. Impact of Throne Speech on Order Sought

The BCUC Panel has accepted the Throne Speech as an exhibit in the 2006 IEP/LTAP proceeding and provided intervenors with the opportunity to make submissions on matters they believe arise out of the Throne Speech.\(^{37}\) Several intervenors have described the contents of the Throne Speech as a dramatic change.

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\(^{31}\) Ibid.

\(^{32}\) Ibid, pg. 16.

\(^{33}\) Ibid, pg. 22.

\(^{34}\) Ibid.

\(^{35}\) Ibid.

\(^{36}\) Ibid.

\(^{37}\) Ex. A-44, pg. 2.
to the public policy landscape.\(^{38}\) Despite being significant and potentially far-reaching, the Throne Speech pronouncements do not trigger a need for changes to either the Order sought or the specific determination requests contained in the LTAP.

BC Hydro respectfully submits that the LTAP actions remain appropriate in light of the Throne Speech – indeed, as highlighted by several intervenors,\(^ {39}\) the Throne Speech directionally supports the need for BC Hydro to proceed with the LTAP initiatives. The initiatives identified in the Throne Speech address risks and uncertainties identified by BC Hydro through the 2006 IEP analysis such as the future costs of, or constraints on GHG emissions,\(^ {40}\) and serve to reinforce the resource option choices made by BC Hydro in its LTAP.

The Throne Speech does not alter the fundamental need for new resources to meet customer demand in the future. As demonstrated by the load-resource gap,\(^ {41}\) with the inclusion of the F2006 Call results but prior to the implementation of the LTAP, approximately 7,400 – 11,600 gigawatt hours per year (GWh/y) of energy and 1,000 - 1,800 megawatts (MW) of capacity are required to fill the gap between load and existing resources at the end of F2015. This basic need is substantial, urgent and was not seriously challenged by any intervenor. BC Hydro’s detailed submissions with respect the load/resource gap issues raised by various intervenors are set out in Part III.B.1 of this Reply.

BC Hydro considers the implications of the Throne Speech announcements on each of the requested determinations below and concludes that no changes should be made to the requested Order.

- An Order stating that the LTAP meets the requirements of section 45(6.1) of the UCA

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\(^{38}\) See for example, SCCBC Argument, pg. 3; and Ex. C15-8, JIESC letter of February 14, 2007, pg. 1.

\(^{39}\) JIESC Argument, pg. 1; CEC Argument, pg. 54; Terasen Argument, pgs. 2-3, para.6.

\(^{40}\) Early in the proceeding, BC Hydro identified GHG risk as one of the two biggest risks facing BC Hydro. See Ex. B-32, pg. 5.

\(^{41}\) Ex. B-44, pgs. 4-5; see also BC Hydro Argument, pgs. 25 – 26.
The Throne Speech has no impact on BC Hydro’s request for an Order stating that the LTAP meets the requirements of section 45(6.1) of the UCA. Part III.A of the BC Hydro Argument details how the LTAP meets the requirements of section 45(6.1) of the UCA and will not be repeated here. No intervenor argued that the LTAP, together with BC Hydro’s capital plans and major project expenditure determination requests, do not satisfy the requirements of section 45(6.1) of the UCA.

- A determination under subsection 45(6.2)(b) of the UCA that expenditures of $1.7 million required to undertake and complete the Definition phase work of Energy Efficiency (EE)3, 4 and 5, including completion of an updated Conservation Potential Review (CPR), are in the interests of persons within BC who receive, or who may receive, service from BC Hydro

BC Hydro agrees with CEC,42 Terasen,43 SCCBC44 and ESVI45 that the Throne Speech emphasizes conservation and that EE3, 4 and 5 are directionally consistent with the Throne Speech.

It is undisputed that DSM is a potentially cost-effective resource that mitigates exposure to cost risk associated with natural gas and electricity prices, GHG offset scenarios, and reduces transmission costs and avoids siting risk. DSM is a key element of BC Hydro’s resource acquisition strategy. BC Hydro’s current EE3, 4 and 5 plans are based on aggressive energy savings targets derived from the 2002 CPR.46 Completion of a new CPR will work to identify remaining DSM potential available as compared to the 2002 CPR. BC Hydro strongly agrees with SCCBC that the scope of the 2007 CPR must include a more comprehensive understanding of the potential associated with behaviour and lifestyle changes and that the Throne Speech emphasis

42 CEC Argument, pg. 34. CEC argues that the EE3, 4 and 5 targets may need to be revised upward in light of the Throne Speech.
43 Terasen Argument, pgs. 5-6.
44 SCCBC Argument, pgs. 5, 8 and 9.
45 ESVI Argument, pg. 10. ESVI, like CEC, argues that the EE3, 4 and 5 targets may need to be revised upward in light of the Throne Speech.
46 Ex. B-10, BC Hydro response to SCCBC IR 1.57.2.
on “a personal conservation ethic” is one more reason why the 2007 CPR should be scoped in this way.\textsuperscript{47}

Any changes to forecasts of cost-effective volumes of DSM as a result of the 2007 CPR and the Definition phase of EE3, 4 and 5 will be reflected in the next LTAP.\textsuperscript{48} In any event, the $1.7 million is required to complete the Definition phase work for BC Hydro to have the best information to implement a DSM plan capable of achieving the desired objectives. The proposed expenditure is clearly in the interests of persons within BC who receive, or who may receive, service from BC Hydro.

- A determination under subsection 45(6.2)(b) of the UCA that expenditures of $0.8 million for the electricity savings associated with the Greater Vancouver Water District (GVWD) micro-hydro Load Displacement (LD) 2 project are in the interests of persons within BC who receive, or who may receive, service from BC Hydro

The GVWD micro-hydro LD2 project represents a specific DSM initiative that will reduce energy demand. The project, which resulted out of a formal, competitive request for proposal process,\textsuperscript{49} represents a valuable project that either met or exceeded all of the prescribed eligibility criteria,\textsuperscript{50} and is demonstrably cost-effective: the project has a price of energy significantly below the 2003 Green Call Reference Price, the F2006 Call Reference Price and the electricity price forecasts.\textsuperscript{51} The GVWD micro-hydro LD2 project aligns with the Throne Speech in that it meets the BC Clean Electricity requirements and accordingly assists in meeting the 90% clean, renewable target, and does not emit GHGs. Neither the BCUC nor any intervenor raised the proposed project during the oral phase of the proceeding and no intervenor contested approval of the proposed project in Argument. This LD project represents a cost-effective component of the suite of DSM initiatives available to reduce the load resource gap and should be approved for implementation.

\textsuperscript{47} For other reasons, see BC Hydro Argument, pgs. 81 and 82 (and in particular, footnote 377, and the references to Tr. 20, 21 and 22).

\textsuperscript{48} BC Hydro Argument, pg. 57 (see Tr. 8, pg. 1069, ln. 17 to pg. 1070, ln. 3).

\textsuperscript{49} Ex. B-1E, Appendix M, pg. 2.

\textsuperscript{50} Ex. B-1E, Appendix M, Table 2.

\textsuperscript{51} Ex. B-17-3, BC Hydro response to BCUC IR 4.427.1; Ex. B-1E, Appendix M, pg. 7.
• A determination under subsection 45(6.2)(b) of the UCA that expenditures of $2,875,000 required to undertake and complete the Identification, Definition and Implementation phase work for the 2007 Call are in the interests of persons within BC who receive, or who may receive, service from BC Hydro

The 2002 Energy Plan directs that new supply is to be largely provided by the private sector. The Throne Speech does not suggest any change to this direction. As such, independent power producer (IPP) projects and other third party supply will continue to be a key resource alternative in satisfying the need for new resources to meet customer demand.

The need for an open, “all-source” call for resources sufficiently large to attract large projects has not diminished with the Throne Speech. While the Throne Speech signals a change to the voluntary 50% BC Clean Energy target established in the 2002 Energy Plan, no new resource options have been banned. To ensure the most cost-effective call process, detailed call design analysis is essential to assess the risks presented by the proposed Throne Speech GHG requirements and how those risks are best addressed. It will also be necessary to consider the Throne Speech pronouncement that at least 90 per cent of electricity is to come from “clean, renewable” sources. BC Hydro will be engaging IPPBC, individual IPPs, customer intervenors and other stakeholders in the design of the 2007 Call. The potential for increased F2006 Call attrition due to the Throne Speech requirement that coal-fired generation projects must sequester GHG emissions and the potential for a narrower range of resource options are issues that will need to be addressed as part of the proposed 2007 Call NSP and the next LTAP.

• A determination under subsection 45(6.2)(b) of the UCA that expenditures of $520,000 required to undertake and complete the Identification phase work for the 2009 Call are in the interests of persons within BC who receive, or who may receive, service from BC Hydro

53 Ex. A2-26, at pg. 17.
54 The 2002 Energy Plan (supra, note 52, pg. 25) banned nuclear power in BC. The Throne Speech does not signal a change in nuclear power policy.
While the details of the 2009 Call will be further developed in the next LTAP, the stringent GHG sequestration and offset requirements signaled by the Throne Speech suggest that advance 2009 Call design work would be an asset to designing what is likely to become another very important call for resources.

- A determination under subsection 45(6.2)(b) of the UCA that expenditures of $12.5 million in F2007 and F2008 required to complete the Definition phase of Revelstoke Unit 5 are in the interests of persons within BC who receive, or who may receive, service from BC Hydro.

The evidence is uncontradicted that Revelstoke Unit 5 is a long-term, low environmental impact, cost-effective capacity resource that provides unique and significant benefits, and is required for system reliability purposes on or before its earliest possible in-service date. The evidence in support of this position is compelling, and is summarized in the BC Hydro Argument at Part III.B.3.a. All intervenors making submissions on Revelstoke Unit 5 support the project. Noteworthy in this regard is the customer group support. JIESC “strongly supports” Revelstoke Unit 5, BCOAPO also “strongly supports” Revelstoke Unit 5, and CEC “supports BC Hydro moving ahead quickly with the Revelstoke 5 Unit to a [Certificate of Public Convenience and Necessity (CPCN)] Application”. IPPBC also supports Revelstoke Unit 5.

Revelstoke Unit 5 aligns with the Throne Speech in that it is a BC Clean Electricity project, does not emit GHGs, makes more efficient use of water and with the net increase in generation, will assist BC Hydro in meeting the Provincial requirement that BC be electricity self-sufficient by 2016. The implications of the Throne Speech, together with the new peak load forecast and the rejection of LTEPA+, accelerate the already pressing need for the capacity that will be provided by Revelstoke Unit 5. The potential for increased F2006 Call attrition and a potentially narrower range of resource

55 JIESC Argument, pg. 20.
56 BCOAPO Argument, pg. 18, para. 101. See also pg. 10, para. 53 and pg. 13, para. 66.
57 CEC Argument, pg. 54.
58 Tr. 15, pg. 2383, Ins. 5-6.
59 While Revelstoke Unit 5 is a capacity project and would provide 480 MW of very long term dependable capacity, it would increase Revelstoke Generating Station’s annual average generation by 140 GWh/yr: Ex. B-1E, pg. 8-36, Ins. 18-19.
options as a result of the stringent GHG sequestration and offset requirements proposed in the Throne Speech suggests that Revelstoke Unit 5 may be needed even more urgently than initially anticipated. In addition, if the 90 per cent clean, renewable Throne Speech target leads to the greater acquisition of intermittent resources, the 2006 IEP portfolio analysis demonstrates that additional capacity will be required.\textsuperscript{60}

While the Throne Speech does not trigger any change to the Order sought or determinations requested in the Application, as described above, it is expected to directionally lead to an increased need for capacity. In response to this added urgency and at the request of significant customer groups to fast track Revelstoke Unit 5,\textsuperscript{61} BC Hydro advises that it intends to file a CPCN application for Revelstoke Unit 5 prior to receipt of the BCUC’s decision concerning the 2006 IEP/LTAP. Subsequent to the filing of their Arguments, JIESC\textsuperscript{62} and BCOAPO\textsuperscript{63} have written to the BCUC submitting that it would be prudent for BC Hydro to file the Revelstoke Unit 5 CPCN application in advance of the BCUC’s decision on the LTAP.

- A determination under subsection 45(6.2)(b) of the \textit{UCA} that expenditures of $1.0 million in F2007 and $2.0 million in F2008 required to complete the Identification and Definition phase work for the next Revelstoke or Mica Unit are in the interests of persons within BC who receive, or who may receive, service from BC Hydro.

For the same reasons set out above with respect to the need for Revelstoke Unit 5, advancement of one of Revelstoke Unit 6 or Mica Unit 5 is urgent. The Investigation and Definition phase work related to Revelstoke Unit 6 and Mica Unit 5 is critical to ensure that the most appropriate capacity project is selected to be developed next, and that upcoming Resource Smart capacity projects are maintained at the appropriate development stage to help meet reliability requirements, augment IPP supply contributions and maintain operational flexibility in a GHG-free manner. The

\begin{itemize}
\item \textsuperscript{60} Ex. B-1A, pg. 7-4, Table 7-1.
\item \textsuperscript{61} JIESC Argument, pgs. 2, 17 and 20; CEC Argument, pgs. 54-55.
\item \textsuperscript{62} Ex. C15-10: “The JIESC also confirms that it supports BC Hydro filing a CPCN for Revelstoke Unit 5 in advance of receipt of the 2006 IEP/LTAP Decision. As indicated in the JIESC’s Final Argument, Revelstoke 5 is economic and urgently required”.
\item \textsuperscript{63} Ex. C4-20: “we agree it would be prudent for BC Hydro to file a CPCN Application concerning Revelstoke 5 … without waiting on the Commission’s decision in the LTAP”.
\end{itemize}
next capacity enhancements may be required for system reliability purposes as early
as F2013,\footnote{Ex. B-146.} or possibly earlier in light of the Throne Speech pronouncements.

The proposed expenditures to move the Revelstoke Unit 5 and Revelstoke Unit 6/Mica Unit 5 projects forward are clearly in the interests of persons within BC who receive, or who may receive, services from BC Hydro and should be approved.

- Approves the submission of the transmission LTAP plan and Contingency Resource Plans (CRPs) for inclusion in BC Hydro’s 2006 Network Integrated Transmission Service (NITS) update/application

While BC Hydro has not had the opportunity to fully consider potential implications to the transmission LTAP plan and CRPs as a result of the Throne Speech pronouncements, BC Hydro remains convinced that the proposed CRPs, with the additional clarity provided by the BC Hydro/BCTC joint letter (\textit{Joint Letter}),\footnote{Ex. B-102.} address the reasonable long term planning risks and uncertainties that need to be planned for in relation to BC Hydro’s obligation to supply service to both existing customers and new customers in an uncertain future, and are appropriate for inclusion in the upcoming NITS application.

Each of BCOAPO\footnote{BCOAPO Argument, pg. 19, para 110.}, CEC\footnote{CEC Argument, pg. 60.} and JIESC\footnote{JIESC Argument, pg. 21.} expressly support BC Hydro in this regard. In any event, the regulatory mechanisms in place provide ample opportunity for regulatory review of the transmission-related components of BC Hydro’s CRPs after the BCUC has approved those CRPs for submission in a NITS application. The ongoing regulatory review mechanisms are detailed in Part III.C.1.b of the BC Hydro Argument. BC Hydro’s specific response to the BCTC Argument is set out below in Part III.C.3 of the Reply.
• Burrard Thermal Generating Station (Burrard)

With respect to Burrard, BC Hydro acknowledges that any future plans for Burrard will require careful consideration in light of the proposed net-zero GHG offset and the 90 per cent clean, renewable pronouncements wet out in the Throne Speech. The proposed GHG targets are likely to add to the cost of operating Burrard as currently configured, and also add to the cost of any repowering of Burrard. Irrespective of future potential added costs, the choice to repower Burrard remains BC Hydro’s, not the BCUC’s, for the reasons outlined in Part I.C.2.a and III.B.5.b of the BC Hydro Argument and in Part III.A.1 of the Reply.

B. Impact of Throne Speech on BC Hydro Request for Additional BCUC Endorsement/Commentary

While the Throne Speech pronouncements do not trigger a need for changes to either the Order sought or the specific determination requests contained in the LTAP, they do give rise to the need to reconsider the value in certain of the BC Hydro requests for BCUC endorsement and/or commentary. Part I.C.1.b of the BC Hydro Argument contains the initial request for additional BCUC endorsement and commentary.

Post-Throne Speech, BC Hydro continues to seek the following:

• BCUC endorsement of BC Hydro’s future regulatory review process proposal, as described in Part IV of the BC Hydro Argument;

• BCUC comment on the BC Hydro Project Evaluation Methodology, including revision to the BCUC’s decision with respect to the Vancouver Island Generation Project, as described in Part I.C.1.b(ii);

• BCUC endorsement of the specific project evaluation economic measures outlined at Part I.C.1.b(ii) of the BC Hydro Argument; and

69 BCUC Order No. G-55-03, Reasons for Decision: Application for a Certificate of Public Convenience and Necessity for Vancouver Island Generation Project (September 8, 2003), pgs. 33-35 (VIGP Decision), a copy of which is found in Schedule B to the BC Hydro Argument, Tab 8.
• BCUC comment on the 2006 IEP planning objectives of maximizing reliability, minimizing financial costs of energy production over the 20 year planning horizon and minimizing environmental risk, as described at Parts I.C.1.b(iii) and II.B.2 of the BC Hydro Argument.

To be clear, BC Hydro no longer seeks BCUC comment in relation to any proposed aspect of the 2007 Call design. Instead, BC Hydro agrees with JIESC that in today’s circumstances, all features of the 2007 Call are best addressed through First Nations and stakeholder engagement and the proposed NSP, where the complex details and delicate trade-offs involved can be properly weighed and considered to design the most competitive and cost-effective call possible. As set out in the BC Hydro Argument, the BCUC will be afforded an opportunity to provide comment on the 2007 Call terms sheet and mandatory criteria whether or not the NSP results in a Negotiated Settlement Agreement.

C. Need to Close Record

BC Hydro agrees with the submissions of various intervenors that the advent of the Throne Speech does not call for the 2006 IEP and LTAP to be rewritten, as the LTAP aligns with the Throne Speech. The practice of integrated electricity planning must be dynamic and adaptive to changing circumstances if it is to meet its objective of guiding resource choices to the most cost-effective and risk-appropriate alternatives. BC Hydro developed the 2006 IEP and the LTAP against a backdrop of continuing market, regulatory and structural changes in the electric power industry. The Throne Speech represents another input into this iterative process that sets out, in broad brush strokes, the Provincial Government’s goals and aspirations for the Province of BC.

70 JIESC Argument, pg.18.
71 BC Hydro Argument, pg. 91, Ins. 8-13.
72 SCCBC Argument, pg. 3; JIESC Argument, pgs. 1-2; CEC Argument, pg. 13; CPC Argument, pg. 2.
The importance of BC Hydro’s pursuit of secure supply, an objective that aligns with the Provincial Government policy of self-sufficiency, cannot be overemphasized. As highlighted by Mr. Elton in his opening remarks:

“We are talking about plans to meet domestic customer demand far into the future, and that future is sure to be different than we expect it, and we cannot afford to come up short. If through time it becomes apparent that some projects can be delayed or have their scope reduced, so be it. Those are actions that can be taken as appropriate. However, the reverse cannot happen. We won’t be able to depend on resources that don’t exist.”

The LTAP aligns with the Throne Speech and accordingly BC Hydro submits that the Throne Speech should not be used to further delay urgently needed actions to help secure the resources needed to meet future customer demand. The actions proposed in the LTAP are consistent with both the 2002 Energy Plan and BC Hydro’s interpretation of the Province’s commitment to self-sufficiency.

ESVI’s submissions in this regard are remarkable. While the vast majority of intervenors advocate closing the record and addressing the policy items contained in the Throne Speech and Energy Plan II as part of the next LTAP, in its Final Argument, ESVI requests various updated statements and/or recalculations by BC Hydro. In effect, ESVI seeks a re-opening of the record to allow BC Hydro to file a large volume of new evidence in Reply Argument, presumably without affording parties any opportunity to either test or respond to the new evidence.

BC Hydro declines ESVI’s requests for two reasons. First, it is not possible to complete the significant recalculations and updated statements requested within the time available. Second and more fundamentally, even if it were possible to complete the work requested in the allotted time, it is not appropriate to introduce new evidence at the argument stage of a proceeding as discussed previously, leaving parties no opportunity to test that new evidence. With respect, the place to consider the need for

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73 Tr. 7, pg. 634, ln. 22 to pg. 635, ln. 4.
74 ESVI Final Argument, pg. 2.
75 ESVI itself characterizes the requests as “burdensome”: ESVI Final Argument, pg. 2.
potential changes to BC Hydro’s integrated resource plans and action items in light of
the Throne Speech concepts and Energy Plan II is as part of the next LTAP.

To repeat, BC Hydro agrees with the vast majority of intervenors that the record in this
proceeding should be closed, and respectfully submits that the BCUC issue the Order
sought and determinations requested in this matter expeditiously. The Throne Speech
announcements and Energy Plan II specifics will be addressed in a timely way as part
of the next LTAP.

D. The Next LTAP Filing

1. Content of Next LTAP

In its submission of February 28, 2007, BC Hydro committed to examining the effects
of both the Throne Speech and Energy Plan II in the next LTAP. JIESC requests that
the BCUC direct BC Hydro to: (1) “revisit, not redo”, and file with the next LTAP an IEP
“update” examining the effects of new Provincial Government policies; (2) ensure the
next LTAP addresses the issues arising out of the Throne Speech and Energy Plan II;
(3) proceed with the projects for which authorization was sought in the 2006 LTAP on
the basis that all such projects appear to be consistent with the Throne Speech; and
(4) proceed with the 2007 Call consultations and NSP utilizing the most recent Site C
costs as a test for cost-effectiveness.

BC Hydro generally agrees that the next LTAP should address JIESC requests (1) and
(2), but does not believe a BCUC direction is required. JIESC request (3) would be
addressed if the BCUC grants BC Hydro’s requested Order. BC Hydro is of the view
that JIESC request (4) may have merit but is a matter for the 2007 Call NSP, and
respectfully submits that any BCUC direction at this time on what cost-effectiveness
benchmarks should be used in the 2007 Call evaluation would be premature and
counter-productive.

76 Ex. B-151.
77 JIESC Argument, pgs. 4 and 5.
In addition to providing an update on the 2006 LTAP action items, BC Hydro proposes to undertake as part of and incorporate into the next LTAP the following:
• **Resource options update:**

  - The then-current status of the availability of cost-effective DSM to meet new Provincial Government targets.

  - The current status of carbon sequestration technology development to gauge the likelihood of coal-fired generation development and the associated costs.

  - The impact of the 100 per cent GHG offset and 90 per cent clean, renewable Throne Speech pronouncements on the operating costs and availability of natural gas-fired generation projects. BC Hydro may need to develop several scenarios if the Provincial Government GHG reduction targets and offset eligibility have not been clarified before the next LTAP. This will include an assessment of Burrard’s operating costs.

  - Wind integration: While the 2005 Resource Options Report (ROR) confirms there is good potential for wind in British Columbia,\(^78\) there may be a limit to how much BC Hydro’s system can absorb. The evidence is clear that other jurisdictions are grappling with this question,\(^79\) and some have capped the volume of wind at approximately 10% of system capacity.\(^80\) BC Hydro will be continually revisiting its evaluation and methods of wind integration as it (1) develops wind resource data; (2) further studies wind impacts in BC; and (3) gains wind operational experience. BC Hydro is considering these issues as part of the 2007 Call design and will need to design and implement studies that can be completed and can add value given that no wind generation projects yet exist in the Province. A comprehensive quantitative wind study of the integration of “actual wind generation into the

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\(^78\) Ex. B-1B, App. F, pgs. 7-28 to 7-34.

\(^79\) See the wind integration cost studies and references attached to Ex. C25-14B, SCCBC Response to BC Hydro IR 1.1.

\(^80\) Tr. 21, pg. 3326, Ins. 1-10.
actual BC Hydro system may not be complete or even possible before the 2007 Call issuance, in which case it may be prudent to adopt conservative assumptions based on information available for wind acquisitions employed by jurisdictions similar to BC Hydro’s system.

- An assessment of the energy and capacity potential for biomass energy from woodwaste and beetle-killed lumber.

- The volumes of firm energy and dependable capacity contributed by clean, intermittent resources on a portfolio basis.

- Examination of large energy supply sources, including Site C, in addition to clean, renewable resource potential. With respect to Site C, BC Hydro intends to file its Stage 1 report with the BCUC, and will report on the preliminary Stage 2 work, as part of the next LTAP. BC Hydro does not agree with SCCBC’s assertion that the fact that the Throne Speech does not mention Site C by name means that Site C is “not a viable resource option” and sees no need for it to act on SCCBC’s unusual and premature request that BC Hydro take Site C out of the 2010 IEP resource portfolios.

- **Updated load/resource gap analysis:**

  - A new load forecast, an update on existing and committed supply and demand-side resources, including any new information on attrition from the F2006 Call and, as practicable, incorporating any new EE3, 4 and 5 targets resulting from the Definition phase work and 2007 CPR. Included with this update will also be an assessment of the new Provincial Government conservation target.

It is too early to determine the need to update portfolio sensitivity analysis.

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81 This description of the wind integration study is borrowed from SCCBC’s Argument, pg. 17.

82 SCCBC Argument, pg. 21.
BC Hydro is committed to consulting with intervenors on the scope of the next LTAP.

2. Filing Date of the Next LTAP

SCCBC is isolated in its request\textsuperscript{83} that the BCUC mandate specific dates for the filing of the next LTAP and indeed for the next full IEP four years from now. No other intervenor supports this request. It is also noteworthy that SCCBC is unable to point to any jurisdiction in which the regulator imposes specific dates for the filing of Integrated Resource Plans (IRPs) and other electric utility long-term plans.

BC Hydro is of the view that the mandating of specific filing dates would not be a useful exercise and that what matters is that, to the extent possible, there is an appropriate filing cycle that ensures LTAPs are meaningful and are effectively coordinated with other regulatory filings such as BCTC’s Transmission Capital Plans and BC Hydro’s own Capital Plans and RRAs. BC Hydro submits that BCUC-mandated specific LTAP filing dates potentially undermine both of these objectives.

It is the need to maintain some flexibility with respect to the next LTAP filing date that lies at the heart of the difference between BC Hydro and several intervenors such as JIESC, CEC and Terasen on the one hand, and SCCBC on the other hand. Clearly, to be meaningful, the next LTAP must:

(1) Address the Throne Speech, Energy Plan II and other, ongoing related Provincial Government policy developments such as the Climate Change Plan;

(2) Be timed to provide sufficient time to effectively incorporate the changed conditions and to allow for informed resource decisions. SCCBC,\textsuperscript{84} as well as the vast majority of other intervenors, support this position; and

\textsuperscript{83} SCCBC Argument, p.31.
\textsuperscript{84} Ibid, pg. 3
(3) Be available to inform the significant decisions that are expected to be needed to effectively meet the load/resource gap while respecting Provincial Government policies.

Currently, there is uncertainty as to when the Climate Change Plan will be released, and whether there will be any follow-up Energy Plan II actions in the form of specific GHG regulations or directions to the BCUC. These Provincial Government documents impact not only the next LTAP, but as SCCBC itself points out, the allocation of GHG risk in the 2007 Call\(^\text{85}\) and potentially other elements of the LTAP action items such as the EE3, 4 and 5 targets. BC Hydro requires some flexibility with respect to the next LTAP filing date so as to ensure it can adequately analyze and plan for these Provincial Government policy developments.

SCCBC’s contention that EE3, 4 and 5 Definition phase work, the 2007 CPR and presumably other Definition phase work and acquisition processes can be forced to conform with a BCUC mandated LTAP filing date\(^\text{86}\) is not realistic, and if implemented could result in sub-optimal analysis and resulting acquisition plans. The 2007 CPR is the subject of First Nations and stakeholder consultation through the CPR External Review Panel, as is EE3, 4 and 5 through the Electricity Conservation and Efficiency Advisory Committee.\(^\text{87}\) Artificial timelines could impact the amount of First Nations and stakeholder engagement BC Hydro wishes to undertake with respect to these DSM initiatives. BC Hydro is of the view that intervenors and other stakeholders bring valuable experience and knowledge that could be lost if BC Hydro were forced to curtail its engagement processes for the purpose of meeting a specific LTAP filing date. Alternatively, a mandated specific LTAP filing date could preclude modifying acquisition targets based on the more current estimate of DSM achievability and pricing information.

\(^{85}\) Ibid, pg. 6.
\(^{86}\) Ibid, pg. 34.
\(^{87}\) Tr. 30, pg. 3077, Ins. 9-13.
To be fair, SCCBC recognizes that some flexibility is required and addresses this by way of a proposed requirement that BC Hydro apply to the BCUC, with public notice, for “approval” to delay a scheduled LTAP filing request. BC Hydro believes that SCCBC’s proposed system of approval applications will only result in yet more process. Presumably, the BCUC would provide interested parties with an opportunity to comment on any BC Hydro delay approval request, which in turn would require a BC Hydro response. This additional process will add to the costs and time taken for regulatory review.

BC Hydro submits that its filing cycle proposal – namely, a two year filing cycle for LTAPs, with the filing of the next LTAP sometime in the late Fall of 2007 – yields a sensible balance between BC Hydro’s need to manage its business and the BCUC and stakeholders’ need to ensure that business is being managed in the public interest, is otherwise appropriate for the reasons set out at pages 132 to 133 of the BC Hydro Argument, and is supported by the majority of intervenors that made submissions on this issue. BC Hydro proposes to consult with intervenors as to whether the next LTAP should be a separate filing or form part of the next RRA, currently scheduled for January 2008, in which case it would be filed in January 2008.

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88 JIESC Argument, pg. 5; Terasen Argument, pgs. 12-13, para. 32; CEC Argument, pg. 87. The only other intervenor that opined on this issue is SCCBC.
III. SPECIFIC REPLY

A. Role of the BCUC

In this section, BC Hydro addresses:

1. The BCOAPO and CEC submissions with respect to the BCUC’s supervisory role pursuant to sections 45(6.1) and (6.2) of the UCA;

2. The requests by IPPBC, BCOAPO and CEC for specific binding BCUC directives; and

3. The submissions of BCOAPO concerning the weight the BCUC should attach to the Provincial Government’s commitment to self sufficiency.

In each case, BC Hydro submits that the matter should be disposed of in the manner requested by BC Hydro based on the evidentiary record. However, we have also included submissions on whether the BCUC has the jurisdiction to grant the requested directives.

1. General Comments Concerning BCUC Role

Both the BCOAPO and CEC Arguments address the BCUC’s role in reviewing plans filed pursuant to section 45(6.1) of the UCA. BC Hydro is of the view that the three parties are not as far apart on this topic as they may first seem.

a. Evidentiary Record Concerning Resource Options and Repowering Burrard

It must be remembered that BC Hydro raised the issue of the limits of the BCUC’s jurisdiction in reviewing section 45(6.1) plans in the context of the BCUC mandating specific resource options and/or choosing specific resource options for further examination in general, and the repowering of Burrard in particular. With respect to the LTAP, BC Hydro submits that it has considered all of the reasonable resource options,

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89 BCOAPO Argument, pgs. 7 – 10; CEC Argument, pgs. 9 – 13.
including the repowering of Burrard, and that accordingly its requested LTAP Order
ought to be granted. As set out above, with the exception of BCOAPO’s opposition to
the 2009 Call determination request, both BCOAPO and CEC support BC Hydro’s
requested Order.

No intervenor, including BCOAPO and CEC, contends that BC Hydro has failed to
properly consider an alternative, and all intervenors who addressed the repowering of
Burrard in their Argument agreed with BC Hydro that this is not the time to pursue the
repowering of Burrard.\(^{90}\) BC Hydro respectfully submits that in light of the
overwhelming, uncontradicted evidence as to the many reasons why BC Hydro is not
proceeding with repowering Burrard at this time, and in light of evolving Provincial
Government policy, the BCUC should refrain from directing BC Hydro to further
investigate the repowering of Burrard.

Further, BC Hydro agrees with JIESC that repower Burrard is not the next economic
alternative.\(^{91}\) The cost-effectiveness of Burrard as currently configured, and of repower
Burrard,\(^ {92}\) has been altered by the 100 per cent GHG offset requirement for existing
and new natural gas-fired generation signalled by the Throne Speech. This is an issue
that BC Hydro will investigate in the next LTAP or as part of the 2007 Call Definition
phase work. The remainder of this part of the Reply responds to BCOAPO’s and
CEC’s submissions concerning the BCUC’s jurisdiction to either mandate or further
investigate certain resource options.

**b. Areas of Agreement on BCUC Section 45(6.1) Plan Jurisdiction**

**Section 45(6.1)**

Among other things, BC Hydro is seeking in its requested Order BCUC confirmation
that the LTAP meets the requirements of section 45(6.1) of the *UCA*. BC Hydro agrees
with CEC that as part of arriving at a decision as to whether the LTAP meets the

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\(^{90}\) SC CBC Argument, pgs. 21-22; JIESC Argument, pgs. 15-16; CEC Argument, pg. 50; CPC Argument,
pg. 8; IPPBC Argument, pgs. 18-20.

\(^{91}\) JIESC Argument, pg. 16.

\(^{92}\) As depicted in Ex. B-17-3, BC Hydro responses to BCUC IRs 4.451.3 and 4.451.4 respectively.
requirements of section 45(6.1) of the UCA, the BCUC can and should give direction to
BC Hydro "as to whether expenditures may in the future be seen as prudent". BC Hydro also agrees with both CEC and BCOAPO that as part of its section 45(6.1) review the BCUC can make its views known as to the prudency of the overall LTAP and its expectations for future LTAP filings if the BCUC is of the view that a particular resource option has not been properly analyzed, and that BC Hydro then takes the risk in future RRA prudency and LTAP reviews.

Section 45(6.2)

BC Hydro, BCOAPO and CEC all appear to agree that pursuant to section 45(6.2)(b) of the UCA, the BCUC clearly has the power to either approve or deny plan expenditures on the basis that they are or are not in the interests of persons within BC who receive, or who may receive, service from BC Hydro. BC Hydro agrees with BCOAPO that pursuant to section 45(6.2)(b) of the UCA the BCUC may deny a particular expenditure determination request on the basis that BC Hydro has not adequately considered the alternatives.

c. Differences between BC Hydro, BCOAPO and CEC

The principal differences between BC Hydro on the one hand and BCOAPO and CEC on the other hand appear to be limited to:


2) The jurisdiction of the BCUC to direct as opposed to suggest that BC Hydro consider and pursue, for example, the repowering of Burrard or any other

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93 CEC Argument, pg. 9.
94 CEC Argument, pg. 11.
95 BCOAPO Argument, pg. 10, para. 48.
96 [1996] BCJ 379, found at Tab 13 of BC Hydro’s Book of Authorities, Schedule B to BC Hydro’s Argument.
resource option the BCUC felt should form a part of BC Hydro’s long-term plans.

BC Hydro submits that the BC Court of Appeal’s ruling that the BCUC derives its jurisdiction solely from the provisions of the *UCA* and that there is no need to imply terms remains very relevant. Both CEC and BCOAPO cite the BC *Interpretation Act* to urge the BCUC to broadly interpret sections 45(6.1) and 45(6.2) of the *UCA*.

BC Hydro respectfully submits that a “liberal” reading of both sections 45(6.1) and 45(6.2) cannot override section 5 of the *Hydro and Power Authority Act*, which specifically allocates to the BC Hydro Board of Directors the initial responsibility for long-term planning, among other things. Moreover, BC Hydro submits that the BCUC would fall into error if it were to imply terms in sections 45(6.1) and 45(6.2) to allow it to substitute its judgment for that of BC Hydro’s Board of Directors and management as to what resource options ought to be examined and pursued by way of a binding directive.

Both BCOAPO and CEC appear to be stating that the BCUC should imply into the wording of section 45(6.2) the power to direct BC Hydro to examine certain resource options in future plans. However, in BC Hydro’s respectful submission, the BC Court of Appeal in the IRP Decision specifically rejected the argument that terms should be implied into the *UCA*.

BCOAPO cites the Supreme Court of Canada case of *Re Rizzo & Rizzo Shoes Ltd.* BC Hydro agrees that that case stands firmly behind the principle of statutory interpretation which emphasizes that statutory language must be given its plain, ordinary meaning with reference to the objects of the statute. BCOAPO goes on to cite the phrase “review of a plan” to suggest that somehow this permits the BCUC to “direct BC Hydro to return to the drawing board” with respect to a particular resource option.

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98 R.S.B.C. 1996, c.238, section 8. The text of section 8 is cited at pgs. 10 to 11 of the CEC Argument.
99 R.S.B.C. 1996, c.212. A copy of the *Hydro and Power Authority Act* is attached as Tab 1 to BC Hydro’s Book of Authorities, Schedule B to the BC Hydro Argument.
BC Hydro submits that the plain, ordinary meaning of the phrase “establish a process to review” a section 45(6.1) plan, contained in subsection 45(6.2)(a) of the UCA and nowhere else in either section 45(6.1) or section 45(6.2), cannot be tortured and artificially extended to imply a power to direct BC Hydro to examine certain specific resource options. Subsection 45(6.2)(a) of the UCA is clearly aimed at the process of review – that is, whether an oral hearing should be held, or a written review process would suffice – and not what powers the BCUC may have as part of the review. It is subsections 45(6.2)(b) and 45(6.2)(c) which speak to what substantive powers the BCUC possesses with respect to a section 45(6.1) plan. No provision in either subsection permits the BCUC to direct BC Hydro to analyze and address a particular resource option in a future LTAP filing, and BC Hydro relies on Part I.C.2 of its Argument for the additional statutory analysis that supports this position.

There is one further issue raised by BCOAPO that requires clarification. BCOAPO questions how BC Hydro can arrive at the conclusion that the BCUC has no jurisdiction with respect to the volumes of either the 2007 or the 2009 Calls.101 BC Hydro’s submission concerning the BCUC’s jurisdiction with respect to the 2007 and 2009 Call volumes was restricted to and tied to its submission that the BCUC has no jurisdiction to order BC Hydro to repower Burrard, and as a result of that order, also order BC Hydro to reduce the volumes of its calls. Clearly, the BCUC has jurisdiction under section 71 to either accept EPAs resulting from BC Hydro calls as filed as energy supply contracts, or following a hearing declare that an EPA is not in the public interest. Its perceptions of the appropriateness of the volume of the call may influence the conclusion it reaches in that respect. In addition, BC Hydro agrees with BCOAPO that, pursuant to section 45(6.2)(b) of the UCA, the BCUC has the power to deny call-related expenditures if the BCUC finds they are not in the interests of persons within BC who receive, or who may receive, service from BC Hydro. Again, the BCUC’s conclusion in this regard may be influenced by the volume of any particular call.

101 BCOAPO Argument, pg. 10, para. 49.
2. Specific Intervenor Directive Requests

a. IPPBC

IPPBC requests that the BCUC issue the following three “orders or directions”:

1) That BC Hydro “make available the full pro forma 2007 Call contract and evaluation criteria prior to the commencement of” the NSP.\(^\text{102}\)

2) If the “BCUC decides that natural gas generation should be included in the LTAP, that [BC Hydro] and not IPPs take natural gas price risk and that any calls for new supplies be structured accordingly”.\(^\text{103}\)

3) As “a general principal [sic], that the 2007 Call, and any subsequent call, [EPAs] be reasonably acceptable to lenders in the financial markets where IPPs borrow money to finance their projects”.\(^\text{104}\)

BC Hydro respectfully submits that the BCUC has no jurisdiction to issue any of these three requested orders or directives, and in the alternative that there is no evidence in the 2006 IEP/LTAP proceeding that any of these three requested orders or directives are required or are in the interest of persons within BC who receive, or who may receive, service from BC Hydro. For purposes of this submission, it does not matter whether the instrument requested is a BCUC order or BCUC directive, and accordingly for convenience IPPBC’s requests are treated as requests for directives. Each of the three IPPBC requested directives are dealt with in turn.

Pro Forma EPAs

In making its request that the BCUC direct BC Hydro to circulate *pro forma* EPAs prior to and as part of the proposed 2007 Call NSP, IPPBC makes no reference to the provisions of the *UCA* and what statutory authority would permit the BCUC to make

\(^{102}\) IPPBC Argument, pg. 23.

\(^{103}\) Ibid., pg. 22

\(^{104}\) Ibid., pg. 22.
such a directive. In BC Hydro’s respectful submission, the reason is obvious – there is no such statutory authority.

BC Hydro’s views on the BCUC’s lack of jurisdiction to order the production of *pro forma* EPAs as part of a review of a section 45(6.1) plan are well known and are laid out in BC Hydro’s letter of 29 August 2005, attached as Ex. B-35 in this proceeding.

The 2007 Call NSP forms part of the 2006 LTAP. It is not a separate section 45(6.1)(b) plan to “meet the demand for energy by acquiring energy from other persons”.

Accordingly, BC Hydro relies on its submissions set out at Ex. B-35. In that submission, BC Hydro took the position, with which BCUC counsel was in “substantive agreement”, \(^{105}\) that:

1) Section 45(6.1) of the *UCA* applies to the period of time prior to the filing of a section 45(6.1) plan. Thus it is inapplicable to the current situation where the LTAP has already been filed, and affords the BCUC no jurisdiction to require BC Hydro to file *pro forma* EPAs with respect to the 2007 Call in this proceeding at this time. Further, BC Hydro does not consider that section 45(6.1) of the *UCA* empowers the BCUC to require a public utility on a prospective basis to include *pro forma* EPAs as part of a long-term plan.

However, this issue need not be decided in the current circumstances, and BC Hydro reserves its right to make further submissions on this point if and when it becomes necessary to deal with it;

2) Conversely, section 45(6.2) of the *UCA* plainly speaks to what the BCUC may do after receipt of a plan, which is the current situation. Subsections (a) through (c) empower the BCUC to establish processes to review plans filed under section 45(6.1), and to consider and make determinations regarding the expenditures referred to in such plans. Nowhere in section 45(6.2) is the BCUC empowered to direct a public utility to amend its application that has already been filed and under review. Thus section 45(6.2) is equally inapplicable to the current situation.

In addition, IPPBC’s assertion that the IPPBC Board of Directors has “fully considered”
the issue and has “reaffirmed its position that the 2007 Call evaluation criteria and
[EPAs] must be prepared and circulated to interested parties prior to the
commencement of the [NSP]” represents the wholly inappropriate introduction of new
evidence in Argument, and is entitled to no weight whatsoever. Further, IPPBC’s
comments concerning Mr. Davis and Mr. Weimer and their respective roles in
reviewing LTEPA+, and that the LTEPA+ term sheet did not provide sufficient detail
required for a commercial understanding of the LTEPA+ transaction, represent the
equally inappropriate introduction of new evidence through Argument from the
LTEPA+ proceeding. The Chair was clear that evidence from the LTEPA+ proceeding
could not be used as evidence in the 2006 IEP/LTAP proceeding. Accordingly,
these IPPBC statements are not evidence in this proceeding and again are entitled to
no weight whatsoever.

What is on the record and clear from the record is the following:

1) There were no material differences between the F2006 Call term sheet,
which formed the basis of the 2005 Resource Expenditure and Acquisition
Plan NSP, and the resulting F2006 Call Large and Small EPAs; and

2) The three IPPBC Board members comprising the IPPBC Panel were
completely divided on the merits of grounding a NSP on pro forma EPAs as
opposed to a detailed term sheet setting out the key risk allocation issues
and other terms and conditions. Mr. Campbell, an IPPBC Board member
and the only developer on the IPPBC Panel, expressed the view that
there would be the potential for prolonged delays resulting from a line-by-
line pro forma EPA debate. Mr. Campbell was clear that in his view, if a

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106 IPPBC Argument, pg. 25.
107 Tr. 22, pg. 3365, Ins. 18-20.
108 Tr. 20, pg. 3030, In. 23 to pg. 3031, In. 13.
109 Ex. C18-31, CV of Mr. Campbell.
110 BC Hydro Argument, pg. 90, citing Tr. 23, pg. 3720, Ins. 20-26; pg. 3721, Ins. 11-18; and pg. 3722, Ins.
23 to 26 to pg. 3723, In. 1.
NSP were based on *pro forma* EPAs, “it would never happen”.\(^{111}\) Given the
divisions that exist within the IPPBC Board as evidenced by the differing
positions taken by members of the IPPBC Panel, BC Hydro has no faith
that IPPBC speaks for all IPPs on this issue. BC Hydro agrees with Mr.
Campbell’s views concerning the impracticality of basing a NSP on *pro
forma* EPAs, and has no intention of circulating *pro forma* EPAs prior to the
2007 Call NSP. In BC Hydro’s submission, several weighty issues must be
discussed with the customer groups in particular both prior to and at the
2007 Call NSP, such as: (1) the level of public disclosure;\(^{112}\) (2) allocation
of gas risk; (3) allocation of GHG risk; (4) the appropriate cost-effectiveness
benchmarks; and (5) dispatchability, among other things. These issues
require serious consideration, and leave no room for a line-by-line analysis
of *pro forma* EPAs.

BC Hydro does agree with IPPBC that in addition to a detailed term sheet, proposed
draft evaluation criteria with a level of detail consistent with a term sheet should be
circulated to the 2007 Call NSP participants, and will commit to do so.

**BCUC Mandating Gas Risk**

IPPBC asserts that if the BCUC should decide now that natural gas-fired generation
should be included in the LTAP, it should direct BC Hydro to take natural gas price risk
in the 2007 Call and future calls. With all due respect, it is not up to the BCUC to
“decide” as part of the 2006 LTAP if natural-gas fired generation is eligible for the 2007
Call or future calls. As set out in BC Hydro’s Argument, the BCUC has already found
that BC Hydro has the initial responsibility to plan for future resource additions in
general, and to design its call processes in particular.\(^{113}\) There is no provision in the
*UCA* that would permit the BCUC to fetter its discretion by deciding an issue now that
is to be the express subject of a NSP (or in the alternative subject to First Nations and

\(^{111}\) *Ibid*, pg. 91, citing Tr. 23, pg. 3723, Ins. 4-8.

\(^{112}\) This is touched on in the JIESC Argument, pg. 20.

\(^{113}\) BC Hydro Argument, pgs. 89-90, citing the VIGP Decision, *supra*, note 69, pg. 79.
stakeholder input) later in the year and subsequent section 71 filing in mid-2008, and
that clearly must be informed not only by the Throne Speech and other Provincial
Government policy developments such as Energy Plan II, but also by consultation with
BC Hydro’s customers.

BC Hydro submits that a BCUC directive mandating BC Hydro assume natural gas
price risk in the 2007 Call and future calls at this time would:

1) Contravene the rules of natural justice as both BC Hydro and the customer
groups will have been deprived of their rights to make submissions on this
issue without the benefit of a thorough examination of Provincial
Government policy such as Energy Plan II and the Climate Change Plan,
and without a draft 2007 Call term sheet. BC Hydro’s evidence is clear - it
intends to work with intervenors and other stakeholders to design 2007 Call
provisions to give consideration to natural gas-fired generation bids within
the context of Provincial Government policy while at the same time
appropriately allocating both natural gas price risk and GHG risk.114 The
Throne Speech contains significant new GHG policy developments that
must be taken into account in designing the 2007 Call. As is apparent from
the customer intervenor Arguments, the customer groups are at this time
divided on the merits of BC Hydro and its customers assuming natural gas
price risk, with JIESC115 and CEC116 “strongly” questioning why BC Hydro
should take on such risk. BCOAPO, for its part, states that BC Hydro is
most able to assume gas risk but questions the value added an IPP is
providing in the case of a CCGT project if it transfers such risk to
BC Hydro.117 JIESC is correct when it points out that BC Hydro has yet to
begin consultations with the customer intervenors concerning the 2007 Call

114 See BC Hydro Argument, pgs. 92 and 93, and the evidence cited in footnotes 417 through to 420.
115 JIESC Argument, pg. 9.
116 CEC Argument, pgs. 41 and 42.
117 BCOAPO Argument, pg. 17, para. 95.
design, and BC Hydro submits that these consultations must be permitted to proceed unencumbered with a BCUC directive mandating the allocation of natural gas price risk in the 2007 Call. IPPBC is, after all, requesting that BC Hydro customers assume the risk of natural gas price volatility and increases, and those customers have a right to make their views known on this topic in the context of a detailed 2007 Call term sheet laying out all of the proposed risk allocations, and not in the more abstract long-term planning context.

2) Lead to the fettering of its discretion. It is an error of law for administrative decision-makers to limit the ambit of their powers in the future. The BCUC will be called on to comment on and ultimately accept or reject any 2007 Call Negotiated Settlement Agreement that may result from the proposed NSP, and also to decide if any resulting EPAs filed pursuant to section 71 of the UCA should be accepted as filed as energy supply contracts. To allocate natural gas price risk, a central issue for the 2007 Call design, at this time would be to inappropriately rule in advance of the matter coming before the BCUC and having it decided on its merits at that time.

3) Not accord with the evidentiary record. Mr. Campbell, the sole witness aside from BC Hydro witnesses with expertise in the construction of CCGTs, gave evidence that there are mechanisms short of full flow throughs that could make a natural gas-fired project work for an IPP. The Chair did not pursue this issue in detail because, we respectfully submit, the Chair was correct that this issue need not be decided in this
BC Hydro submits that in light of this evidence, the BCUC should afford the parties an opportunity to explore natural gas price risk sharing mechanisms as part of the 2007 Call NSP.

**EPA Financial Test**

In BC Hydro’s submission, IPPBC’s request for a BCUC imposed “financial market test” is vague and is not supported by any evidence in this proceeding.

It is not clear what the IPPBC request means in practical terms. The IPPBC request refers to multiple lenders in financial markets (plural) where IPPs borrow money. Is BC Hydro expected to obtain a list of bidders and their proposed financial sources and then approach those parties or some reasonable number of parties and assess whether the proposed EPAs are “reasonably acceptable”? Lenders are obviously in the business of reducing their risk to the absolute minimum possible. When can BC Hydro know that it has obtained sufficient “sign-off” from IPP lenders? Is there not a conflict of interest involved in mandating that BC Hydro obtain some form of “sign off” on EPAs from IPP lenders? Is the test proposed by IPPBC whether the EPA is “financeable”, or is the test whether the EPA is financeable at the lowest possible cost to the IPP? In BC Hydro’s submission, these matters, to name only a few, are unclear.

In addition, there is simply no evidence whatsoever that the F2006 Call EPAs or EPAs resulting from the prior 2002 Customer Based Generation Call and the 2003 Green Call were not “reasonably acceptable to lenders in the financial markets where IPPs borrow money to finance their projects”.

First of all, some 61 tenders from 37 bidders for 53 separate projects were submitted by IPPs in respect of the F2006 Call, including 24 bids received in the Large Project stream.\(^{122}\) The F2006 Call Large EPA does not contain a termination right for bidders if the bidders are not able to secure financing after award of the EPA.\(^ {123}\) The only Large

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\(^{122}\) *Ex. B-22, pg. 1.*

\(^{123}\) *Ibid, Appendix D.*
1  Project EPA termination right is an inability to obtain permits by a specific date after
2  having used commercially reasonable efforts to secure those permits. Therefore, in
3  BC Hydro’s submission, the BCUC should be entitled to find that bidders had to be
4  fairly confident that they could obtain financing on the EPA before they submitted their
5  bids. This is supported by the fact that those bidders that were awarded Large Project
6  EPAs were required to post Performance Security at the time the EPAs were signed.
7  All bidders posted that security.\textsuperscript{124} As Mr. Kusnierczyk testified, BC Hydro required a
8  letter from financial backers be included in the F2006 Call tender submissions.\textsuperscript{125} This
9  suggests the F2006 Call EPAs are financeable.

10  While it may be possible that a small number of successful bidders in the F2006 Call
11  did not adequately consider the financeability of the F2006 Call Large and Small
12  EPAs, it is extremely remote to the point of being unbelievable that all successful
13  bidders failed to do so. In fact, the one witness who is a project developer and who has
14  been awarded EPAs in the F2006 Call (IPPC witness Mr. Campbell, Executive Vice
15  President, Chief Financial Officer (CFO) and Director of Pristine Power Inc., with the
16  EPAs being for the 50 MW Mackenzie Green Energy Project, the 150 Mile House and
17  Savona ERG Projects\textsuperscript{126}), mentioned no concern in this regard when stating that
18  project developers are the better party to manage project financing.\textsuperscript{127} It speaks
19  volumes if a CFO of a company holding an interest in three F2006 Call EPAs does not
20  mention something about financeability concerns when offered the opportunity in such
21  a critical regulatory hearing.

22  Second, as is clear in the F2006 Call Report filed as Exhibit B-22 in this proceeding,
23  IPPs were afforded two opportunities to provide comments on the F2006 Call
24  documents. The F2006 Call Large and Small EPAs were circulated for comment in the
25  fall of 2005 as part of the second round of consultation, and no IPP comments were
26  received with respect to EPA financeability. There was no mention of financeability

\textsuperscript{124} \textit{Ibid}, pg. 60.
\textsuperscript{125} Tr. 22, pg. 3385, Ins. 8-10.
\textsuperscript{126} Ex. C18-31, CV of Mr. Campbell.
\textsuperscript{127} Tr. 23, pg. 3712, ln. 6 to pg. 3713, ln. 7.
concerns in any of the approximately 250 comments received by BC Hydro in the fall of 2005 shortly before issuing the F2006 Call.\textsuperscript{128} Mr. Kusnierczyk confirmed that as part of the two stage F2006 Call consultation process, IPPs were consulted on financeability, among other things.\textsuperscript{129} The result was the F2006 Call Large and Small EPAs which attracted a large number of bidders.\textsuperscript{130}

b. BCOAPO

BCOAPO requests that the BCUC “insist on” or otherwise direct that:

1) A “significant portion of any projects accepted in the [2007 Call] be dispatchable and/or base load, assuming that those kinds of resources remain permissible if the [Provincial Government] implements the Throne Speech”;\textsuperscript{131}

2) BC Hydro develop a “comprehensive avoided cost study for incorporation in the next LTAP”;\textsuperscript{132}

3) BC Hydro “work with Powerex to identify the regions in which Powerex trades, where Powerex could use physically backed resources to enhance its trading activity”;\textsuperscript{133} and

4) BC Hydro should be required to put forward a study that estimates its own cost of developing any new large gas-fired plant as part of the section 71 filing of any EPA with an IPP to develop large natural gas-fired facility to enable the BCUC to set revenue requirements based on the lesser of BC Hydro’s own cost estimate or the IPP cost.\textsuperscript{134}

\textsuperscript{128} Ex. B-22, pg. 7 and Appendix B.
\textsuperscript{129} Tr. 22, pg. 3384, Ins.15-20.
\textsuperscript{130} Ex. B-22, pg. 1.
\textsuperscript{131} BCOAPO Argument, pg. 10, para. 53.
\textsuperscript{132} Ibid, pg. 15, para. 85.
\textsuperscript{133} Ibid, pg. 18, para. 98.
\textsuperscript{134} Ibid, pg. 17, para. 96.
BC Hydro respectfully submits the evidence does not support the issuance of such directives or alternatively, that the BCUC lacks the jurisdiction to issue these four BCOAPO requested directives.

2007 Call Design and Dispatchable Resources

BCOAPO starts off its Argument by stating that “it would be imprudent” for the BCUC “to make premature decisions” with respect to the 2007 Call, among other things, “that lock us into trajectories that are vulnerable to” Provincial Government policy changes “in the coming period”. 135 BC Hydro is in strong agreement with this submission. However, BCOAPO then goes on to somewhat inexplicably, and in a manner that appears to be inconsistent with this position, request the BCUC to do precisely what BCOAPO recommends against – that is, prematurely direct that the 2007 Call result include a “significant portion of dispatchable and/or base load” resources.

To be fair, BCOAPO qualifies its directive request with the observation that such a directive should be consistent with Provincial Government policy. BC Hydro submits that BCOAPO is right to question whether dispatchable and/or base load resources “remain permissible” if the Provincial Government implements the Throne Speech. As set out above, one of the action items BC Hydro proposes to undertake as part of the next LTAP is to analyze the impact of the GHG sequestration requirement on coal-fired generation and the 100 per cent GHG offset requirement on natural gas-fired projects such as CCGTs, which according to the 2005 ROR, are both baseload and dispatchable resources (other baseload and dispatchable resources include hydro with storage). 136 Further, a greater understanding is required of how the Throne Speech clean, renewable 90% target will be implemented before BC Hydro proceeds with the structuring of the 2007 Call terms. BC Hydro understands the concern underlying BCOAPO’s request, and has indicated in this proceeding that it wishes to attract firm energy projects, capacity-rich projects and dispatchable projects to bid into the 2007

135 Ibid, pg. 3, para. 18.
However, BC Hydro submits that design of the 2007 Call terms to attract such projects should not be undertaken now but rather should be informed by BC Hydro’s 2007 Call First Nations and stakeholder engagement process and the proposed 2007 Call NSP.

In addition, for the reasons set out above in respect of IPPBC’s directive requests, BC Hydro respectfully submits that the BCUC would be fettering its discretion and acting without jurisdiction if it were to pre-ordain the outcome of the 2007 Call at this time. As stated above, the ruling of the BC Court of Appeal in the IRP Decision - that the BCUC derives its jurisdiction solely from the provisions of the UCA and that there is no need to imply terms - remains very relevant. No UCA provision permits the BCUC in advance of a section 71 filing to mandate what resources should be accepted as part of a competitive call process.

Avoided Cost Study

BCOAPO supports BC Hydro’s proposal to develop all DSM resources that are cost-effective and to use the Utility Test, All Ratepayers Test and Non-Participant Test as set out in the BCUC’s October 2004 Decision concerning BC Hydro’s F05/F06 RRA. BCOAPO submits that the one significant item that is missing is the appropriate avoided cost measure for DSM programs, and requests that the BCUC direct BC Hydro to develop a “comprehensive avoided cost study for incorporation into the next LTAP”.

Overlooking the fact that it is unclear what exactly BCOAPO intends in reference to a “comprehensive avoided cost study”, BC Hydro submits that such a direction is not necessary. BC Hydro has been clear both in the Amended LTAP and through its witnesses that it will not be using a single number such as the F2006 Call Reference Price as a bright line test to be applied to all DSM programs; rather, DSM programs would be compared against both call prices and the appropriate electricity price

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137 See BC Hydro Argument, pg. 93 to 95, and footnote references 421, 422 and 423, which detail BC Hydro’s submissions that the evaluation criteria in the 2007 Call must recognize the value-added attributes of different projects and resources types, especially those that provide dependable capacity, dispatchability and predictable energy deliveries.
forecasts to ensure cost-effectiveness. BC Hydro agrees with BCOAPO that there is no one number which would serve as an appropriate avoided cost.

BC Hydro has defended use of the F2006 Call Reference Price as one of the cost-effectiveness benchmarks on the basis that the avoided cost of DSM is not dependent upon the similarity of alternate resources to DSM products. Instead, the avoided costs of DSM are the costs that would otherwise have been incurred in the absence of DSM. An assessment of the appropriate reference begins with the resource that would have been obtained and an estimate of the cost of that resource. Given that competitive calls would most likely be the resource purchased in the absence of DSM, an estimate of the cost of resources resulting from competitive calls inherently forms the basis for the avoided cost of DSM. Making adjustments to account for any potential differences between supply resources and DSM resources is not needed because it does not impact the true costs that are avoided. BC Hydro’s further submissions with respect to the F2006 Call Reference Price are set out in Part III.D.4 of the Reply.

In any event, BC Hydro accepts that it bears the onus of defending the avoided cost measures it puts forward as part of its EE3, 4 and 5 Implementation plan filing. BC Hydro expects to seek input with respect to the appropriate avoided cost measures as part of its Electricity Conservation and Efficiency Advisory Committee consultation.

Powerex Swap

The concept of “swaps” as raised by BCOAPO is not well understood. Even counsel for BCOAPO had difficulty framing the concept in cross-examination. All told, the

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138 Ex. B-1E, pg. 8-51, Ins. 26-28: “DSM programs … will be compared to the appropriate prices established through calls and market forecasts to ensure relative cost-effectiveness”; Tr. 19, pg. 2854, ln. 10 to pg. 2856, ln. 6.

139 Ex. B-1E, pg. 8-58; Tr. 18, pg. 2825, ln. 21 to pg. 2830, ln. 22.

140 The Implementation Plan filing details are set out in Ex. B-6-3, BC Hydro response to BCUC IR 1.166.2.

141 Tr. 20, p.3106, ln. 23 to p.3108, ln.22 and p.3123 ln. 5 to p.3124, ln. 14.
question was posed three times, twice directly by counsel for BCOAPO and once with
the assistance of the BCUC Panel.\(^{142}\)

The first two times, the responses were:

> "So if you're suggesting that Powerex could profitably contract
> with a plant in Saskatchewan and move it to Midwest, and do
> that as a profitable trade, I think that's available anyhow."\(^{143}\)

> "Swap as I might understand it would normally be two parties
> who are long and short in different places, that they would
> switch generation. The generation that you would buy in
> Saskatchewan, presumably you would sell that into
> Saskatchewan for the best price you could get, and the
> Canadian entitlement, similarly here, has a market component.
> They're unrelated. So Powerex could enter into either side of
> those contracts. We could buy the Canadian entitlement, with
> the same opportunity cost that -- so I'm not sure the swap's
> helping you."\(^{144}\)

The response both times was that such opportunities are available to Powerex in any event, and they are unrelated events.

If one carefully parses the chain of events described in the laboured question, Mr. Reimann ultimately accepted that notionally, if (1) BC Hydro entered into a fixed long term contract to purchase electricity from a third party in another jurisdiction (Saskatchewan in the example); and (2) BC Hydro assigned its contractual rights to Powerex to sell the electricity in a third jurisdiction (North Dakota, USA, in the example); and (3) in exchange for the assignment of rights in (2), Powerex commits to acquire an equivalent amount of energy in a fourth jurisdiction for delivery to Sumas (in

\(^{142}\) Tr. 20, p.3124, ln. 15 to p. 3126, ln. 9.

\(^{143}\) Tr. 20, pg. 3108, Ins. 16-19.

\(^{144}\) Tr. 20, pg. 3124, Ins. 2-12.
this example); and (4) the proposed scenario resulted in a contract that was delivered
to the BC border with a fixed, attractive price, then that would be of interest to
BC Hydro.\footnote{145}

Such an opportunity – if it could ever be found – and if the associated agreements
could ever be negotiated to the satisfaction of all parties in the chain – might create
value.

However, as Mr Reimann stated on two occasions, the deal in the Saskatchewan and
North Dakota regions is effectively unrelated to the deal in the west; and Powerex
could likely enter into such arrangements now, but does not normally get into such
long term contracts. Further, being stuck with energy from a long term contract in
another jurisdiction does not necessarily represent an opportunity for Powerex.\footnote{146} This
is a far cry from accepting that the concept of swaps should be pursued by BC Hydro
for firm use such as in the 2007 Call. BC Hydro respectfully submits that such
concepts, if they have any merit at all, are for Powerex’s agenda. BCOAPO’s
assertions are simply insufficient to support the directions being requested.

BC Hydro further points out that, conceptually, soliciting bids from extra-provincial
resources appears on its face to be inconsistent with the Throne Speech
pronouncements with respect to self-sufficiency.

No other intervenor raised the matter.

BC Hydro respectfully submits that the BCUC must decline to direct BC Hydro in the
manner proposed.

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\textit{BC Hydro Gas-Fired Project Cost Estimate}

BC Hydro respectfully submits that a BCUC directive that BC Hydro study its own
costs of developing any new large natural gas-fired generation facility for the purpose
of comparing a hypothetical BC Hydro self-build option with an IPP natural gas-fired

\footnote{145 Tr. 20, p.3126, Ins. 5-8.}
\footnote{146 Tr. 20, p.3107, Ins. 18-22.}
project bid into the 2007 Call and setting revenue requirements based on such
assessment would run contrary to the 2002 Energy Plan and would unhelpfully pre-
empt the 2007 Call First Nations and stakeholder engagement process and the 2007
NSP. The uncontradicted testimony of Ms. Farrell was that as a result of Policy Action
No. 13 of the 2002 Energy Plan, the only gas-fired facility BC Hydro could develop
would be the repowering of Burrard. BC Hydro has committed to study the costs of
repowering Burrard as part of the 2007 Call Definition phase work within the context
of Provincial Government policy and, as set out above, also look at the costs of large
projects for the next LTAP. BC Hydro has also reviewed the IPPBC Argument, which
raises concerns with respect to using the repowering of Burrard as a cost-
effectiveness benchmark. As part of both the 2007 Call First Nations and
stakeholder engagement process and the 2007 NSP, BC Hydro will consult with
intervenors as to what the appropriate cost-effectiveness benchmarks should be for
the 2007 Call.

c. CEC

CEC seeks to make any favourable determination by the BCUC in respect of
expenditures on Revelstoke Unit 5 conditional on BC Hydro providing, in any CPCN
application in respect of Revelstoke Unit 5, “an explanation as to what changes can be
made to the transfer pricing agreement between BC Hydro and its subsidiary Powerex
which will more fairly accrue the benefits of these significant investments to
customers…”.

This submission by CEC raises two difficult issues. First, it treads into an issue of
important Provincial Government policy that has already been the subject of a

147 Tr. 9, pg 1103, ln. 3 to pg. 1105, ln. 11; Tr. 10, pg. 1395, Ins. 16-19.
150 CEC Argument, pg. 85.
significant hearing before the BCUC, a report by the BCUC,\textsuperscript{151} and a legislated
Government response.\textsuperscript{152} Second, the submission inappropriately links the requested
relief with a specific project, and the approval process in respect of it. For the reasons
elaborated in the following paragraphs, BC Hydro opposes CEC’s specific request.

While CEC repeatedly says it is not in this proceeding seeking a change to the
$200 million limit on that portion of Powerex’s net income that is to accrue to
BC Hydro’s ratepayers,\textsuperscript{153} this assertion is, with respect, difficult. The quote from the
CEC Argument noted above demonstrates that CEC’s ultimate objective is a re-
allocation of the trade benefits arising from BC Hydro’s system to the advantage of
BC Hydro’s customers and to the disadvantage of BC Hydro’s (and thus Powerex’s)
shareholder. That is, the requested explanation is plainly meant to provide a
foundation for doing indirectly what CEC acknowledges it may not do directly, namely
change the $200 million cap.

In this regard it is helpful to refer to the Terms of Reference issued by the Province in
2003 that initiated the Heritage Contract Enquiry.\textsuperscript{154} The 9\textsuperscript{th} recital to those Terms of
Reference reads as follows:

\begin{quote}
WHEREAS trade revenue, net of incremental costs properly
allocated to BC Hydro for internal management purposes,
above $200 million in any year will flow to the government
for the benefit of all British Columbians;
\end{quote}

It is apparent from the foregoing that the $200 million cap did not arise as a result of
the BCUC’s Heritage Contract Enquiry. Rather it was a fundamental premise and

\begin{footnotes}

\textsuperscript{151} An Inquiry into a Heritage Contract for British Columbia Hydro and Power Authority’s Existing
Generation Resources and Regarding Stepped Rates and Transmission Access: Report and
Recommendations (October 17, 2003) (HC Inquiry Report). The Heritage Inquiry Report is found at
BC Hydro’s Book of Authorities Referred to In Argument, Schedule B to BC Hydro’s Argument, Tab 16.

\textsuperscript{152} BC Hydro Public Power Legacy and Heritage Contract Act, S.B.C. 2003, c.86 (HCA); Heritage Special
Directive No. HC1, Order-in-Council No. 1125, Province of British Columbia, November 27, 2003 (HC1);
Heritage Special Directive No. HC2, Order-in-Council No. 1123, Province of British Columbia,
November 27, 2003 (HC2). Each of HCA, HC1 and HC2 are found at BC Hydro’s Book of Authorities
Referred to In Argument, Schedule B to BC Hydro’s Argument, at Tabs 4, 5 and 6 respectively.

\textsuperscript{153} CEC Argument, pgs. 82, 83, 85 and 87.

\textsuperscript{154} HC Inquiry Report, supra, note 151, Schedule A, ph. 90.
\end{footnotes}
expression of Provincial Government policy that Powerex net income in excess of $200 million was to go to the benefit of all British Columbians. The only issue in the Heritage Contract Enquiry was how net income less than $200 million was to be allocated.\footnote{On this point BC Hydro proposed, the BCUC recommended, and the Provincial Government accepted, that all Powerex net income less than $200 million be allocated to ratepayers as an offset to BC Hydro’s revenue requirements from time to time. See pgs. 34-37 of the HC Inquiry Report.}

Moreover, the Transfer Pricing Agreement (TPA) was a fundamental component of BC Hydro’s Heritage Contract proposal, was the subject of significant debate at the Heritage Contract Enquiry and was accepted by Provincial Government in its current form. Since it is the vehicle for allocating costs between BC Hydro and Powerex for electricity trade, it cannot be argued that the TPA in its current form, as accepted by the BCUC in 2003, does not currently affect a proper allocation of costs.

BC Hydro notes that the mere fact that the TPA contemplates amendment does not mean that it should be amended for the purpose of circumventing clear expressions of Provincial Government electricity policy. It follows that the relief requested by CEC ought to be denied.

Even if the BCUC disagrees with BC Hydro’s assessment regarding the substance of CEC’s request, BC Hydro submits that there are procedural concerns with the request as well. Ignoring the question of whether the BCUC has the ability to condition the approval of an expenditure pursuant to its section 45(6.2)(b) review of a public utility plan, a matter that BC Hydro respectfully submits is a live issue, it is not appropriate for CEC to couple the requested direction with the Revelstoke Unit 5 funding relief sought in this proceeding. In BC Hydro’s submission the issue raised by CEC arises not from any one project, but rather by the entirety of BC Hydro’s system being available from time to time for electricity trade purposes. In other words, if the issue is in fact engaged, it is engaged whenever and for whatever reason Powerex’s net income in a year exceeds $200 million, and not as a result of the specific expenditures contemplated in relation to Revelstoke Unit 5.
For these reasons BC Hydro is of the view that, if the BCUC is inclined to require BC Hydro to provide the explanation requested by CEC, it should only do so as part of a process that is not linked to any particular project, but rather as part of a more generic BC Hydro application, for example a RRA or LTAP.

To be clear, BC Hydro recognizes the importance of the issue of trade benefit quantification to CEC, and agrees that the allocation of expected benefits should be analyzed as part of the project development process. For this reason, BC Hydro is committing to include in future facilities applications, to the extent possible, enumeration of the expected benefits for the particular project, and anticipated allocations of such benefits. Such enumeration and allocation will be included in the Revelstoke Unit 5 CPCN application.\(^{156}\)

3. Self-Sufficiency

While BCOAPO devotes three and one-half pages of its Argument to the issue of the BCUC’s consideration of self-sufficiency, it is unclear to BC Hydro whether BCOAPO is asking the BCUC to ignore the five Provincial Government policy documents, including the Throne Speech, that confirm the Province’s commitment to self-sufficiency.\(^{157}\)

For the reasons set out in the BC Hydro Argument at pages 14 to 19, BC Hydro respectfully submits that the BCUC cannot ignore the Province’s commitment to self-sufficiency in rendering the LTAP decision. Further, BC Hydro agrees with the submissions of ESVI\(^{158}\) that the Throne Speech is black and white with respect to the

\(^{156}\) Ex. B-17-2, BC Hydro response to BCOAPO IR 3.16.2, pgs. 4-5.

\(^{157}\) In addition to the Throne Speech, Ex. A2-26, the other four documents are listed at page 16 of the BC Hydro Argument: (1) the February 2006 Throne Speech (Ex. B-6-3, BC Hydro response to BCUC IR 1.279.2); the August 28, 2006 letter of the Ministry of Energy, Mines and Petroleum Resources (Ex. A-22, attachment to BCUC IR 2.1 to the WFC); the statements of the Premier in legislative debates (Ex. B-21, pg. 4876 of Attachment 1 to BC Hydro IR 1.1.1 to the WFC); and the statements of the Minister of Energy, Mines and Petroleum Resources at the IPPBC Annual Conference on 31 October 2006 (Ex. B-36, Attachment A to the Opening Statement of Mr. Elton, pg. 4).

\(^{158}\) ESVI Argument, pg. 5.
Province’s commitment to self-sufficiency: “The new energy plan will require British Columbia to be electricity self-sufficient by 2016”.\textsuperscript{159}

In BC Hydro’s respectful submission, the LTAP is clearly aligned with the Province’s commitment to self-sufficiency, and by accepting the security of supply underpinnings of the LTAP, the BCUC will have left the door open for BC Hydro to shift to self-sufficiency, including allowing for further regulatory review as the specific actions proposed by the LTAP are brought back before the BCUC for implementation.\textsuperscript{160} As a further check, BC Hydro agrees with the JIESC proposal to examine the impacts of self-sufficiency in the next LTAP.\textsuperscript{161}

\section*{B. IEP Analysis}

\subsection*{1. Load/Resource Gap}

BC Hydro’s assessment of the load/resource gap underpinning the need for new resources is supported by JIESC,\textsuperscript{162} CEC\textsuperscript{163} Terasen,\textsuperscript{164} and IPPBC.\textsuperscript{165}

\subsubsection*{a. BC Hydro Heritage Assets}

The only party that raised any issue whatsoever with BC Hydro’s assessment of energy and capacity from its Heritage Assets is CEC, who submits that BC Hydro should have some alternative resource to “firm up the average water flow on the hydro-electric system” after the planning reliance on Burrard ends in F2014. CEC

\textsuperscript{159} Supra, note 24, pg. 16.

\textsuperscript{160} This solution was also proposed by IPPBC in its letter of February 28, 2007, Ex. C18-38.

\textsuperscript{161} JIESC Argument, pg. 2.

\textsuperscript{162} JIESC Argument, pg. 8. JIESC’s submits that, given the current energy and capacity shortfall, “acquiring new resources is a common priority of all stakeholders.”

\textsuperscript{163} CEC Argument, pg. 6. The CEC “takes no issue” with the process of establishing the load/resource balance (the load forecast, the assessment of existing resources, assessing the committed EPA, DSM and Project Resources and defining the gap). CEC Argument, pg. 24.

\textsuperscript{164} Terasen Argument, pg. 2, para. 5. Terasen accepts that the evidence that BC Hydro needs “to secure new resources in a timely manner.”

\textsuperscript{165} IPPBC Argument, pg. 12. IPPBC agrees that there is an increasingly urgent need to develop electricity supply to meet the growing demand. IPPBC believes in fact that this need is even more urgent than BC Hydro anticipates. This latter point is addressed below under the heading Load Forecasting Risk.
appears to suggest that one alternative to firm up this energy would be using the Canadian Entitlement (CE) or the market.\textsuperscript{166} However, Ms. Kurschner convincingly explained why this would not be an effective or efficient use of the CE.\textsuperscript{167} In addition, BC Hydro submits that CEC’s proposal to firm up the average water flow is not supported by any evidence and contravenes BC Hydro’s generation energy reliability criterion.

Ultimately, CEC supports BC Hydro’s assessment of the capacity from the existing system, but indicates it hopes to provide stakeholder input to BC Hydro on this issue (firming up water variability) in the intervening time to the next LTAP.\textsuperscript{168} BC Hydro agrees that the issue raised by CEC should not be the subject of any comments from the BCUC in this proceeding.

\textbf{b. Attrition and Prior IPP Supply}

BC Hydro submits that it has clearly met the burden established by the BCUC’s F2006 Call Decision, where the BCUC stated that it “neither accepts nor rejects BC Hydro’s argument to increase the award volume to reflect attrition and outage risk, or the specific attrition and outage allowance proposed by BC Hydro”.\textsuperscript{169} The BCUC indicated that it expected the issue to be addressed more explicitly as part of the IEP/LTAP proceeding. The evidence in the current proceeding and the potential consequences of recent policy developments indicate that BC Hydro’s estimates of attrition were reasonable. In this regard, BC Hydro relies on Part II.5.b of the BC Hydro Argument. BC Hydro’s estimates were not seriously challenged by any party.

JIESC\textsuperscript{170}, BCOAPO\textsuperscript{171} and SCCBC\textsuperscript{172} all commented on whether the two coal-fired generation projects from the F2006 Call have an increased likelihood of attrition in light

\begin{footnotesize}
\begin{enumerate}
\item[166] CEC Argument, pgs. 21 – 23.
\item[167] Tr. 13, pg. 1985, Ins. 2-20.
\item[168] CEC Argument, pgs. 23-24.
\item[169] Supra, note 23, pg. 25.
\item[170] JIESC Argument, pg. 11. JIESC also notes that the difficulties of construction bids and financing in an overheated economy may well eliminate other projects.
\item[171] BCOAPO Argument, pg. 1, para. 5.
\end{enumerate}
\end{footnotesize}
of recent policy developments. While BC Hydro believes it is still too early to draw any
firm conclusions about the prospects for these projects, they now face some additional
challenges in light of the Throne Speech pronouncements.

c. Reliability Criteria

No party challenged BC Hydro’s evidence regarding its energy or capacity reliability
criteria. JIESC accepts BC Hydro’s energy planning criterion as “reasonable” and also
comments that reliance on 400 MW of capacity of planning reserves is of “definite
economic and environmental value” and should be continued.\textsuperscript{173} CEC agrees that it is
appropriate to continue to rely on 400 MW from neighbouring control areas.\textsuperscript{174}

d. Reliance on 2,500 GWh/y of Non-Firm Resources

BC Hydro submits that its proposal to rely on 2,500 GWh/y of domestic non-firm
resources (as opposed to spot market purchases) is consistent with the Provincial
Government’s commitment in the Throne Speech to target electricity self-sufficiency by
2016. CEC accepts BC Hydro’s view regarding the appropriateness of reliance on
2,500 GWh of domestic non-firm supply.\textsuperscript{175} While BCOAPO expresses concerns
regarding the price and lack of flexibility of IPP-sourced non-firm energy,\textsuperscript{176} it ultimately
does not challenge BC Hydro’s proposal regarding the 2,500 GWh/y.

\textsuperscript{172} SCCBC Argument, pg. 5.
\textsuperscript{173} JIESC Argument, pgs. 7-8.
\textsuperscript{174} CEC Argument, pg. 24.
\textsuperscript{175} CEC Argument, pg. 20.
\textsuperscript{176} BCOAPO Argument, pgs. 10 – 11, paras. 50 – 54.
2. Gas and Electricity Price Risk

a. Natural Gas and Electricity Price Forecast Scenarios

Two of the three customer groups—JIESC and CEC—support BC Hydro’s analysis in relation to gas and electricity price forecasts, including the High Gas case. Terasen and BCOAPO oppose the equal weighting given to the High Gas case. Terasen’s and BCOAPO’s arguments are not compelling.

Terasen on High Gas

Terasen suggests that BC Hydro “does not provide adequate justification” as to why such high prices would be sustained over an extended period of time. Terasen relies on two arguments, neither of which are persuasive:

1. Terasen points to the BCUC’s conclusion in the Alcan LTEPA+ Decision.
   A judgment is not evidence, even between the parties, of any fact which was neither directly decided nor a necessary ground of the decision. The evidence before the BCUC in the LTEPA+ proceeding differed from the evidence and questions before the BCUC in this proceeding.

2. Terasen points to the description of the High Gas case as a “stress test” in the 2004 IEP. This point was answered directly and in detail:

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177 JIESC Argument, pg. 9. JIESC indicates that it “does not feel further work needs to be done at this time in evaluating overall risk.”

178 CEC Argument, pg. 41. CEC accepts BC Hydro’s evidence that the gas price risk for a high gas price scenario is a possibility and that there is increased volatility in gas prices. CEC Argument, pg. 71. CEC supports BC Hydro’s price gas and electricity price forecasts and agrees with BC Hydro that it is prudent to reduce exposure to these risks. In particular, CEC states that considering a High Gas price scenario seems “only reasonable and prudent”.

179 Terasen Argument, pg. 7, para 21.

180 Order No. G-176-06, Re: Alcan’s LTEPA Amending Agreement, Amended and Restated Long Term Electricity Purchase Agreement (December 29, 2006). A copy of the Order is found at Schedule B of the BC Hydro Argument, Tab 15.

“MR. PERTTULA: Q: So is that sentence [re “stress test”] still true, of the High case, for the 2006 IEP?

MR: STANDBROOK: A: No, I don’t believe it’s still true…Our methodology hasn’t changed, but I think its fair to say that our view of the world has changed.”

Messrs. Lauckhart, Standbrook and Ince all elaborated on the above answer and provided ample and compelling justification as to why the High Gas case had been viewed differently between the 2004 and 2006 IEPs, and why the inclusion of a scenario that contemplated sustained high gas prices was a reasonable assumption. 182

Terasen on Natural Resources Canada (NRCan) 2006 Forecast

Terasen also submits that no weight should be given to the adjusted NRCan forecast presented by Mr. Ince. Terasen takes pains to point out that the NRCan forecast (as adjusted) produced results that are slightly higher than actual gas prices experienced to date. However, Terasen expresses no concerns with the Confer forecast notwithstanding that it produced significantly lower forecasts than the actual gas price in both 2005 and 2006. 183 The asymmetry of Terasen’s argument would suggest that Terasen is unduly concerned with knocking out or decreasing the weighting of a high gas price scenario while content to leave untouched any scenario forecasting lower gas prices.

BCOAPO on High Gas

BCOAPO takes the position that BC Hydro’s High Gas Scenario should be given less weight than the EIA or Confer scenarios. 184 With respect, BCOAPO’s submission mischaracterizes the evidence on the record.

BCOAPO fails to acknowledge relevant evidence on the record, for example:

182 Quote from Tr. 13, pg. 1951, ins. 2-8. See also the elaboration at Tr. 13, pg. 1947, ln. 13 to pg. 1954, ln. 1.

183 Exhibit B-1A, pgs. 3-11 and 3-18; Exhibit B-25, Direct Testimony of D. Ince, pg. 3.

184 BCOAPO Argument, pg. 11, para. 59.
In paragraph 56, BCOAPO suggests there is “no evidence” that spikes in gas prices can persist. To the contrary, Messrs. Lauckhart and Ince on Panel 3 discussed at length the reasons they believed that high gas prices could persist over the long-term.  

Similarly, in paragraph 59, BCOAPO suggests there is “no evidence” on the record analysing the likely impact of a vigorous regime of GHG emission regulation. This is what Panel 4’s evidence was all about and Natsource produced an extensive report that analyzed the potential costs of a variety of scenarios of GHG regulation.

BCOAPO also ignores inconvenient evidence. In paragraph 59 of its Argument, BCOAPO suggests that since the High Gas Scenario is “intended to form an upper bound for the natural gas price forecasts” it therefore should be regarded as less probable. However, Mr. Ince answered this point directly in explaining that while the High Gas scenario was the highest of the forecasts presented it was in no way intended to reflect the upper bound of where gas prices could go.

Finally, BCOAPO misunderstands the submissions in BC Hydro’s Argument. BCOAPO suggests that BC Hydro’s logic is that since high cost is the most harmful market environment, we should always assume that will occur. BC Hydro made no such submission. BC Hydro’s submission in its Argument was that if all scenarios are equally likely to occur (equally weighted), but the consequences of one scenario (High Gas) are more harmful than other scenarios, then taking steps to avoid the more damaging scenario is simply prudent planning.

### 3. Market Risk

While CEC agrees with BC Hydro’s position that moving away from too much reliance on market supply is appropriate, it expresses a concern that the policy of self-
sufficiency should not preclude trade as a means of optimizing the value of the
system.\textsuperscript{189} BCOAPO states that BC Hydro has used price volatility to make significant
trade revenue\textsuperscript{190} but is now moving toward less market volatility risk. In reply,
BC Hydro simply notes that there is a fundamental distinction between (a) relying on
the market to serve domestic load and (b) accessing the market to capture trade
benefits and to optimize the value of the system. BC Hydro plans to reduce the former
but not compromise the latter.

\textbf{a. Net Import Data}

While SCCBC did not pursue the issue during the oral hearing, its concerns regarding
BC Hydro’s import data seem to have re-emerged in Argument. SCCBC asserts that,
for future proceedings, it is “essential” that BC Hydro import/export analysis includes “a
reconciliation of its methodology with that of StatsCan/NEB.” However, SCCBC states
that it does not quarrel with BC Hydro’s assertion that there was insufficient time to
prepare reconciliation in the context of the current application.\textsuperscript{191}

In reply, BC Hydro notes that its objection to preparing such reconciliation is based on
more than simply the absence of sufficient time in this proceeding. BC Hydro’s
witnesses testified that such reconciliation would be difficult (due to uncertainty
regarding the source and treatment of the data) and time consuming.\textsuperscript{192} As stated at
Ex. B-10-3, response to SCCBC IR 1.26.6, BC Hydro “does not believe that any further
reconciliation is warranted or even possible.” Any additional information that might be
obtained does not justify the time and expense that would be required.

\textbf{b. 18\% Market Exposure}

Terasen supports reductions in exposure to short term market commodity risk where
the purpose is to achieve security of supply. However, Terasen submits that the

\textsuperscript{188} BC Hydro Argument, pgs. 38, sections II.C.2.a. (ii) and II.C.3.
\textsuperscript{189} CEC Argument, pgs. 56 and 73.
\textsuperscript{190} BCOAPO Argument, paras. 63 and 64.
\textsuperscript{191} SCCBC Argument, pgs. 34 – 35.
\textsuperscript{192} Tr. 15, pg. 2244, Ins. 4-14.
financial risk to which BC Hydro’s customers are exposed is “better represented by the 12% market exposure under average water conditions than by the 18% under critical water conditions.” In reply, BC Hydro notes that it has to plan its system, for reliability purposes, on the basis of critical water.

4. Load Forecasting Risk

Similar to the alignment of intervenors on the issue of price forecasting (discussed above), two of the three customer groups—JIESC\(^\text{195}\) and CEC\(^\text{196}\)—find BC Hydro’s load forecasting methodology to be suitable for the purposes of this proceeding.

IPPBC suggests the load forecast may be understated while BCOAPO suggests it may be overstated. Interestingly, both reach their contradictory conclusions by examining the gross domestic product (GDP) assumptions in the load forecast. IPPBC’s and BCOAPO’s concerns do not withstand scrutiny.

a. IPPBC on Load Forecasting

IPPBC suggests that BC Hydro’s load may grow faster than forecast due to high GDP growth forecasts. IPPBC attempts to ground this assertion on BC Hydro’s evidence that there is high correlation between electricity sales and the provincial GDP.\(^\text{197}\) However, IPPBC fails to acknowledge the clarification on this very point given by Mr. Tiedemann that while “the correlation is high…the relationship is such that the incremental effect is not one-to-one.”\(^\text{198}\)

\(^{193}\) Terasen Argument, pg. 6, paras. 14-15.
\(^{194}\) See BC Hydro Argument, pgs. 28-32.
\(^{195}\) JIESC Argument, pg. 10. BC Hydro’s load forecasting methodology and the estimates of DSM savings in respect of the load forecast are “sufficiently accurate for the purpose of this proceeding.”
\(^{196}\) CEC Argument, pg. 74. CEC agrees that BC Hydro’s methodology has not been found to have any major flaws and that the evidence supports use of BC Hydro’s forecasts as a base for planning.
\(^{197}\) IPPBC Argument, pgs. 12 – 13.
\(^{198}\) Tr. 10, pg. 1415, Ins. 1-3; BC Hydro Argument pg. 51.
b. BCOAPO on Load Forecasting

BCOAPO also comments on the treatment of the GDP driver in the load forecasts—but draws the very different conclusion, that it is being used to manipulate the load forecast upwards. BCOAPO misinterprets some of the evidence on the record to suggest that the forecast is predicated on “the assumption of twenty years of uninterrupted economic growth”. BCOAPO attempts to cast doubt on this by asserting (without reference to the evidence) that “[t]here has never been a twenty-year period of sustained strong economic growth in Canada.”¹⁹⁹

BCOAPO has mischaracterized the assumption in the load forecast. The GDP forecast is based on multiple sources including the Provincial Government and third party sources such as the Conference Board of Canada. The GDP forecast used in the load forecast reflects positive but declining annual economic growth rates,²⁰⁰ however it does not directly reflect periods of recession and recovery because it is impossible to predict economic cycles with any degree of certainty. BC Hydro is of the view that the economic growth rate assumption as reflected in the GDP forecast is reasonable for the entire forecast period.

c. CEC Concern with the Range of Uncertainty in Load Forecasting

CEC “tends to agree” with BC Hydro’s assessment of its load forecasting methodology as contained in BC Hydro’s Argument but expresses a concern that “BC Hydro may be under representing the variability it will face in the future.”²⁰¹ CEC does not appear to suggest any changes to the load forecasting methodology, but rather seems to suggest widening the band of uncertainty (plus or minus) surrounding the load forecast.²⁰²

²⁰⁰ Ex. B-1C, App. K-2, pg. 5, Table 3.2. This table shows the annual growth rates that decrease from 3.4% in 2005/06 down to 1.9% in 2025/26.
²⁰¹ CEC Argument, pg. 17.
²⁰² CEC Argument, pg. 17-19.
The evidence in this proceeding demonstrates that load forecasting (like any exercise that is designed to predict the future) is difficult and subject to a large number of unpredictable variables. The concerns of CEC might be shared by BC Hydro if a load forecast, once complete, was not updated for several years at a time. This is not the case. Load forecasts are updated regularly and new information (including information regarding actual load growth as well as updated information on the drivers of future growth) is incorporated as it becomes available. Broadening the bands of uncertainty around the load forecast would do little, if anything, to improve the robustness of the planning process.

5. GHG and Environmental Risk

SCCBC was alone in advocating for a more extensive and expensive role for BC Hydro in climate change research. (In contrast, CEC states that it takes “significant comfort” from the fact that BC Hydro has been “diligent in examining climate change as an issue and has been active in anticipating potential consequences as the science evolves.”203) While SCCBC indicate that they are “not critical” of BC Hydro’s past activities in this area, it indicates that “going forward, a more structured and focused approach to research on the potential effects of climate change on BC Hydro’s hydroelectric resources would be appropriate.” For example, SCCBC state that by the time of the 2010 IEP it would be desirable for BC Hydro to provide “a substantive report on the state of knowledge regarding potential climate change impacts on its hydroelectric resources.”204

BC Hydro’s witness, Tim Lesiuk, indicated that such studies are very expensive and, as such, BC Hydro has engaged in such studies in a manner where it is of the view it can justify the costs to ratepayers and the shareholder.205 Given the high cost of such studies and the very high-level information produced, BC Hydro submits that its current approach to participation in climate change studies is appropriate and prudent.

203 CEC Argument, pgs. 76 – 77.
204 SCCBC Argument, pg. 26.
205 Tr. 14, pg. 2047, ln. 1 to pg. 2286, ln. 24.
6. Portfolio Analysis

With the sole exception of IPPBC, portfolio analysis appears to have general support
and the results of such analysis have been used by intervenors in Argument.

JIESC specifically supports both portfolio and trade-off analysis, as long as such
analysis does not re-manifest itself as centralized planning and decision making.206
JIESC acknowledges that BC Hydro has not used the Resource Portfolio trade-off
analysis to pre-ordain the results of competitive call processes. CEC comments
appear directionally similar to JIESC’s. CEC suggests that there may be simpler and
more direct alternatives to portfolio analysis such as “acquisition process
management”207. BC Hydro is not certain what acquisition process management
entails, but agrees with the CEC suggestion that this can be explored in future
engagement processes.

The Security of Supply portfolio analysis was used by a number of intervenors in
Argument. BCOAPO points to the Security of Supply analysis of the portfolios with
3,000 GWh/y and 6,000 GWh/y as being examples that are less expensive and less
volatile than other portfolios. Counsel for BCOAPO pursued this issue in cross
examination of BC Hydro Panel 5. At that time, Ms. Matthews acknowledged this point
based on the present value of the portfolios, but stated that the reliability aspects of the
two portfolios would not be the same.208 CEC identifies BC Hydro’s analysis of the long
vs. short position situation as appropriate reviews of the situation, supports both
BC Hydro’s analysis of the market reliance issue and its plan to move away from too
much reliance on markets.209

IPPBC submits that it does not “believe” that BC Hydro should be utilizing a portfolio
approach. This belief is supported only by IPPBC’s assertions with respect to the
position it took at the Provincial Integrated Electricity Planning Committee (PIEPC),

206 JIESC Argument, pgs. 6 and 13.
207 CEC Argument, pg. 6.
208 Tr. 16, pg. 2516, ln.15 to pg. 2517, ln. 18.
209 CEC Argument, pg. 73.
where it put forward an alternative that would have BC Hydro identify the attributes of
the resources it wished to acquire, and then acquire these resources through a
competitive process. BC Hydro submits that IPPBC’s alternative to portfolio analysis:
(1) is too vague to be adopted by the BCUC; (2) is unsupported by any other
intervenor; (3) has not been identified as being adopted by any other utility or
regulator; and (4) would necessitate the BCUC amending its own Resource Planning
Guidelines, without the benefit of submissions from other regulated utilities.

IPPBC chose not to enter any evidence to flesh out how its proposal would work in
practice. The choice of attributes would assume a new prominence under IPPBC’s
proposal, as the choice of attributes would be tantamount to choosing the mandatory
criteria for a competitive call process, as opposed to selecting an input for portfolio
analysis. It is entirely unclear how BC Hydro would secure agreement on the attributes
of the resources to be acquired. The evidence is that PIEPC was divided on the issue
of attributes.\(^{210}\) BC Hydro respectfully submits that it would be imprudent for the BCUC
to rely on an embryonic IPPBC proposal which was conveyed in a second hand way
through IPPBC counsel opening statement and Argument submissions as opposed to
testimony, expert or otherwise.

No other intervenor supports the IPPBC proposal. In addition, while most intervenor
Arguments were silent on the subject, those that did address it did not support the
acquisition of either Resource Smart projects or DSM by way of a competitive
process.\(^{211}\)

The evidence is clear that BC Hydro thoroughly canvassed other utility practices and
found that portfolio analysis is a “standard feature” of IRPs and a “common
practice”.\(^{212}\) Presumably this is why the BCUC’s own Resource Planning Guidelines
provide that utilities are to develop alternative resource portfolios and analyze the

\(^{210}\) See, for example, Ex. B-1A, pg. 2-9, footnote 9.

\(^{211}\) CEC does not support, and sees no need for, a competitive process for DSM on the basis that there is
no evidence DSM programs are not cost-effective: CEC Argument, pg. 28.

\(^{212}\) Tr. 16, pg. 2437, Ins. 11-19.
trade-offs between these portfolios.\textsuperscript{213} By utilizing portfolios, BC Hydro was able to canvass First Nations and stakeholders about attributes important to each of them and then test the impact and trade-offs of such attributes.\textsuperscript{214} BC Hydro witnesses gave evidence that portfolio analysis allows BC Hydro to look “at the whole system from a system perspective”,\textsuperscript{215} something that IPPBC’s proposal would not permit BC Hydro to do.

Finally, BC Hydro respectfully submits that prior to substantively amending the Resource Planning Guidelines and contemplating such a drastic move away from traditional utility planning best practice, the BCUC should consult with other utilities. For all of these reasons, BC Hydro respectfully submits that the BCUC should not recommend that BC Hydro use IPPBC’s proposal as the basis for its next IEP.

C. LTAP Action Plan

1. DSM

   a. Reply to IPPBC - Power Smart Funding Agreements

IPPBC’s arguments that there should be a levelling of performance conditions between EPAs with IPPs and Agreements for DSM ignore one material difference between the two resource sources – deliverability risk. Commercial terms in agreements are designed to reflect the underlying risk allocation. In the case of DSM, there is no evidence that there is any material deliverability risk to be addressed.

IPPBC submits that BC Hydro should restrict the terms offered to DSM participants to create a level playing field with terms offered to IPP projects. The lion’s share of IPPBC’s comments concern security requirements and remedies on default.\textsuperscript{216} While IPPBC complains that the liquidated damages (LDs) provisions are more stringent than the LDs in the various DSM commercial arrangements, the evidence is clear that

\textsuperscript{213} Ex. A2-21, Guidelines 5 and 6, pg. 4.
\textsuperscript{214} Tr. 8, pg. 960, ln. 20 to pg. 962, ln. 17.
\textsuperscript{215} Ibid, pg. 2438, Ins. 2-10; pg. 2440, Ins. 18-21; pg. 2440, ln. 25 to pg. 2441, ln. 4.
\textsuperscript{216} IPPBC Argument, pg. 44.
there is an order of magnitude less attrition in DSM arrangements as compared to
BC Hydro’s experience with IPP calls. Mr. Hobson testified that out of the 400 or so
DSM contracts in place, less than one per cent have resulted in BC Hydro having to
recover incentive amounts from customers.\footnote{217} This stands in sharp contrast to the
attrition rate for the 2003 Green Call. As Ms. Van Ruyven testified, only two of 16
Green Call EPAs are currently delivering 40 GWh/y of the 1800 GWh/y of energy
originally awarded EPAs by BC Hydro.\footnote{218} BC Hydro designs its penalties such as LDs
with a view to the results of such penalties (value for cost). Clearly, there would be little
value in increasing the LDs for DSM commercial arrangements when there is no
material attrition.

As Ms. Van Ruyven testified, Power Smart agreement terms are developed in an effort
to find the right balance between encouraging participation to achieve cost-effective
energy savings and the need to protect against potential risks.\footnote{219} BC Hydro submits
that the evidence is clear that the current terms offered to DSM participants have
achieved the right balance between encouraging participation and protecting against
potential risk. Implementing IPPBC’s proposed changes to the terms found within
Power Smart funding agreements would likely reduce program participation (thereby
caus[ing] the loss of cost-effective energy savings) by protecting against potential risks
associated with DSM projects (for which there is no evidence that such risks exist).

IPPBC is concerned that BC Hydro offers incentives and benefits to DSM participants
that are not made available to IPP projects. In particular, IPPBC wants the Enabling
Activity Agreements to be discontinued and for BC Hydro customers to spend their
own money to investigate energy savings opportunities. IPPBC fails to note that the
purpose behind the offer of incentives and benefits to DSM participants and DSM
initiatives in general is to achieve energy savings that are more cost-effective than
supply options.\footnote{220} IPPBC also fails to note that the incentives and benefits flow to DSM

\footnote{217} Tr. 20, pg. 3025, ln. 12 to pg. 3026, ln. 3.
\footnote{218} Tr. 8, pg. 925, ln. 23 to pg. 926, ln. 4.
\footnote{219} \textit{Ibid}, pg. 3012, ln. 16 to pg. 3013, ln. 24.
\footnote{220} See, for example, Ex. B-10, "Participation in Power Smart Partner Program Agreement", Attachment 8
to BC Hydro’s responses to IPPBC IR 1.17.1.
participants which are BC Hydro customers. Increasing incentives and benefits to IPP projects would not necessarily change the cost-effectiveness of a supply project to BC Hydro customers, but rather simply reduce costs for IPPs. Finally, IPPBC also fails to note that the cost of the incentives and benefits to DSM participants is fully considered in the evaluation of the cost-effectiveness of the DSM energy savings.

b. IPPBC Return on Interest (ROI) Metric

In reply, BC Hydro notes the following with respect to IPPBC’s proposal to use a ROI metric:

1) No other intervenors have indicated a need to include the IPPBC’s ROI metric in the list of metrics already employed by BC Hydro. It is particularly noteworthy that no customer group, on whose behalf IPPBC purported to advance what it termed the “utility ROI”, supports the adoption of the IPPBC ROI metric at this time.\(^{221}\)

2) IPPBC’s assertion that it did not focus exclusively on the utility ROI, which it admitted is the equivalent of the Non-Participant Test,\(^ {222}\) is disingenuous. Under cross examination, the IPPBC panel conceded that IPPBC’s conclusions concerning the cost-effectiveness of BC Hydro’s DSM programs derive solely from its employment of the utility ROI.\(^ {223}\) To be specific, IPPBC characterizes the cost-effectiveness of the entire DSM portfolio using the results of its utility ROI result of 2.2%. This characterization ignores the perspectives of participants and does not accurately represent the cost-effectiveness of the resource.\(^ {224}\) The proper characterization of the cost-effectiveness of the entire DSM portfolio as a resource should be demonstrated using the All Ratepayers perspective, which using the IPPBC’s “total ROI” metric and calculations,

\(^{221}\) BCOAPO Argument, pg. 15, para. 79; CEC Argument, pg. 28; JIESC Argument, pg. 11.

\(^{222}\) See IPPBC Argument, pg. 9, and the BC Hydro Argument, pg. 85 and in particular the evidentiary references set out at footnotes 393 and 395.

\(^{223}\) Tr. 23, pg. 3652, Ins. 1-13.

\(^{224}\) Tr. 18, pg. 2717, In. 14 to pg. 2718, In. 11; pg. 2756, In. 17 to pg. 2758, In. 1; pg. 2758, In. 14 to pg. 2759, In. 12.
results in a ROI of 13.4%.\textsuperscript{225} Using the IPPBC’s own total ROI metric for the All Ratepayers perspective demonstrates the cost-effectiveness of the DSM portfolio.\textsuperscript{226}

3) BC Hydro agrees with CEC that IPPBC’s conclusions are based on “old values for energy that do not reflect the newer more appropriate price references”.\textsuperscript{227} IPPBC used BC Hydro’s September 2004 scenario average price forecast.\textsuperscript{228}

4) BC Hydro submits that it is self-serving and inconsistent for IPPBC to advocate for a “levelling of the playing field” on the one hand, and assert that the cost-effectiveness of BC Hydro’s DSM programs, but not IPP call energy, should be measured against market forecasts on the other hand. As the IPPBC conceded, both DSM and IPP supply displace spot market imports, among other things, and both products are different from the product available on the spot market.\textsuperscript{229}

5) IPPBC states that the ROI metric does not alter the various cost test perspectives (Utility, All Ratepayers, and Non-Participants) that BC Hydro currently employs, but instead is a new metric to measure these perspectives on the basis that it is better understood by the business community and provides more clarity for program designers. There is no evidence whatsoever that the various ROI tests put forward by IPPBC would be better understood by the business community than the benefit/cost ratios BC Hydro currently uses to measure the various cost test perspectives. BC Hydro submits that the benefit/cost ratios are commonly used metrics that are understood within the business community. The current cost tests and metrics employed by BC Hydro are commonly used by other utilities to understand DSM and

\textsuperscript{225} Ex. C18-5, pg. 2, Chart 1.
\textsuperscript{226} Under cross examination, the IPPBC Panel agreed that a total ROI of 13.4% would be “appropriate ROIs in the business world”: Tr. 23, pg. 3639, ln. 25 to pg. 3640, ln. 12.
\textsuperscript{227} CEC Argument, pg. 28.
\textsuperscript{228} TR. 23, pg. 3658, Ins. 3-6.
\textsuperscript{229} Tr. 23, pg. 3660, Ins. 11-12.
compare to other resource options.\(^{230}\) There is no evidence that the IPPBC ROI metric is used by any other utilities for DSM initiatives.\(^{231}\) The current cost tests and metrics employed by BC Hydro provide the information needed by program designers to understand the potential need to balance the cost-effectiveness of the resource and the equity impacts between participants and non-participants. The fact that IPPBC’s ROI metric “uncovered” that some programs returned more than the BC Hydro’s weighted average cost of capital (WACC) from an All Ratepayers Test perspective and did not return BC Hydro’s WACC from a Non-Participant Test perspective is consistent with the existing information provided through current metrics employed by BC Hydro that indicate that some programs have benefit to cost ratios greater than one from an All Ratepayers Test perspective and benefit to cost ratios less than one from a Non-Participant Test perspective.\(^{232}\) It is the application of these different cost test perspectives, and not the metrics, that provide the information needed by program designers to make adjustments while designing programs. The ROI metric provides no further clarity that will benefit program designers who are already fully conversant with the existing metrics employed by BC Hydro.

2. Acquisition from IPPs - Valuing Freshet Energy

CEC agrees with BC Hydro that the spring freshet constraint is “critical and real”. CEC supports BC Hydro “completely” in differentiating energy supply resource value based on constraints such as the spring freshet.\(^{233}\)

CPC does not challenge BC Hydro’s evidence that there is a particular problem in freshet with non-firm energy, but suggests that any price adjustment factor that is

\(^{230}\) See the Summit Blue Consulting, LLC report prepared for the Canadian Association of Members of Public Utility Tribunals, pgs. 19-21 and 37-38 (Ex. B-6-4, attachment to BC Hydro’s response to BCUC IR 1.278.6).

\(^{231}\) See BC Hydro Argument, pg. 86, footnotes 396 – 398.

\(^{232}\) Ex. B-10, BC Hydro response to IPPBC IR 1.22.2, Table 4.9, which sets out the various benefit/cost ratios. In BC Hydro’s submission, these benefit/cost ratios provide the same information as the IPPBC ROI analysis.

\(^{233}\) CEC Argument, pg. 44.
applied during the April to July freshet period should apply to all like energy received during that period.\textsuperscript{234} In reply, BC Hydro submits that it is becoming increasingly constrained and needs to: (a) continue to identify the problems and low value of freshet energy and (b) reflect this in the design of future calls in a way that balances the competing demands (i) to provide IPPs with an adequate payment to cover their costs but also (ii) to provide a price signal that appropriately reflects the incremental value of freshet non-firm energy.

BC Hydro has already confirmed in its Argument that it is exploring all options related to the cost-effective acquisition of new resources as well as appropriate ways to value different projects.\textsuperscript{235} CPC has indicated it supports this approach.\textsuperscript{236} BC Hydro submits that the BCUC should leave this issue to BC Hydro’s First Nations and stakeholder consultation process and the NSP contemplated in advance of the 2007 Call.

3. CRPs
   a. BC Hydro – BCTC Coordination in IEP/LTAP and the Standards of Conduct

First and foremost, BCTC acknowledges that it was involved throughout the IEP process and, subject only to minor improvements noted in its evidence, agrees that the degree of coordination between BC Hydro and BCTC of electricity and transmission plans was sufficient to ensure that the transmission implications of the IEP/LTAP were properly considered.\textsuperscript{237}

In reply to paragraph 7 of the BCTC Argument, BC Hydro agrees that further coordination or more relaxed Standards of Conduct would not likely have made a substantive difference to the CRPs or 2006 LTAP. However, BC Hydro’s view is that the existing Standards of Conduct may be too restrictive for optimal coordination of all generation and transmission planning matters, particularly the more detailed and

\textsuperscript{234} CPC Argument, pg. 7.
\textsuperscript{235} BC Hydro Argument, pg. 89, Ins. 13 – 16.
\textsuperscript{236} CPC Argument, pg. 6, ln. 39.
\textsuperscript{237} BCTC Argument, pg.2, paras. 3 and 4.
technical aspects of a specific plan or project. The requirement that transmission information must be publicly posted can restrict iterative discussion about study results and generation/transmission trade-off options.\textsuperscript{238}

As noted by BCTC in footnote 8 of its Argument, the Federal Energy Regulation Commission has initiated a Notice of Proposed Rulemaking that addresses the effect of Standards of Conduct on integrated resource planning and competitive resource acquisition among other things. BC Hydro intends to work with BCTC to determine what changes to the existing Standards of Conduct might be beneficial, and would bring an application to the BCUC if required.

b. CRPs

In section 4.2 of the BCTC Argument, BCTC makes the following submission, "BCTC agrees that BC Hydro’s legitimate needs are not to be traded off against the needs of others. However, this is not to say that in considering what those needs are, the Commission is not be cognizant of the needs of others."\textsuperscript{239} BC Hydro agrees that the BCUC concluded in the Open Access Transmission Tariff (OATT) decision that it must be cognizant of and sensitive to the impact its approval may have on the ability of other customers to secure long term firm capacity on the transmission system.\textsuperscript{240}

However, no intervenor has questioned the reasonableness of BC Hydro’s CRPs, including BCTC which states it “does not take a position on whether or not the CRPs are appropriate.”\textsuperscript{241} The three customer groups support BC Hydro’s CRPs: BCOAPO supports BC Hydro’s position regarding the CRPs,\textsuperscript{242} JIESC accepts BC Hydro’s

\textsuperscript{238} Tr. 9, pg. 1226, In. 23 to pg. 1229, In. 8; and Tr. 21, pg. 3190, In. 12 to pg. 3193, In. 4.
\textsuperscript{239} BCTC Argument, para. 29.
\textsuperscript{240} BCTC Argument, para. 29.
\textsuperscript{241} BCTC Argument, para. 23.
\textsuperscript{242} BCOAPO Argument, para. 110.
CRPs and believes they are adequate for present purposes,\(^{243}\) and CEC agrees that BC Hydro’s CRPs should be approved.\(^{244}\)

Furthermore, in its response to BCUC IR 1.5.2\(^{245}\) BCTC states that existing long-term firm point to point (PTP), and existing and new short-term PTP transmission customers would not be affected by BCUC approval of the CRPs. BCTC says that any impact that may arise from the CRPs would likely fall on new long-term firm PTP customers, and would probably take the form of constrained rollover rights. BCTC acknowledges that it cannot know how many new long-term firm PTP customers might be affected by approval of the CRPs, and it states that extrapolating historic data suggests little if any impact. BC Hydro also notes that for the past five years all of BCTC’s long-term firm PTP contracts have been for West to East flow,\(^{246}\) which is counterflow to the direction BCTC would reserve for BC Hydro’s CRPs (East to West) if they are approved. Thus, BC Hydro submits that no party has objected to the CRPs, and there is no evidence to suggest that BCUC approval of the CRPs would have a significant impact on a transmission customer’s ability to secure long-term firm capacity.

In reply to paragraph 32 of the BCTC Argument respecting the phrases “directionally appropriate” and “as otherwise described in Appendix O to Exhibit B1-F, as amended”, BC Hydro provides the following additional clarification.

The transmission impacts associated with BC Hydro’s CRPs, if approved, will be further studied jointly by BCTC and BC Hydro prior to or within the NITS application process.

The term “directionally appropriate” was intended to reflect BC Hydro’s understanding that CRPs, once approved by the BCUC, may be subsequently revised and refined prior to or within the NITS application process. Once included in a NITS Agreement, BC Hydro may also subsequently revise the approved CRPs as part of future NITS

\(^{243}\) JIESC Argument pg. 21.
\(^{244}\) CECBC Argument pg. 16.
\(^{245}\) Exhibit C7-8.
\(^{246}\) Exhibit C7-8, BCTC response to BCUC IR 1.5.1.
updates (made pursuant to Attachment J of BCTC’s OATT) to reflect more current
information without the CRPs having to be resubmitted for BCUC approval. BC Hydro
believes this flexibility is consistent with Section 2 of Attachment J of the OATT with
respect to modifications to the timing of forecast contingency resources, specifically:

“Pursuant to Section 31.6 of this Tariff, Network Customers are
required to provide annual updates of Network Load and
Network Resource forecasts. The Network Customer may also
revise the expected in-service dates of the forecasted
generation resources identified in the Network Customer’s
Contingency Resource Plan. [Emphasis added].

In BC Hydro’s view, replacement in the NITS Agreement of contingency resources
(type or volume) located within a major transmission region, and in an approved CRP,
with contingency resources located within the same transmission region should not
require further regulatory approval. Hence, it was anticipated that the CRPs submitted
in the NITS application would be based upon the most current planning information
consistent with this perspective and in particular based upon the latest load forecast
and the best current view of F2006 Call project attrition, and could be subsequently
revised without further regulatory approval. However, replacement of contingency
resources located in one major transmission region with contingency resources
located in another major transmission region could have a significant impact on
BCTC’s transmission capital plans, and in BC Hydro’s view would require BCUC
approval prior to inclusion in a NITS application.

Much of BC Hydro’s new supply resources come from the private sector, which
creates uncertainty in resource options. In BC Hydro’s view the CRPs must include
considerable flexibility, as outlined above, to manage this uncertainty.

c. The Need for, and Timing of, ILM Reinforcement

In reply to section 3.1 of the BCTC Argument, BC Hydro submits that the Interior to
Lower Mainland (ILM) reinforcement is required and justified at the earliest possible in-
service date. BCTC states that delaying development work on ILM reinforcement

would involve significant risk and that even if Burrard repowering were to be pursued, “BCTC would be obligated under the OATT to continue to plan for ILM reinforcement for an earlier in-service date.”

JIESC accepts that ILM reinforcement is already overdue and that its value is not contingent upon any particular development. JIESC would like to see the ILM project advanced even faster than currently proposed by BC Hydro. BC Hydro repeats its submission that ILM reinforcement is required and justified at the earliest possible in-service date. BC Hydro encourages BCTC to file its CPCN application for ILM reinforcement as soon as possible.

**D. Project Evaluation**

1. **Cost-Effectiveness vs. Level Playing Field**

BC Hydro laid out its position on cost-effectiveness in section III.D.2 of its Argument. BCOAPO, CEC and JIESC all support BC Hydro’s view that the appropriate measure for BC Hydro to analyze and compare projects is based on the cost-effectiveness of such projects in meeting the needs of BC Hydro’s customers and not based on IPPBC’s view that a “level playing field” must be created.

Even IPPBC states “Each proponent, BCH included, should use its own true cost of capital.” IPPBC acknowledges that “[a successful IPP’s] bid price will be used to set the customer’s future rates.”

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248 BCTC Argument, para. 17.
249 JIESC Argument, pg. 16.
250 JIESC Argument, pg. 2.
251 BCOAPO Argument, pg. 19 - 20.
252 CEC Argument, pg.54 -55.
253 JIESC Argument, pg. 22.
254 IPPBC Argument, pg. 3.
2. Debt/Equity Ratios

IPPBC’s description in Argument\textsuperscript{255} of the similarities of commercial corporations to BC Hydro glosses over the clear distinctions provided by BC Hydro’s Panel 6 and by Mr. Standbrook.\textsuperscript{256}

Both IPPBC\textsuperscript{257} and Terasen\textsuperscript{258} rely on selective, broad-brush and/or partial references to the results of BC Hydro’s debt/equity ratios shown in capital forecasts to (a) imply BC Hydro is capable of or does manage its debt/equity ratios; or (b) impute direct linkages between BC Hydro equity levels and its capital expenditures. BC Hydro relies on its evidence and the BC Hydro Argument with respect to the sources of funds available to BC Hydro, the use of funds for capital expenditures, and the relative disconnect between the two that results from the operation of HC1 and HC2.

Specific issues such as Contributions in Aid of Construction\textsuperscript{259} are neither relevant nor material to the projects and associated capital investments identified in the LTAP.\textsuperscript{260}

IPPBC’s description of the debt/equity on page 6 of its Argument, based on the reference at footnote 7, is equally ungrounded. Specifically, Mr. Cowan’s response to Mr. Austin was:

“MR. AUSTIN: Q: Would it be fair to say that that billion dollar difference is going to be funded by B.C. Hydro’s equity and not debt?

MR. COWAN: A: No, it would not be fair to say that. That difference will be funded by cash flow generated by the business that is surplus to the operating costs and the payment of the dividend. So -- and if it wasn't spent on the increased capital expenditures, it would be used to pay down the debt”.

\textsuperscript{255} IPPBC Argument, pg. 5.
\textsuperscript{256} Tr. 18, pg. 2770, ln. 7 to pg. 2771, ln. 20.
\textsuperscript{257} IPPBC Argument, pgs. 5 – 8.
\textsuperscript{258} Terasen Argument, pg. 12, para. 30.
\textsuperscript{259} \textit{Ibid.}
\textsuperscript{260} Tr. 18, pg. 2781, Ins. 14 - 21.
On the same page, IPPBC’s Arguments are not supported by the footnote references cited at footnotes 9, 10 and 11. The referenced transcript excerpts on BC Hydro’s capital forecasts resulted in an articulate description of the impact of varying levels of capital projects on BC Hydro’s debt\(^\text{261}\) by Mr. Standbrook. Contrary to what is stated by IPPBC at footnote 11, Mr. Standbrook’s final statement was:

“But when we come to look at an individual project and we say, well, what will the impact of making an investment in that project be on our balance sheet, because of the things I’ve spoken about before the impact of making that capital expenditure on our balance sheet is just debt. It won’t impact the amount of equity we have. It won’t impact the amount of cash flow that’s generated and covered by depreciation. The only impact that that will have is debt. So we look at that and we say, well, effectively we’re financing that project 100 percent by debt”\(^\text{262}\).

IPPBC’s second point on page 7 of its Argument is unsupported by evidence and should be given no weight.

In its third point, IPPBC uses an example of a correction for a revenue imbalance caused by unusual hydraulic conditions to attempt to suggest that BC Hydro manages its equity. Mr. Cowan’s response, which was quoted by IPPBC, does make the distinction where it states “…but it does have an obligation to its shareholder to provide it with a return on its investment.”

In its third point and the paragraph that follows, the IPPBC Argument enters into a revenue requirements discussion. The paragraph starting “If BCH doesn’t feel that …” ignores or attempts to replace the action of HC2 section 4 which states:

\[4 \text{ Subject to section 7, in regulating and setting rates for the authority, the commission must ensure that those rates allow the authority to collect sufficient revenue in each fiscal year to enable the authority to}
\]

(a) provide reliable electricity service,

(b) meet all of its debt service, tax and other financial obligations,

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\(^{261}\) Tr. 18, pg. 2777 ln. 24 to pg. 2780, ln. 13.

\(^{262}\) Tr. 18, pg. 2787 ln. 10 to 21.
(c) comply with government policy directives, including, without limitation, government policy directives requiring the authority to construct, operate or extend a plant or system, and
(d) achieve an annual rate of return on equity equal to the pre-income tax annual rate of return allowed by the commission to the most comparable investor-owned energy utility regulated under the Utilities Commission Act.

BC Hydro’s allowed revenue requirements are defined in HC2 and the UCA. Its equity is prescribed by HC2, which does not define equity as being more or less than a specified range. If BC Hydro requires additional revenue or less revenue, it could make a revenue requirement application to re-establish the appropriate revenue requirements.

Actions identified by IPPBC to “refund excess equity … to the Provincial government … or to the customers…” are not options available in HC2. Surplus cash flow resulting from an unusually high water year (or the corollary deficit cash flow) is an entirely different issue. Mr. Cowan’s comments referred to by IPPBC “It would have the ability to refund some money to the customers…” addressed actual revenue and cash flow, not equity.

Mr. Cowan stated that if surplus funds were not spent on capital programs, such surplus funds would be used to pay down debt.

IPPBC’s suggestion in the following paragraph (starting with “BCH should handle its equity …”), including the sub-points 1 and 2, are not “equity” issues at all; rather, they are revenue requirement issues. The suggestions, if implemented, would not alter the HC equity of BC Hydro as they have no direct link to HC equity. As such, the suggestions made in sub-points (1) and (2) must be dismissed.

The IPPBC then closes section 3 of its Argument with a recommended BCUC order as follows:

263 IPPBC Argument, pg. 7.
264 Tr. 17, pg. 2626, lns. 21-26.
“The BCUC should order or direct BCH to use a proper weighted average
cost of capital in all of its investment evaluations and in its rate impact
calculations.”

“The proper debt/equity ratio to include in the WACC calculation should
be the ratio that BCH is projecting will apply for incremental capital
investments over the next 20 years, namely 58% debt to 42% equity –
unless BCH chooses to stipulate a target debt/equity ratio that it intends
to manage towards, by using its option to issue equity dividends or profit-
sharing refunds. This target ratio would furnish a proper basis for the
WACC calculation.”

BC Hydro has provided evidence as to the operation of HC2 and the effect of capital
expenditures on debt. There is no evidence on the record to suggest anything else.
IPPBC’s confused argument does not support such an order and should be dismissed.
The calculation of a 58% debt to 42% equity is also not supported by the evidence,
and should be ignored.

3. Endorsement of Parameters

In subsection I.B.1.b.ii of the BC Hydro Argument, BC Hydro requested certain project
evaluation economic measures be endorsed, or as coined by JIESC – “codified”.

JIESC also identifies a list of items it argues the BCUC should confirm or codify.
BC Hydro generally agrees with the JIESC proposal for endorsements subject to the
following comments:

• BC Hydro does not agree that it would be appropriate at this time to endorse
  Site C as a standard comparison product to IPPs, DSM and Resource Smart;

• At bullet 3 (appropriate risk adjustment), BC Hydro generally agrees with the
  first sentence, and observes that P90 capital estimates are but one solution to
  risk assessments and should not be endorsed as the only solution.

• Bullets 2 (relevant costs for comparisons) and 7 (principle of cost-effectiveness)
  of the JIESC list are principles BC Hydro agrees with; and

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• The remainder of the factors are generally similar to BC Hydro’s request for endorsement or are in line with its proposed project evaluation methodology.

CEC does not directly comment on the use of the term “endorse”, however it does identify BC Hydro’s discount rates for rate impact and economic evaluation, and accepts that the rates it is using reflect the cost of financing through BC Hydro from a customer perspective. Further, CEC states it agrees with BC Hydro’s financial evaluation approach, with what it calls two exceptions. In each case, the exceptions may better be identified as possible enhancements. BC Hydro suggests the two exceptions would be better addressed at a later date through stakeholder processes or in future proceedings.\(^\text{267}\)

IPPBC argues “codifying the numeric values of BCH’s weighted average debt cost and WACC at specified levels, subject to change, has no practical benefit. It is inevitable they will change, so there is no point in codifying them.”\(^\text{268}\) BC Hydro suggests that, while the numeric values may change, there would still be some benefit in endorsing certain numbers, as long as the definition and use of the term “endorse” or “codify” remains similar to that stated by BC Hydro in its Argument.\(^\text{269}\)

### 4. Reference or Market Price

CEC states BC Hydro’s discussion of the use of the F2006 Call Reference Price comparator is appropriate, including for DSM comparisons.\(^\text{270}\) SCCBC also supports the use of the Reference Price from the F2006 Call.\(^\text{271}\)

BCOAPO does not specifically oppose the use of the F2006 Call Reference Price but states that this Reference Price cannot be used as a single number to apply for future DSM programs. BCOAPO goes on to suggest that the resources that will be avoided

\(^{266}\) JIESC Argument, pg. 22.  
\(^{267}\) CEC Argument, pgs. 65 – 67.  
\(^{268}\) IPPBC Argument, pg. 7.  
\(^{269}\) BC Hydro Argument, section I.C.1.(1), footnote 20.  
\(^{270}\) CECBC Argument, pgs. 66 and 68  
\(^{271}\) SCCBC Argument, pg. 14
by DSM are future resources that may have a higher or lower cost. First, as
confirmed in Part II.A.2 of the Reply, BC Hydro has stated it plans to use the
Reference Price as one indicator, that it is not necessarily a pass/fail comparator and
that there may be other reference signals to take into account. BCOAPO’s higher or
lower cost view is not particularly helpful; decisions are ongoing, and at some point
must be made. At such points in time future resources will always have a higher or
lower cost.

While IPPBC states it is concerned that the Reference Price can be used as a price
test, its main argument seems to rest on but goes much further than the BCUC’s
Determinations at pages 50 and 51 of the BCUC’s LTEPA+ Decision. BC Hydro has
not simply “latched onto” the F2006 Call Reference Price. The F2006 Call Reference
Price was reviewed by BC Hydro’s Risk Management Committee and approved by
BC Hydro’s executive in October 2006. As stated in the Reply in Part II.A.2,
BC Hydro submits that DSM, for example, in the mid to long-term would to a large
extent be displacing future planned acquisitions from domestic IPPs. The evidence is
clear that DSM programs have terms for cost-effectiveness purposes of up to 20
years, which terms are similar to many of the F2006 Call EPAs. When viewed at
holistic levels, energy efficiency savings terms are much longer than an IPP EPA. The
savings that can result from DSM programs are assumed to last indefinitely because
the new technology has been established on a permanent basis.

BC Hydro acknowledges that it is generally more appropriate to use levelized cost
comparisons than single point in time cost comparisons and that reference
comparators covering different periods of time may be different.

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272 BCOAPO Argument, para. 83.
273 IPPBC Argument, footnotes 59 and 60.
275 Ex B-10, BC Hydro response to BCOAPO IR 1.22.2.
IV. CONCLUSION

BC Hydro respectfully submits that the BCUC ought to favour BC Hydro’s position on these issues, and respectfully requests the BCUC issue the Order sought in its entirety.
ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: March 7, 2007

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2006 Integrated Electricity Plan and Long-Term Acquisition Plan

BCHydro

Reply Argument

Schedule A
PRINCIPLES
OF
ADMINISTRATIVE
LAW

Fourth Edition

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law. The courts have used the phrase "patently unreasonable" to determine when an error of law is so serious that it should be characterized as being jurisdictional in nature.\textsuperscript{91} This is discussed more fully in Chapters 11 and 12.

6. The Abuse of Fettering Discretion

Because administrative law generally requires a statutory power to be exercised by the very person upon whom it has been conferred,\textsuperscript{92} there must necessarily be some limit on the extent to which the exercise of a discretionary power can be fettered by the adoption of an inflexible policy, by contract, or by other means. After all, the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits.\textsuperscript{93} Anything, therefore, which requires a delegate to exercise its discretion in a particular way may illegally limit the ambit of its power. A delegate who thus fetters its discretion commits a jurisdictional error which is capable of judicial review.

On the other hand, it would be incorrect to assert that a delegate cannot adopt a general policy. Any administrator\textsuperscript{94} faced with a large volume of discretionary decisions is practically bound to adopt rough rules of thumb. This practice is legally acceptable, provided each case is individually considered on its merits. As Bankes L.J. said in \textit{R. v. Port of London Authority}:\textsuperscript{95}

There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. . . . If the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever

\begin{footnotesize}

\textsuperscript{92} See Chapter 6, for a discussion of circumstances in which a delegate may validly sub-delegate certain statutory powers.

\textsuperscript{93} See W. Wade & C. Forsyth, \textit{Administrative Law}, 7th ed. (Oxford: Clarendon Press, 1994) at 360: "It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case; each one must be considered on its own merits and decided as the public interest requires at the time."

\textsuperscript{94} Or sometimes many administrators, all faced with exercising the same statutory discretion, for example, immigration officers deciding whether to grant landed immigrant status, tax inspectors, or prosecutors deciding whether to proceed by way of indictment or summary conviction. There is a natural tendency for the civil service to attempt to codify the way such discretions are to be exercised, to attempt to achieve consistency. Hence the various "guidelines", "interpretation bulletins" and other similar non-statutory material.

\end{footnotesize}
made. There is a wide distinction to be drawn between these two classes.

Similarly, a delegate does not necessarily commit an error by referring to the policy adopted by another governmental agency when deciding to exercise its own discretion, but may err if the delegate erroneously believes that it is bound by a decision of a different delegate and thereby fails to make an independent decision. It is true that the principles of natural justice and fairness may in both cases require the delegate to disclose the existence of such policies so that a person affected thereby can intelligently make representations as to why the delegate should exercise its discretion differently in the particular case. Nevertheless, the legal issue boils down to whether the delegate in fact has exercised its discretion or fettered it.

(a) Inflexible Policy Fetters on the Exercise of Discretion

The adoption of an inflexible policy almost certainly means that the delegate has not exercised the discretionary power granted to it. Accordingly, an order for mandamus in principle will issue to compel the delegate to decide the particular case on its own merits. This situation arose in Lloyd v. British Columbia (Superintendent of Motor Vehicles), where the Court of Appeal of British Columbia struck down the superintendent's invariable policy of suspending the licence of every driver convicted of driving while impaired. Bull J.A. dealt with the legal issues as follows:

With respect, I do not agree, but I prefer to base my conclusion on a somewhat different approach. As the proceedings are for certiorari, we are concerned with jurisdiction. Did the respondent Superintendent exceed or reject or decline the jurisdiction provided him by the statute, or put in another way, did he determine the question which he was required to determine? To my mind, the question of the justi-

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97 Koopman v. Ostergaard (1995), 34 Admin. L.R. (2d) 144 (B.C. S.C. [In Chambers])
98 On the contrary, the adoption of an inflexible policy constitutes converting a discretionary power into a rule applicable to all cases, rather similar to enacting delegated legislation with no discretionary element. This is the reverse of the problem in Canada (Attorney General) v. Brent, [1955] 3 D.L.R. 587 (Ont. C.A.), affirmed [1956] S.C.R. 318 (S.C.C.), and Brant Dairy Co. v. Ontario (Milk Commission) (1972), [1973] S.C.R. 131 (S.C.C.), discussed in Chapter 6, where the delegate purported to create a discretionary power by enacting delegated legislation. Both errors are fatal because they depart from the form of power delegated by the legislation to the administrator, who has no authority to make such changes.
fication for a blanket policy decision as to unfitness is irrelevant in these proceedings. Once the Superintendent is carrying out his duties within his jurisdiction as required of him, it matters not how wrong or right he may be in the decisions he makes or the discretion he exercises. But where, as in Board of Education v. Rice, [1911] A.C. 179 (H.L.), and in Toronto Newspaper Guild v. Globe Printing Co., [1953] 2 S.C.R. 18, 106 C.C.C. 225, [1953] 3 D.L.R. 561, the inferior tribunal, board or official has declined to enter upon, or has not entered upon, an inquiry upon which he was bound to enter, or where, as in numerous decisions of the Supreme Court of Canada and of this Court, having entered upon such inquiry the tribunal, board or official has exceeded the authority or jurisdictional boundary which the statute gave, a superior Court will interfere by the issue of one of the appropriate prerogative writs.

In my view it is crystal clear that the respondent Superintendent did not enter into any inquiry at all as to whether or not the appellant was or was not, by virtue of any reason, unfit to drive a motor vehicle. He formed no opinion of the appellant’s fitness at any time, and never at any time put his mind to that question. A pre-existing policy decision formed at some unknown earlier time would unquestionably, have bearing upon the formation of his opinion, had he put his mind to the appellant’s fitness or otherwise, but that policy decision is not what the section required the Superintendent to make or to apply. He was required to form an opinion of fitness or unfitness as at the time of the formation of the opinion. Put simply, there never was any inquiry or consideration given to the situation of the person aggrieved by the official charged by the Legislature with judicial or quasi-judicial duties. I fail to see on what valid grounds it can be said that the respondent Superintendent judicially formed an opinion of the appellant’s unfitness to drive at the time of the opinion and which unfitness had been satisfactorily proved to him, when he did nothing more than give directions at some unknown earlier date to his staff to send out suspension notices to all persons who had been convicted of a violation of s. 222 of the Criminal Code and to place his stamped name thereon.

On the other hand, it is sometimes possible for a delegate to adopt a general policy without thereby fettering the exercise of its discretion in a particular case. At the minimum, it appears that the delegate must consider fairly those cases which run counter to the policy. Fair consideration might require

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disclosure of the existence of the policy to the person seeking to be exempted therefrom. Provided that the policy is relevant to the purpose for which the discretion was granted, the courts have upheld the validity of using a flexible policy in determining how to exercise the discretion. In such a case, the delegate has not relentlessly refused or declined to exercise its discretion on account of the policy, but rather has exercised its discretion in the very case before it.

It has been suggested that the administrator’s natural desire for consistency may sometimes amount to an illegal fettering of discretion, as may adopting a policy of only acting on the recommendation of a third party. This not only fetters discretion but also constitutes illegal sub-delegation.

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found that the denial of visiting privileges to a penitentiary inmate’s homosexual partner on the basis that policy excluded homosexual partners constituted a failure to exercise a discretion. In the case of Bourque v. Nouveau-Brunswick (Ministre des Ressources naturelles & de l’Énergie) (1992), 8 Admin. L.R. (2d) 50 (N.B. Q.B.), the applicant found two dead protected birds on his property. He applied to the minister to keep the birds which he proposed to have stuffed and displayed in his house. The permit was denied on the basis of a long standing policy to grant such permits only to universities, museums and other groups and organizations using such animals and birds for educational and scientific purposes. The application was granted insofar as the single minded pursuit of policy had the effect of fettering the discretion of the delegate.


103 Ibid. See also the Winpey Western case, supra note 98, especially at 198-204 (C.A.), and 134-38 (Q.B.).

104 An interesting application of this rule is found in Nastrani v. Canada (Minister of Citizenship & Immigration) (1998), 148 F.T.R. 117 (Fed. T.D.), where an immigration officer fettered her own discretion by saying that she would never exercise her discretion in favour of an applicant on welfare. By adopting this blanket approach, the immigration officer failed to consider the applicant’s individual circumstances.

105 See Lewis v. British Columbia (Superintendent of Motor Vehicles) (1979), 108 D.L.R. (3d) 525 at 528 (B.C. S.C.) where Taylor J. wrote:

Those performing the Superintendent’s duties quite understandably desire to avoid consideration of the merits of individual cases, and the controversy which arises when applicants are turned down on the basis of judgement. They prefer the strict application of rules to which reference can be made. Had the Legislature desired that the licenses be granted or refused on the basis of compliance with particular standards it would have authorized such standards to be established by regulation. Instead, it has determined that the decision should be based on “fitness” and “ability” and make the Superintendent and his delegates judges of these qualities in individual applicants.


(b) Contractual Fetters on the Exercise of Discretion

A statutory delegate cannot validly contract to exercise its discretion in a particular way. As Lord Birkenhead said,\textsuperscript{108} there is

a well-established principle of law, that if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into a contract or take any action incompatible with the exercise of their power or the discharge of their duties.

Thus, any contract which compels a municipality to re-zone land in a particular way is illegal, whether reliance is placed upon it by the municipality, the land-owner, or any third party.\textsuperscript{109} Of course, a statute may specifically permit such contractual agreements on how a discretionary power is to be exercised.\textsuperscript{110}

(c) Reference to Other Governmental Policies

A statutory delegate sometimes exercises its discretion by reference to a policy articulated by some other governmental body. On the one hand, such an external policy must clearly be relevant to the statutory question in issue.\textsuperscript{111} If it is irrelevant or improper, the exercise of the delegated power is invalid for this reason.\textsuperscript{112} On the other hand, even if the external policy is relevant, the rule against fettering requires the delegate to exercise its own discretion in deciding whether and how to accept the policy. In particular, the delegate


\textsuperscript{109} See Pacific National Investments Ltd. v. Victoria (City) (2003), 223 D.L.R. (4th) 617 (B.C. C.A.), leave to appeal allowed (2003), 2003 CarswellBC 2799 (S.C.C.), where the Court undertakes a thorough examination of the legal and policy principles relating the exercise of discretion by a municipality. See also Vancouver (City) v. Vancouver (Registrar Land Registration District), [1955] 2 D.L.R. 709 (B.C.C.A.), where illegality was asserted against the city when the registrar refused to register an agreement which gave it an interest in land which it undertook to re-zone and Osborne v. Amalgamated Society of Railway Servants (1908), [1909] 1 Ch. 163 (Eng. C.A.), affirmed [1910] A.C. 87 (U.K. H.L.), where this principle was applied to strike down an agreement as to how trustees were to vote; Egerton v. Earl of Brownlow (1853), 4 H.L.C. 1 (U.K. H.L.) at 160-61.

\textsuperscript{110} Under s. 10 of the (now repealed) Northern Canada Power Commission Act, R.S.C. 1985, c. N-24 [Repealed R.S.C. 1985, c. 7 (4th Supp.), s. 1.] the commission was given broad discretion to determine the rates to be charged for power supplied by it. However, under s. 11, the commission could also enter into long-term contracts for the supply of power, and any such contract lawfully delegates from the commission’s ongoing discretionary rate-setting power.

\textsuperscript{111} As it was held to be in both Innisfil (Township) v. Vaspa (Township), [1981] 2 S.C.R. 145 (S.C.C.), varied [1982] 1 S.C.R. 1107 (S.C.C.), and the Wimpey Western case (1983), 28 Alta. L.R. (2d) 193 (Alta. C.A.), affirming (1982), 21 Alta. L.R. (2d) 125.

\textsuperscript{112} See the discussion of this abuse in section 2 of this chapter, above.
cannot simply treat the external policy as a given, and may be required to permit cross-examination and refutation of that policy.\textsuperscript{113} The expectation that a delegate will exercise its discretion in a manner so as to accommodate other governmental policies raises difficult legal issues about the relationship between apparently independent administrative bodies and more centralized government agencies,\textsuperscript{114} which are only occasionally dealt with specifically by the legislature.\textsuperscript{115}

In theory, all fetters on the ability of a delegate to exercise its discretion are an abuse, and result in a loss of jurisdiction\textsuperscript{116} which can be reviewed by the courts, even in the face of a privative clause.

7. The Standard of Review of Discretionary Decisions

The standard of review that a court will use in reviewing the exercise of discretionary powers is discussed in Chapter 12.\textsuperscript{117}

8. Summary

This chapter has considered the legal limitations on the ability of a statutory delegate to exercise discretionary powers. Although the essence of a discretionary power is that it can and should be exercised differently in different cases, this does not mean that discretionary administrative actions can never be challenged successfully in court. In the first place, the courts can review whether the legislation in fact grants the delegate authority to exercise the impugned discretion at all.\textsuperscript{118} Even if the court upholds the ambit of the discretionary power upon which the delegate relies, judicial review nevertheless

\textsuperscript{113} This was the issue in the Innisfil case, supra note 111.


\textsuperscript{115} See for example, s. 27 of the Broadcasting Act, S.C. 1991, c. 11, which permits the cabinet to give broad directions to the Canadian Radio-Television and Telecommunications Commission respecting the Free Trade Agreement, and the former s. 54 of the Public Service Employee Relations Act, R.S.A. 1980, c. P-33, as amended by the Labour Statutes Amendment Act, 1983 (Alta.), c. 34, s. 5(7), which required a board of arbitration to consider the Provincial Treasurer's written statements of fiscal policy.

\textsuperscript{116} The error is jurisdictional in nature because the policy fetter prevents the delegate from exercising its discretion at all. In the Innisfil case, supra note 111 however, some of the judges in the lower Ontario courts treated this type of error as one within jurisdiction. With respect, this approach is theoretically incorrect, as Estey J. recognized in the Supreme Court of Canada.

\textsuperscript{117} The applicable standard of review of a decision of a municipal corporation is discussed in Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231, 20 Admin. L.R. (2d) 202 (S.C.C.).

lies to ensure that there has been no abuse of that power in a particular case. Although the courts have frequently elided them together, this chapter has for convenience grouped possible abuses into the following categories:

(a) improper intention in exercising a discretionary power for an unauthorized or ulterior purpose, in bad faith, or for irrelevant considerations;

(b) acting on inadequate material where there is no evidence or by ignoring relevant considerations;

(c) exercising discretionary power so as to obtain an improper result, which may be unreasonable, discriminatory, retroactive or uncertain in operation;

(d) exercising discretionary power under a misapprehension of the law; and

(e) fettering the exercising of discretion by adopting a policy or entering into a contract.

In theory, all these abuses cause the delegate to lose jurisdiction, and therefore are susceptible to judicial review even in the face of privative clauses.

9. Selected Bibliography


119 Ibid.
120 See Chapter 15.
Indexed as:

❖ Heisler v. Saskatchewan (Minister of Environment and Resource Management)

Between
Keith Heisler, applicant, and
Minister of Saskatchewan Environment and Resource Management, respondent, and
Ron Lavoie and Morrison Morley, intervenors
(Q.B. No. 891)
And between
John Bardahl, applicant, and
Minister of Saskatchewan Environment and Resource Management, respondent, and
Ron Lavoie and Morrison Morley, intervenors
(Q.B. No. 1066)

1999 SKQB 156
Q.B. No. 891 of 1998 J.C.R. and
Q.B. No. 1066 of 1998 J.C.R.

Saskatchewan Court of Queen's Bench
Judicial Centre of Regina
Kraus J.

(81 paras.)

Crown — Authority of ministers, exercise of — Discretionary power, limitations — Authority of ministers, delegation of — Nondelegable matters — Trade regulation — Services, licensing and regulation — Licensing — Amendment of — Particular services — Outfitters.

Application by Heisler and Bardahl, two outfitters, to have the respondent Minister of Environment and Resource Management's decision to amend their outfitting licenses quashed. Outfitters were licensed by the Crown to provide guide services and equipment to deer and bear hunters. In two districts, the number of outfitters increased dramatically and the boundaries of their hunting areas began to overlap. The Crown developed an overlap elimination process, to settle the boundaries. Ninety-five per cent of the boundaries were settled by consent. The applicants consented to their allotment in one of the districts but felt aggrieved by their allotment in the other. They were informed that if no resolution
was reached at mediation, the overlap would be eliminated by arbitration. When the arbitration meeting was held, one of the applicants was not aware of the meeting and the other was not permitted to attend. The applicants received letters telling them that their licences had been amended.

**HELD:** Application allowed. The Minister's authority to amend outfitters' licenses was based on the Natural Resources Act and the Outfitter and Guide Regulations. The Minister's decision to amend the licenses was part of a ministerial policy and was thus a discretionary decision. By implementing voluntary agreements with other outfitters without considering whether they were fair to the applicants, the Minister fettered his discretion. There was no meaningful opportunity to challenge the policy or its application to the applicants. It could not be said that the Minister maintained any control over the manner in which the voluntary agreements were reached with the outfitters. That authority was sub-delegated. While the Outfitter and Guide Regulations gave the Minister wide discretion to determine the terms and conditions under which a license would be renewed, there was no provision that the Minister could delegate his authority to renew licenses. Thus, the Minister lacked statutory authority to delegate, and the policy of implementing voluntary agreements was a patently unreasonable delegation of the Minister's decision-making authority. There was no undue delay by the applicants in commencing these applications, and this was an appropriate case for the court to exercise its discretion to grant relief to the applicants. The applicants were entitled to the relief they sought in relation to the hunting district where they did not provide their consent to the amendment of their licenses.

**Statutes, Regulations and Rules Cited:**


Natural Resources Act, S.S. 1993, c. N-3.1, ss. 3, 4(1)(a), 4(1)(b), 4(1)(c), 4(1)(d), 4(1)(e), 4(1)(f), 4(1)(g), 4(1)(h), 4(1)(i), 4(1)(j), 23(a), 23(b), 23(c)(i), 23(c)(ii), 23(c)(iii), 23(c)(iv), 23(d), 23(e), 23(f), 23(g)(i), 23(g)(ii), 23(g)(iii), 23(g)(iv), 23(g)(v), 23(g)(vi), 23(g)(vii), 23(h), 23(i), 23(j), 23(k), 23(l).

Outfitter and Guide Regulations, 1996, R.R.S. c. N-3.1 Reg. 2, ss. 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), 7(g), 7(h), 11(1)(a), 11(1)(b), 11(1)(c), 11(1)(d), 11(1)(e), 11(2), 11(3), 12(1)(a), 12(1)(b), 12(2).


Saskatchewan Queen's Bench Rules, Rule 675.

**Counsel:**

Brian A. Barrington-Foote, Q.C., for Keith Heisler.
Murray K. Walter, Q.C., for John Bardahl.
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Robert J. Lane, for Ron Lavoie.
Dorothy J. Olson, for Morrison Morley.
Outfitters, licenced by the Crown, provide guide services and equipment to hunters of white-tailed deer and bear. In the Glaslyn and Spiritwood Districts, the number of outfitters increased dramatically and the boundaries of their hunting areas began to overlap. The population of the game and the investment by outfitters in capital and operating costs were threatened. These pressures were recognized by the outfitting industry and the Crown, and ways and means were sought to sustain the game population and protect investment. Quotas were imposed, but were often exceeded, and did not achieve the benefit of reduction of game population, stress and outfitter dispute, particularly with respect to the overlap areas. The solution? It was thought by the outfitters and the Crown that elimination of the overlap areas would sustain the harvest of game and protect investment. How to achieve that solution? The overlap elimination process (OEP) was developed by the Crown, in consultation with the industry, to settle boundaries to hunting areas amongst the 22 outfitters in the Glaslyn and Spiritwood Districts by eliminating overlap. The OEP resulted in success, to the extent that 95 percent of the boundaries were settled by consensus. However, two outfitters, the applicants, feel aggrieved by their allotment in the Glaslyn District. They, along with all other outfitters, consented to their allotment in the Spiritwood District during the OEP but they take the position that such consent was conditional upon settlement of their boundaries in the Glaslyn District, and, since that settlement was not achieved, they challenge the OEP and the Minister's decision and seek an order returning their boundaries to the locations before the OEP was undertaken in both the Glaslyn as well as the Spiritwood District. Two of the other outfitters, the intervenors, consented to their allotment in both the Glaslyn and Spiritwood Districts and are content with the OEP and Minister's decision.

Overlap Elimination Process

The OEP was developed within the context of change in the outfitting industry. Saskatchewan Environment and Resource Management ("SERM") began to make policy changes in the industry in 1991. Until then, the industry was relatively unregulated. An applicant who met the criteria would receive a licence to guide within designated wildlife management zones. However, the number of outfitters grew and this led to overlap in the guiding areas of the outfitters in the Glaslyn and Spiritwood Districts which threatened wildlife populations and outfitters' investments.

By October of 1991, SERM was developing a policy proposal to deal with the issues in the industry and asked the outfitters for input. The proposal included a reduction in the size of the assigned operating area ("AOA") for which an outfitter would be licenced to a maximum of six townships and a prohibition of overlapping of new and existing AOAs. Over the next few years, the development of this policy continued and outfitters, including Mr. Heisler and Mr. Bardahl, made representations to SERM. In 1993, outfitters were given a map with their 1993 licence renewal application that outlined the areas of overlap in their AOAs. In 1994, quotas were set for the number of clients an outfitter could guide, broken down by species (white-tailed deer and bear).

In August of 1994, SERM invited outfitters to attend one of a number of meetings to discuss further changes to The Outfitter and Guide Regulations, 1988 (The Renewable Resources, Recreation and Culture Regulations, R.R.S., c. R-19.01 Reg. 2 (formerly Reg. 1), as well as issues such as revenue generation and bonding and training of outfitters. One of the objectives was the reduction of overlap of AOAs amongst outfitters.

In February, 1995, SERM wrote to the outfitters outlining a number of resource management changes affecting their 1995 outfitting operations. One change was the elimination of overlap of outfitters' AOAs. Outfitters were advised that the elimination process would be a joint initiative between SERM and the Saskatchewan Outfitters' Association ("SOA") that would occur in 1995 and 1996. All outfitters would be invited to voluntarily and collectively eliminate their respective overlap problems and, in cases where elimination could not be voluntarily agreed upon, SERM and SOA would facilitate a
solution. In November 1995, SERM wrote to the outfitters indicating that the strategic policy on outfitting was still being developed but that "short term action plans" would be implemented. One of these action plans was the OEP. Meetings would be held throughout 1996 to eliminate overlap in the AOAs and outfitters were urged to attend the meetings and to participate in good faith. If outfitters did not attend, SERM reserved the option to decide on overlap reduction in their absence. Meetings were scheduled in each district and outfitters with AOAs in the districts were invited to attend. Specifically, Mr. Heisler, by letter, and Mr. Bardahl, by phone call, were invited to attend the OEP meeting for the Spiritwood District that was scheduled for January 29, 1996.

¶ 6 At the January 29, 1996 meeting, all of the overlapping areas in the Spiritwood District were resolved: the outfitters, including Mr. Heisler and Mr. Bardahl, settled their hunting areas and resolved boundary uncertainties by agreement. Mr. Bardahl attended that meeting, in part, by telephone and consented to the reduction of his AOA in the Spiritwood District. Mr. Bardahl agreed to divide in half the overlap of his AOA and Mr. Heisler's AOA. Mr. Heisler was the only outfitter with land overlapping with Mr. Bardahl's AOA and that overlap was resolved to their satisfaction. Mr. Heisler did attend the January 29, 1996 meeting. His only overlap in the Spiritwood District was with Mr. Bardahl and he also agreed that the area should be divided in half. Mr. Heisler signed a consent to the reduction of his AOA in the Spiritwood District and indicated that he would be pursuing the remainder of his AOA in the Glaslyn District.

¶ 7 The focus of the OEP then shifted to the Glaslyn District. The applicants participated in further meetings with their colleagues and officials of SERM but they were unable to eliminate the overlaps between their AOAs and other outfitters' AOAs. In the Glaslyn District, eight outfitters overlapped in one area including Mr. Heisler and Mr. Bardahl. Other outfitters in the Glaslyn District did reach agreements to eliminate the overlap of their AOAs and, as they did so, that land was taken out of the negotiations. As more of the outfitters reached agreement, that land became unavailable to the remaining outfitters who continued to negotiate. SERM allocated AOAs in the Glaslyn District solely on those agreements.

¶ 8 Following two meetings in the Glaslyn District, five outfitters had not resolved their overlaps; Messrs. Heisler, Bardahl, Graham, Nash and Stone. It was apparent to the applicants that they were faced with resolving boundaries to the remaining land in the Glaslyn District which had not been allocated by agreements amongst the other outfitters during the earlier stage of the OEP.

¶ 9 The applicants participated in a mediation session on April 24, 1996, in order to resolve their Glaslyn District AOAs. The other outfitters who had reached agreements by negotiation did not attend the mediation. Information exchanged and positions taken at the mediation is not before the Court as it is privileged by agreement. However, following mediation, the land that was available was reduced by 75 percent to 35 sections following allocations of AOAs. However, the AOA boundaries of the applicants in the Glaslyn District were not settled by the mediation. Mr. Heisler wrote to SERM on May 7, 1996, to propose resolution of his boundaries in the Glaslyn District and enclosed a map showing his proposed boundaries. His map clearly indicated that his boundaries in the Spiritwood District were settled but also clearly requested areas outside the 35 sections that SERM indicated were remaining available following mediation.

¶ 10 The applicants had been informed that if no resolution was reached at the mediation, the overlap would be eliminated by arbitration. In response, on behalf of SERM, Mr. Erickson depones (in paragraph 18 of his affidavit sworn June 24, 1998) that "... to the extent SERM officials referred to arbitration as part of the process, what was meant was that SERM would be making the ultimate decision in the event of an impasse". On July 11, 1996, Mr. Heisler was informed by another outfitter that SERM was holding the arbitration meeting that day. Mr. Heisler's counsel contacted SERM to
request permission to appear and to make representations but SERM refused his request. Mr. Bardahl was not aware of the meeting until after it occurred. The July 11, 1996 meeting was attended by a number of SERM officials; some of whom had been involved in the OEP in the Glaslyn District and some of whom had not. No outfitters attended. On July 22, 1996, SERM wrote to each of the applicants advising that a decision had been made, setting out their new AOA and giving the rationale used to define the boundaries. The applicants were invited to give written reasons to SERM if they did not agree with their new AOA.

¶ 11 Indeed, each of the applicants wrote to SERM in early August expressing disagreement with his AOA. In reply, SERM wrote to each applicant in early September, advising that, "the arbitration decisions were reached on July 11, 1996" and that SERM had received the responses from the outfitters who did not agree with their AOAs. The applicants were told a final decision was to be made following review of these responses.

¶ 12 In December, 1996, the applicants received formal notification that the Minister was considering amending their 1996/97 outfitters' licences. The letter set out a number of reasons for the proposed amendments and gave each applicant the opportunity to make written or verbal representations to the Deputy Minister. The applicants did meet with the Deputy Minister and made representations. In May, 1997, Mr. Bardahl received a letter from the Deputy Minister confirming that his 1996/97 licence was amended in accordance with the recommendation made by SERM following the July 11, 1996 "arbitration meeting". Mr. Heisler also received a letter from SERM in early May, 1997, indicating that his 1996/97 AOA was further reduced from that recommended by SERM at the July 11, 1996 "arbitration meeting". "Area 1" was taken from his AOA and assigned to another outfitter. Mr. Heisler also received a letter from the Minister in late May, 1997 stating that his 1996/97 licence would be amended in accordance with the recommendation of SERM following the "arbitration meeting" on July 11, 1996.

¶ 13 SERM conceded that "Area 1" was wrongly taken from Mr. Heisler's AOA and offered to reconsider whether "Area 1" should be returned to Mr. Heisler following a fair hearing. Mr. Heisler took the position that the area ought to be returned to him and that SERM could only then consider whether it should be taken away after a full hearing. SERM treated this as a rejection of its offer and now argues that any challenge to the decision to take away "Area 1" must be by judicial review. Mr. Heisler argues that "Area 1" was improperly taken from him, as was all the other land that was taken away by the amendment to his 1996/97 licence.

¶ 14 The applicants argue that their outfitters' licences have been improperly amended through the OEP and that the Minister's decision to amend their 1996/97 licences should be quashed. They submit that their licences should be returned to the terms of their pre-OEP licences subject only to such deletions to their AOAs as the Minister may make following a full and fair hearing.

¶ 15 In support of this argument, the applicants submit that their consent to the resolution of their boundaries in the Spiritwood District was conditional upon resolution of their boundaries in the Glaslyn District. I do not accept that argument since the preponderance of the facts show that they consented to their boundaries in the Spiritwood District: Mr. Heisler participated in the OEP meeting in the Spiritwood District; Mr. Bardahl made his position clear to a SERM official who presented it at the Spiritwood meeting on his behalf; both Mr. Heisler and Mr. Bardahl, along with the other affected outfitters, negotiated and settled their boundaries in the Spiritwood District; Mr. Heisler signed a consent; Mr. Bardahl must be considered to have consented as he received exactly what he asked for in the Spiritwood District; it became apparent, if it was not apparent at the outset, that the Spiritwood District land was not subject to negotiation in the future OEP meetings and mediation; by his map accompanying his letter of May 7, 1996, Mr. Heisler confirmed his settlement of the boundaries in the
Spiritwood District. For these reasons, I find that both Mr. Heisler and Mr. Bardahl unconditionally consented to their allocated AOAs in the Spiritwood District.

16 The applicants submit that the entire OEP was flawed in that SERM failed to protect the interests of non-consenting outfitters. The applicants argue that the OEP was both procedurally and substantively flawed.

17 Procedurally, the applicants argue that the OEP was unfair. The applicants and SERM agree that the Minister owes a duty of procedural fairness to the applicants but they disagree on the content of that duty.

18 Substantively, the applicants argue that the Minister's decision to amend the applicants' licences is patently unreasonable and thus an excess of jurisdiction. By implementing the voluntary agreements, SERM, as the alter-ego of the Minister, improperly delegated its authority to amend the outfitting licenses of the applicants. Further, the applicants argue that the Minister's discretion to amend the applicants' licenses was fettered by the implementation of those voluntary agreements. The Minister could not fully consider the applicants' arguments as part of their pre-OEP allocation was already allocated to other outfitters. The applicants also submit that the OEP is discriminatory in that it treated outfitters who reached agreement on their boundaries differently than those outfitters who did not reach agreement on their boundaries.

19 On behalf of the Minister, it is argued that it was made clear at the outset that the Minister would resolve any overlaps that were not settled by negotiation and agreement during the OEP. And further, the Minister is entitled to consider a number of factors in reaching a decision to amend an outfitting license and a voluntary agreement is a valid factor. In the alternative, it is argued on behalf of the Minister that, should this court determine that one or more of the applicants' submissions is correct, the court should refuse to grant the applicants the relief sought. The remedy of quashing a decision following a judicial review is discretionary and, it is argued, the applicants should be barred from the relief sought due to their conduct throughout the OEP and due to their delay in bringing this application for judicial review and the resulting detriment it would cause. Finally, on behalf of the Minister it is submitted that the relief should not be granted based on the general public interest in avoiding the chaos that would ensue in the outfitting industry should the OEP be found to have been improper.

Legislation

20 The Minister's authority to amend outfitting licences arises out of The Natural Resources Act, S.S. 1993, c. N-3.1 (the "NRA"). The powers of the Minister are set out in s. 4(1):

4(1) The minister may:

(a) undertake, support or sponsor planning, research and investigations respecting parks and natural resources;

(b) design and carry out programs respecting the management and development of parks and natural resources;

(c) design and carry out programs designed to educate, provide interpretation and inform the public respecting things done in relation to parks and natural resources;
(d) plan, develop, construct, acquire, operate and maintain any park, recreation site, fish hatchery, public hunting or fishing area, research laboratory, forest nursery or any other facility related to parks and natural resources;

(e) purchase, lease or otherwise acquire any land or interest, right or estate with respect to land and assets, artifacts and movable property associated with the land for the purpose of making them available for parks and natural resources;

(f) carry out programs to promote public safety in the use of firearms and other equipment connected with recreation;

(g) establish programs to encourage and promote the commercial development of natural resources;

(h) do anything that the minister considers necessary to conserve, develop, manage and utilize parks and natural resources in a sustainable manner;

(i) carry out commercial activities and resource protection and development services;

(j) enter into agreements with the Government of Canada, the government of any other province or territory of Canada or a minister, agent, or official of that government, or any person, agency, board, commission, organization, association, institution or body for the purpose of furthering the activities of the department.

These powers must be exercised in a manner consistent with the responsibility given to the Minister in s. 3:

3 The minister is responsible for all matters not by law assigned to any other minister, department, branch or agency of the Government of Saskatchewan relating to the acquisition, promotion, development, maintenance and management of parks and natural resources.

The Minister, however, is not authorized to make regulations. That authority is given to the Lieutenant Governor in Council in s. 23:

23 The Lieutenant Governor in Council may make regulations:

(a) respecting the management, utilization and conservation of natural resources;

(b) respecting the provision of financial and other assistance in connection with commercial fishing;

(c) authorizing the minister, by order, to designate in connection with commercial fishing assistance mentioned in clause (b);

(i) waters in respect of which assistance is payable;
(ii) species of fish in respect of which assistance is payable;

(iii) assistance rates; and

(iv) eligibility requirements for assistance;

(d) respecting the recovery of commercial fishing assistance mentioned in clause (b), including the circumstances under which that assistance may be recovered;

(e) respecting the provision, by rental, hire or otherwise, of boats, vehicles, other equipment, accommodation and other facilities, and services to hunters or fishermen;

(f) respecting the guiding of hunters or fishermen;

(g) respecting any matter that the Lieutenant Governor in Council considers necessary in connection with the licensing of persons engaged in the activities mentioned in clauses (e) and (f) including:

(i) eligibility for a licence or permit;

(ii) terms and conditions to which a licence or permit is subject;

(iii) classes of licences and permits and the fees to be paid for them;

(iv) the time and location in Saskatchewan to which a licence or permit relates or is limited;

(v) the species of wildlife or fish to which a licence or permit relates or is limited;

(vi) the duties and responsibilities of a person holding a licence or permit; and

(vii) the renewal, revocation and suspension of licences or permits;

(h) respecting the activities, programs or services that the Commercial Revolving Fund may be used for;

(i) respecting the activities, programs or services that the Resource Protection and Development Revolving Fund may be used for;

(j) defining, enlarging or restricting the meaning of any word or expression used in this Act but not defined in this Act;

(k) respecting any matter or thing required or authorized by this Act to be prescribed in the regulations;

(l) respecting any other matter that the Lieutenant Governor in Council considers necessary to carry out this Act according to its intent.

¶ 21 The Lieutenant Governor in Council created The Outfitter and Guide Regulations, 1996, R.R.S.
c. N-3.1 Reg. 2, pursuant to the NRA which was proclaimed on May 17, 1996. Prior to that date, and for the period of the development of the OEP and implementation of the negotiation and mediation stage of the OEP, The Outfitter and Guide Regulations, 1988 were in effect. These regulations were created pursuant to The Renewable Resources, Recreation and Culture Act, S.S. 1983, c. R-19.01 (repealed by S.S. 1993, c. N-3.1) which was in effect prior to the proclamation of the NRA in 1993.

§ 22 The Outfitter and Guide Regulations, 1988 set out the licensing regime of outfitters:

3(1) No person shall carry on business as an outfitter in Saskatchewan unless he holds a valid and subsisting outfitter's licence issued pursuant to these regulations.

4(4) The minister may, as a term or condition of any outfitter's licence, limit or specify:

(a) that the outfitter is authorized to provide an outfitting service with respect to:
   (i) fishing or fishing for one or more species of fish;
   (ii) hunting big game or any one or more species of big game;
   (iii) hunting game birds or any one or more species of game birds;
   (iv) any specified combination of fishing or hunting big game or game birds;

(b) the area of land with respect to which the outfitter is authorized to provide his outfitting service to hunt wildlife;

(c) the bodies of water on which the outfitter is authorized to provide an outfitting service with respect to fishing;

(d) the number of clients he may annually or at any time accommodate or provide an outfitting service for at his base camp, any outcamp or any day-use site;

(e) the amount and type of equipment to be used in connection with his outfitting service;

(f) the species of wildlife and the amount of each species that may be taken annually in connection with his outfitting service for any area of land with respect to which he is authorized to carry out his outfitting service;

(g) the species of fish and amount of each species that may be taken annually in connection with his outfitting service for any or all bodies of water with respect to which he is authorized to carry out his outfitting service;
(h) the times of the year when the outfitter may carry out all or any portion of his outfitting service;

(j) any other terms and conditions that the minister may consider appropriate.

5 (1) Subject to section 22, every outfitter's licence is valid for the term specified in the licence and is subject to:

(a) the terms and conditions specified in the licence; and

(b) these regulations.

(2) Subject to any terms and conditions the minister considers appropriate, an outfitter's licence may be renewed or transferred.

(3) The annual fee for an outfitter's licence is the fee determined in accordance with Table 1 of the Appendix and is payable within 30 days of the date of billing.

This regime allowed the Minister to renew an outfitter's licence on any terms or conditions that he deemed appropriate.

¶ 23 The Outfitter and Guide Regulations, 1996 changed a number of the regulations. A licence to outfit in Saskatchewan is still required, however, the terms under which a licence may be issued or renewed have changed:

7 The minister may issue or renew an outfitter's licence subject to any terms respecting:

(a) the type of hunting or angling with respect to which the outfitter is authorized to provide an outfitting service;

(b) the area, including land and bodies of water, with respect to which the outfitter is authorized to provide an outfitting service;

(c) the number of clients to which the outfitter may annually or at any time provide an outfitting service;

(d) the quantity and type of equipment to be used in connection with an outfitting service;

(e) the species of wildlife or fish and the number of each species that may be taken annually in connection with an outfitting service;

(f) the times of year when the outfitter may carry out all or any portion of an outfitting service;

(g) the type of hunting, if any, for which a firearm may be carried by the outfitter while providing an outfitting service or by a guide employed by the outfitter while providing a guiding service on behalf of the outfitter; or
(h) any other matter the minister may consider appropriate.

Further procedural safeguards were also added where the Minister intends to amend, suspend or revoke an outfitter's licence:

11(1) The minister may amend, suspend or revoke an outfitter's licence where:

(a) the outfitter has contravened any term imposed on the licence or any provision of these regulations;

(b) the outfitter has been convicted of a contravention of an enactment mentioned in Table 2 of the Appendix;

(c) an employee of the outfitter has been convicted for a contravention of an enactment mentioned in Table 2 of the Appendix and the contravention was committed by the employee while providing a guiding service on behalf of the outfitter;

(d) the minister considers the amendment, suspension or revocation necessary in the public interest; or

(e) the outfitter has not provided an outfitting service for two consecutive years.

(2) Where the minister revokes an outfitter's licence, the minister may prohibit the person from applying for an outfitter's licence for a period not exceeding five years.

(3) A decision by the minister to amend, suspend or revoke an outfitter's licence or to prohibit a person from applying for an outfitter's licence is final.

12(1) Before amending, suspending or revoking an outfitter's licence, the minister shall provide the person to whom an outfitter's licence has been issued with:

(a) reasonable notice of the intended action, including written reasons; and

(b) an opportunity to make written representations to the minister.

(2) Where, in the opinion of the minister an emergency exists, the minister may amend, suspend or revoke an outfitter's licence without the notice mentioned in subsection (1).

¶ 24 While the OEP was begun prior to the creation of The Outfitter and Guide Regulations, 1996, these regulations were in effect when the Minister amended the applicants' AOA's in the Glaslyn District and it is these regulations with which the Minister had to comply when those licences were amended.

Analysis

¶ 25 The Minister's decision to amend the applicants' licenses is based on the authority given in the NRA and the regulations. The decision to amend these specific licenses arose out of the Minister's
"short term action plan" to adopt a policy of exclusive AOA's.

26 The effect and validity of a ministerial policy was considered by the Supreme Court of Canada in Maple Lodge Farms Limited v. Government of Canada and the Minister of Economic Development, responsible for Industry, Trade and Commerce and Canadian Chicken Marketing Agency, [1982] 2 S.C.R. 2. At pp. 6-7, McIntyre J., speaking for the court, held that policy guidelines may be properly issued provided they do not fetter the minister's discretion:

It is clear, then, in my view, that the Minister has been accorded a discretion under s. 8 of the Act. The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; ..." does not fetter the exercise of that discretion. The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it. There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to state general requirements for the granting of import permits. It will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be. To give the guidelines the effect contended for by the appellant would be to elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion. Le Dain J. dealt with this question at some length and said, at p. 513:

The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion (see British Oxygen Co. Ltd. v. Minister of Technology [1971] A.C. (H.L.) 610; Capital Cities Communications Inc. v. Canadian Radio-Television Commission [1978] 2 S.C.R. 141, at pp. 169-171), but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion (see Re Hopedale Developments Ltd. and Town of Oakville [1965] 1 O.R. 259).

In any case, the words employed in s. 8 do not necessarily fetter the discretion. The use of the expression "a permit will normally be issued" is by no means equivalent to the words 'a permit will necessarily be issued'. They impose no requirement for the issue of a permit.

27 A ministerial decision similar to the decision here was challenged in Carpenter Fishing Corp. v. Canada (1997), 155 D.L.R. (4th) 572; leave refused [1999] S.C.C.A. No. 349 (QL). In that case, Décar J.A. held at para. 28 that, "[t]he imposition of a quota policy (as opposed to the granting of a specific licence) is a discretionary decision in the nature of policy or legislative action". The imposition of a quota policy is similar to the Minister's decision, in this case, to impose a policy of exclusive AOAs. As such, that policy must also be considered a legislative action. It is clear that the Minister has the authority to implement such a policy as s. 7(b) of The Outfitters and Guide Regulations, 1996 indicates that the Minister may issue or renew an outfitter's licence subject to any terms respecting the area in which the outfitter may guide.

28 The applicants argue, however, that the policy of exclusive AOA's is not the subject of the applicants' challenge. They concede that the Minister has the power to implement a policy of exclusive AOAs. Rather, their challenge centres on the Minister's application of the exclusive AOA policy to the
applicants.

¶ 29 In implementing the ministerial policy of exclusive AOAs, SERM developed the OEP to amend AOAs by voluntary agreements reached between the affected outfitters. It is this second policy, the "administrative policy" which SERM used to implement the ministerial policy of exclusive AOAs, that the applicants challenge.

¶ 30 The court in Carpenter Fishing Corp., supra, at para. 29, addressed a similar argument and found that an administrative decision made to implement a legislative policy is, in fact, part of the legislative policy itself and thus, must be reviewed on the standard applicable to that policy:

Once the Minister, through his Department, has defined policy guidelines, what is requested from him when granting a licence is to direct his attention to the applicant and to satisfy himself that the general guidelines may be fairly applied to that applicant. To the extent that the policy is developed by the Minister in the exercise of his general duties under the Fisheries Act, R.S.C. 1985, c. F-14 (as it read in 1990), and that it is not blindly applied by him in the later exercise of his discretion when granting a specific licence, the act of granting the licence, however administrative in nature and otherwise subject to ordinary judicial review as it may be, cannot be challenged under the general rules applicable to administrative actions in so far as its policy component, i.e. the implementation of the quota policy by the Minister is concerned. When examining an attack on an administrative action-the granting of the licence-a component of which is a legislative action-the establishment of a quota policy-reviewing courts should be careful not to apply to the legislative component the standard of review applicable to administrative functions. The line may be a fine one to draw but whenever an indirect attack on a quota policy is made through a direct attack on the granting of a licence, courts should isolate the former and apply to it the standards applicable to the review of legislative action as defined in Maple Lodge Farms.

¶ 31 On this authority, it must be recognized that the implementation of the OEP, though it may appear administrative in nature, is really a component of the ministerial policy of exclusive AOAs in the outfitting industry.

¶ 32 L’Heureux-Dube J., speaking for the court, recently reviewed the proper approach to judicial review of a discretionary decision in Baker v. Canada (Minister of Citizenship and Immigration) (1999), 174 D.L.R. (4th) 193 (S.C.C.). She held at para. 56, that the "pragmatic and functional" approach must be applied in each case to determine the appropriate standard of review applicable into a judicial review of an administrative decision:

Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the "proper purposes" or "relevant considerations" involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions
will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.

¶ 33 The applicants and the Minister agree that the appropriate standard of review of the Minister's decision is "patent unreasonableness". I find that the Minister's decision to amend the applicants' licenses is part of the ministerial policy of exclusive AOAs and thus, a discretionary decision. It remains to be determined, then, whether the Minister's decision was made in accordance with statutory authority, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.

Fettering Discretion

¶ 34 The applicants argue that SERM's policy to implement agreements resolving overlapping boundaries as reached by consent amongst the affected outfitters fetters the Minister's discretion to amend the applicants' licences. By applying SERM's policy without further considerations, the applicants submit that the Minister was unable to fully consider each applicant's position as part of each applicant's pre-OEP AOA in the Glaslyn District had already been allocated to other outfitters. They argue that their challenge of the policy to implement voluntary agreements is an attack on the manner in which the Minister amended each individual applicant's 1996/97 outfitting licence and not on the ministerial policy of exclusive AOAs. By implementing the voluntary agreements without considering whether their application would be fair to the applicants, the Minister fettered his discretion.

¶ 35 On behalf of the Minister, it is submitted that it was proper to implement the voluntary agreements. By doing so, the Minister properly took into account policy concerns beyond those related to the allocation of individual AOAs. The Minister relies on Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries and Oceans) (1998), 162 D.L.R. (4th) 625 (F.C.A.) where the court held at (para. 14) that exercise of the Minister's absolute discretion under the Fisheries Act, R.S.C. 1985, c. F-14 was properly influenced by a number of policy considerations:


¶ 36 The applicants' submission has merit. The Minister's policy to implement the voluntary agreements may have properly reflected considerations beyond those relating to the individual applicants, but the blind application of that policy was improper. SERM officials consistently stated that the policy was to implement the voluntary agreements without any further consideration. This policy is contrary to the principle set out by the Supreme Court of Canada in Maple Lodge Farms, supra, whereby the Minister must allow the policy and its application to an individual to be challenged.
¶ 37 In this case, there was no meaningful opportunity to challenge the policy or its application to the applicants. The Minister did not turn his mind to whether the policy could be applied fairly to all outfitters or to whether it could be applied fairly to the applicants until his discretion was fettered by the implementation of the voluntary agreements and the resulting amendments to those outfitting licenses. Although each applicant was given the opportunity to make representations to the Minister following the arbitration process, this opportunity was given too late in the process to have had any real meaning. The Minister had fettered his discretion by applying the voluntary agreement policy at an earlier stage, and, through that application, the Minister had reduced the land available to be allocated to the applicants. The Minister could not consider whether each applicant's individual licence should be amended. It was a foregone conclusion that the licences would be amended as there was insufficient quantities and insufficiently located land remaining to re-issue the applicants' licences on their pre-OEP terms. The locations and the quantity of land remaining to be allocated had been reduced by the earlier stages of the OEP to the point that there remained 35 sections to be divided amongst four outfitters, including the applicants. If the Minister had been persuaded by the arguments of these outfitters, he would have been unable to allocate the amount of land each outfitter had requested because there was not enough land remaining.

¶ 38 This is not to say that the applicants would necessarily have received the allocation that each sought. Rather, what was required was for the applicants to have had a meaningful opportunity to challenge the voluntary agreement policy and its effect on them at some point in the process where their arguments could have affected the allocation of their AOAs. At the point in the OEP where the applicants were allowed to make representations to the Minister, the Minister had already fettered his discretion to amend each applicant's licence by allocating all but 35 sections according to the voluntary agreement policy. By so fettering his discretion, the Minister exceeded his statutory authority under the NRA and The Outfitters and Guide Regulations, 1996.

Delegation of Decision-Making Authority

¶ 39 The applicants further submit that the voluntary agreement policy itself is beyond the Minister's statutory authority. By implementing the agreements reached without any further consideration, the Minister improperly delegated his authority.

¶ 40 On behalf of the Minister, it is submitted that there was no delegation of his authority. The Minister considered a number of factors in deciding on the OEP and implementation of the resulting voluntary agreements and, thus, the Minister maintained control of the process by which the decisions were made. Although the Minister did not turn his mind to the amendments resulting from the voluntary agreements, it is submitted, the Minister reserved to himself the authority to decide on the elimination of overlap where no agreement could be reached. Ergo, it is submitted, that the Minister did not delegate his statutory authority.

¶ 41 SERM, as the Minister's alter-ego, is alleged to have sub-delegated the authority conferred on the Minister by the NRA and The Outfitters and Guide Regulations, 1996. I hold that it is proper for SERM to exercise the statutory authority conferred on the Minister in this legislation as there is no indication that that authority must be exercised by the Minister himself, see: R. v Harrison (1976), 66 D.L.R. (3d) 660 (S.C.C.) at pp. 665-6. The authority to sub-delegate that statutory authority, however, must be found within the legislation itself.

¶ 42 In Canada v. B.M. Enterprises (T.D.), [1992] 3 F.C. 409 at 416 (F.C.T.D.), Reed J. found that the critical issue in determining whether decision-making authority has been delegated is the degree of control that is exercised by the individual who is responsible for the decision. In that case, the issue was whether the Deputy Minister had improperly delegated the authority to issue an income tax assessment
to an employee. Reed J. found that the authority had not been delegated:

In the present case, the assessment in question was done in the name of the Deputy Minister; it was done, as has been noted, in accordance with procedures controlled by him and by officials acting according to his directions. It cannot be said that the assessment was issued by Mr. McKenzie [the employee] even though he physically supervised the preparation of the notice which was sent. The assessment was issued as a result of the participation of a number of individuals, not the least of which was the legal advice given by officers of the Department of Justice. In the circumstances, I think it is appropriate to consider the issuing of the assessment as the act of the Deputy Minister even though he did not personally review this file.

¶ 43 Those circumstances do not exist here. While the Minister through SERM controlled the stages of the OEP, it cannot be said that the Minister maintained any control over the manner in which the voluntary agreements were reached by the outfitters. The Minister did not specify criteria that the outfitters had to consider nor did he reserve to himself any authority to review or change the voluntary agreements. In addition, the outfitters were not under his control or direction. Rather, each outfitter was told to reach an agreement with the other outfitters in overlap with his or her AOA.

¶ 44 In addition, the Minister's residual authority to decide on the elimination of overlap where no agreement could be reached cannot be considered as maintaining the authority to make the decision to amend an individual's outfitting license. At best, it may be considered some control over the OEP itself. The residual authority only allowed the Minister to make the decision to amend a license where the outfitters involved refused to exercise the authority delegated to them. If the affected outfitters reached agreement, the Minister did not turn his mind to amending their licences. The Minister only became involved when no agreement was reached and, thus, only turned his mind to amending those limited number of licenses.

¶ 45 For these reasons, I find that SERM did sub-delegate the Minister's decision-making authority. It remains, then, to determine whether the legislation granted the Minister the authority to sub-delegate his decision-making authority.

¶ 46 Section 23(g)(vii) reserves the authority to make regulations concerning any matter related to the renewal, revocation and suspension of licences to the Lieutenant Governor in Council. The Outfitter and Guide Regulations, 1988 provided that an outfitter's licence could be renewed subject to any terms or conditions the Minister considered appropriate but did not indicate the process by which an amendment to a licence could be affected. These regulations were in effect when the impugned amendments were made to those outfitters' licences who had reached voluntary agreements. There is no express authority in these regulations allowing the Minister to delegate his decision-making authority and thus, it must be determined whether the regulations implicitly allowed for delegation of that authority.

¶ 47 In Fairhaven Billiards Inc. v. Saskatchewan Liquor and Gaming Authority (Sask.) (1999), 177 Sask. R. 237, [1999] S.J. No. 307 (C.A.), Tallis J.A. addressed the limits on administrative authority unless sanctioned by statute. In that case, the Liquor and Gaming Commission imposed quotas on the number of liquor licences that it would grant based on population. The court found that the quotas were mandatory and operated as eligibility requirements, and then reviewed the applicable legislation to determine if the Commission had the authority to impose eligibility requirements. In doing so, the court commented on statutory interpretation for the purposes of determining statutory authority at para. 28:
In returning to the question whether the Authority exceeded its statutory powers in this case, it is important to re-state that this question involves a question of statutory interpretation. To answer that question we must try to determine legislative intent using traditional principles of statutory interpretation and then give effect to the intent of the legislature. To divine that intention, we traditionally look to the words of the statute and if they are clear, we need to go no further: see for example Christie v. Texas Industries (1985), 43 Sask. R. 90 (C.A.). Of course the language of the statute must be read in context and with regard for the overall administrative scheme: see Elizabeth Fry (supra) [(1989) 2 W.W.R. 168 (Sask. C.A.)].

¶ 48 Here, the legislation is silent as to the authority of the Minister to delegate his authority and so I must consider the overall administrative scheme and the language of the legislation generally. Subsections 4(1)(g) and (h) of the NRA appear to give the Minister wide discretion to establish programs to promote commercial development of natural resources and to do anything necessary to conserve, develop, manage and utilize parks and natural resources in a sustainable manner. This discretion would militate in favour of an implied authority to sub-delegate. However, the NRA reserves to the Lieutenant Governor in Council the authority to make regulations on all matters relating to the renewal of licences. This specific reservation of authority reduces the discretion available to the Minister and appears to indicate that unless the regulations specifically allow the Minister to delegate his authority, he (or his alter-egos) must make each decision to amend an outfitting licence.

¶ 49 While The Outfitter and Guide Regulations, 1988 gave the Minister wide discretion to determine the terms and conditions under which a licence would be renewed, there is no provision that the Minister may delegate his authority to renew licences. Thus, the Minister lacks statutory authority to delegate his authority to amend outfitting licences. The Minister's policy to implement voluntary agreements in the Glaslyn District is a delegation of his decision-making authority and the decisions to amend the licences in the Glaslyn District by such a policy are patently unreasonable beyond the Minister's jurisdiction.

Discrimination

¶ 50 The applicants also submit that the Minister discriminated against those outfitters who did not reach agreement during the negotiation stage of the OEP. The Minister submits that all outfitters were treated equally and fairly. All the outfitters were informed at the outset of the OEP that where overlap could not be eliminated by agreement, the Minister would determine how the overlap would be eliminated. With this understanding of the process, the Minister submits that the applicants cannot now be heard to complain that they were treated unfairly by the Minister determining the elimination of the overlap affecting their AOAs.

¶ 51 The Minister's submission is correct. The applicants were informed at the outset of the process and knew that if they did not reach agreement, the Minister would make the determination for them. Any outfitter who did not reach agreement would have been so treated and I find that the OEP did not discriminate against those outfitters who did not reach agreement.

Procedural Fairness

¶ 52 As I have found that the Minister exceeded his statutory authority by fettering and sub-delegating his discretion, it is unnecessary to address the applicants' submissions in regard to the content of the Minister's duty of fairness.
Discretionary Bars

¶ 53  The Minister submits that even if the court finds that the Minister has exceeded his authority in some way through the OEP, that the relief that the applicants seek is discretionary and in the circumstances of this case ought not to be granted. Three grounds are advanced in support of this submission: first, that the applicants' conduct should be a bar to the relief sought; second, that the applicants' delay in bringing this application and the resulting detriment are grounds under Rule 675 of The Queen's Bench Rules for the court to deny the relief; and, third, that the court should deny the relief on general public interest grounds.

¶ 54  On the first ground, the Minister argues that the applicants did not fully participate in the OEP and therefore, cannot now complain about its results. The Minister submits that although Mr. Heisler attended all of the negotiation meetings, he did not negotiate in good faith. He stood off to the side while other outfitters negotiated and refused to participate as evidenced by his early departure from the second Glaslyn meeting. In addition, Mr. Heisler did not fully participate in the mediation and also left that session early.

¶ 55  Mr. Heisler submits that he did properly participate in the OEP. He attended all the meetings and simply took a strong position to maintain the viability of his outfitting business. He also attended the mediation session and only left early because of the threatening tone of some of the other participants.

¶ 56  The Minister also submits that Mr. Bardahl failed to fully participate in the OEP as Mr. Bardahl did not attend all of the negotiation meetings even though he was aware that the Minister had reserved the right to eliminate the overlap in the absence of any outfitter.

¶ 57  Mr. Bardahl submits that his failure to attend the second Glaslyn meeting was the result of the Minister's failure to notify him of the meeting, and that he would have attended if he had been properly notified.

¶ 58  I find that Mr. Heisler did attend all of the negotiation meetings and he did participate in the negotiation process. Although his negotiation style may not have been the style envisioned by the Minister when the OEP was developed, it cannot be said that his negotiating position was in bad faith. The Minister did not inform the outfitters of any rules applicable during the negotiation stage of the OEP other than that the negotiations were intended to reach voluntary agreements to eliminate overlap and that the outfitters were invited to attend the meeting "with an open mind and a willingness to negotiate". Thus, I find that Mr. Heisler's conduct was consistent with the information he received and I do not find that Mr. Heisler's conduct is a bar to the relief sought.

¶ 59  I find that Mr. Bardahl attended only one meeting during the negotiation stage of the OEP. He did not attend the negotiation meeting in the Spiritwood District but he communicated his position to a SERM official and his non-attendance did not affect the negotiation process in that district. Mr. Bardahl attended the first negotiation meeting in the Glaslyn District but did not attend the second meeting. He did not receive notification of this meeting but it is unclear whether Mr. Bardahl became aware of this meeting by other means. Nonetheless, I find that Mr. Bardahl's conduct is not sufficient reason to bar him from the relief sought.

¶ 60  The Minister relies on Rule 675 as a bar to the relief that the applicants request. The Saskatchewan Court of Appeal recently addressed the proper approach to a determination of undue delay in accordance with Rule 675 in Henry v. Saskatchewan (Workers' Compensation Board) (1999), 172 D.L.R. (4th) 73. Bayda C.J.S. for the majority set out the approach at paras. 70-71:
The Rule requires a two-staged approach. The first stage contemplates a determination whether the delay in "making the application" is "undue". It is important to note that it is the "making" as opposed to the "hearing" of the application that is governed by the Rule. It is important as well to resolve what is meant by "undue". In my view, the term embraces two elements: the first is the actual lapse of time (measured in days, months and years) between the making of the decision requested to be reviewed and the making of the application requesting the review. The second is an assessment of the reasonableness of the lapse of time having regard to such matters as the applicant's circumstances; the nature of the legal problems involved; the conduct, acquiescence, and consent of the opposing party; negotiations toward settlement of the dispute (the list is not exhaustive). This second element is often summarized in the expression "explanation for the delay".

The second stage is engaged only if at the first stage the delay is found to be "undue". The second stage requires a determination whether the order sought by the applicant would result in one or more of three eventualities (i) likely substantial hardship to any person, (ii) likely substantial prejudice to the rights of any person and (iii) detriment to good administration. If one or more of those results is apt to occur, then the judge is empowered to refuse the relief sought. On the other hand, if none of the results is apt to occur the judge would be justified in granting the order even though the delay was undue.

¶ 61 In that case, the court found that a delay of 34 1/2 months was not unreasonable. The court accepted the applicant's explanation that 22 1/2 months of that delay lapsed while another action which would decide a critical issue in the application was pursued. The court then considered only the remaining one year period and found that though the delay was not completely necessary, it could not be considered undue.

¶ 62 Here, the applicants each became aware of the Minister's final decision to amend his licence in May of 1997. Mr. Bardahl commenced his initial application for judicial review in the Swift Current Judicial Centre on February 10, 1998. Mr. Heisler commenced his application for judicial review in the Regina Judicial Centre on March 31, 1998. For convenience of hearing these two applications together, and with the consent of the Minister, Mr. Bardahl stayed his initial application in the Swift Current Judicial Centre and re-commenced the application in the Regina Judicial Centre on April 16, 1998.

¶ 63 Once Mr. Heisler and Mr. Bardahl became aware of the amendments to their licences in May of 1997, each continued to communicate with the Minister and SERM officials with the intention of having the Minister reconsider his decision. Mr. Heisler wrote directly to the Minister on July 7, 1997 and contacted his MP, Mr. Axworthy and his MLA, Mr. Mitchell who communicated with the Minister of SERM on Mr. Heisler's behalf. The Minister replied to Mr. Heisler on August 13, 1997 and re-affirmed the Deputy Minister's decision. Mr. Mitchell further wrote to the Minister on Mr. Heisler's behalf on October 21, 1997 and the Minister replied to Mr. Heisler on January 16, 1998, once again refusing to reconsider the decision to amend Mr. Heisler's licence. Mr. Heisler then commenced this application on March 31, 1998.

¶ 64 Mr. Heisler submits that the period of time that the court should consider in its determination of undue delay is the period from January 16, 1998 when Mr. Heisler received the final letter from the Minister rejecting his request for reconsideration, to the date that the application was commenced. Mr. Bardahl submits that the time period that the court should consider applicable to his application should commence on October 21, 1997 when he received his 1997/98 licence and became aware that no further
appeals were available to him and that a final decision had been made. The Minister, on the other hand, submits that the appropriate time period should commence when the applicants became aware that their licences had been amended by letters each received in May, 1997.

¶ 65 I find that the appropriate time period must be considered to have commenced in May, 1997, when the Minister made his decision to amend the applicants' licences. That is the decision which the applicants are challenging and, thus, the date of that decision must be the beginning of the time period upon which this court will make its determination of undue delay in accordance with the authority of Henry, supra.

¶ 66 I accept both Mr. Heisler's and Mr. Bardahl's explanation for the period of time that passed before their applications for judicial review were commenced. In Mr. Heisler's case, ten months passed before his application was commenced. During that period of time, Mr. Heisler pursued other avenues in the hope of convincing the Minister to reconsider his decision. This is not unreasonable considering the political nature of the decision. The nature of the OEP itself also suggests that Mr. Heisler's conduct was not unreasonable. Unfortunately, the OEP was, admittedly, made up as it went along, and the full extent of the process was not made clear to the applicants. It is not unreasonable that Mr. Heisler would consider it possible that his cause could be advanced by further communication and submissions to the Minister.

¶ 67 In Mr. Bardahl's case, approximately eight months passed before his initial application for review. It is not unreasonable for Mr. Bardahl to have believed that further communications and submissions to the Minister may have resulted in the Minister reconsidering the amendment to his licence because of the nature of the OEP. Once it became clear to Mr. Bardahl that his submissions were no longer being considered, he commenced his application within four months.

¶ 68 I find that there was no undue delay in commencing these applications and thus, it is not necessary to consider whether an undue delay has been detrimental in accordance with the second stage of the approach set out in Henry, supra.

¶ 69 The Minister's final submission with regard to discretionary bars is that this court should refuse to grant the relief that the applicants seek on general public interest grounds. The Minister relies on the Saskatchewan Court of Appeal decision in Re Central Canada Potash Co. Ltd. et al. and Minister of Mineral Resources of Saskatchewan (1972), 32 D.L.R. (3d) 107. In that case, the court upheld the chambers judge refusal to exercise his discretion to grant mandamus based on the confusion and disorder in the potash industry that would have resulted from such an order. The court accepted that this was a valid reason for the judge to refuse the relief.

¶ 70 The availability of this ground must be reconsidered in light of the recent decision of the Saskatchewan Court of Appeal in Henry, supra. At para. 69, the court cautioned against applying cases decided before the imposition of Rule 675, and those from jurisdictions without a similar rule, without consideration of their applicability:

In this Province the effect of delay in the making of an application for judicial review is governed by Rule 675 of the Rules of the Court of Queen's Bench. Cases decided in jurisdictions where, or at a time when, that Rule or one like it was not applicable should therefore be read and applied bearing that in mind....

¶ 71 The court went on to hold, at para. 80, however, that the common law principles as set out in
Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3 at 77 were still applicable to a delay between the making of the application and the hearing of that application:

There is no question that unreasonable delay may bar an applicant from obtaining a discretionary remedy, particularly where that delay would result in prejudice to other parties who have relied on the challenged decision to their detriment, and the question of unreasonableness will turn on the facts of each case: see S.A. de Smith, Judicial Review of Administrative Action (4th ed. 1980), at p. 423, and D.P. Jones and A.S. de Villars, Principles of Administrative Law (1985), at pp. 373-74.

¶ 72 The court then went on to hold that a period of 35 months between the application and the hearing was not undue delay as the respondent had consented to the adjournments and could have withdrawn its consent to the sine die adjournment on 3 days' notice.

¶ 73 The Minister's submission must be considered in light of this authority. The Minister argues that there would be an unsettling effect on the industry to grant the relief that the applicants seek. Other outfitters have relied on the Minister's amendments to their licences; they have developed their businesses in reliance on the exclusive AOAs that they have been allotted and businesses have been sold on the basis of those exclusive AOAs. To cast doubt on the validity of those amendments at this date, the Minister submits, would create chaos in the industry. Many outfitters have AOAs that encompass more than one district and have negotiated in each district after considering their position in other districts. To quash the amendment of any one licence will cause a ripple effect throughout the industry as each outfitter's AOA would be affected by any change to the AOAs bordering on it. The Minister submits that any change to the amendments the Minister has made would in effect have the potential to undo the entire OEP process and cause significant damage to those outfitters who have relied on their allocation.

¶ 74 I cannot accept the Minister's submission. I have found that the applicants have consented to their allocation in the Spiritwood District and that where they have consented, no review of the amendment is available to them. This principle is also applicable to all the other outfitters who have consented to the allocation of their AOAs during the OEP. Thus, the only district in which the applicants may seek relief is the Glaslyn District. Indeed, the Minister is correct in that the AOAs of the other outfitters in the Glaslyn District may need to be reconsidered by the Minister when he reconsider the decision to amend the applicants' licences. Those outfitters will also be limited to reconsideration of their AOAs in the Glaslyn District as they consented to their allocation in the Spiritwood District.

¶ 75 The Minister cannot be heard to complain about the delay in hearing this application as the Minister consented to those delays. Mr. Bardahl stayed his initial application in the Swift Current Judicial Centre with the consent of the Minister. The hearing was set for May 29, 1998 and adjourned by consent of all of the parties to June 25, 1998. That hearing was adjourned by consent to July 21, 1998. That hearing was adjourned sine die by consent and thereafter, was set down and heard on September 22, 1999. As in Henry, supra, the Minister consented to each adjournment and could have withdrawn his consent to the sine die adjournment and brought the matter before the court at an earlier date.

¶ 76 For these reasons, I find that this is an appropriate case for the court to exercise its discretion to grant relief to the applicants.

Remedy

¶ 77 The Minister exceeded the authority granted to him in the NRA, The Outfitter and Guide...
Regulations, 1988, and The Outfitter and Guide Regulations, 1996 by fettering his discretion to amend the applicants' outfitting licences and by delegating his decision-making authority to amend the outfitting licences of the other outfitters who reached voluntary agreements during the negotiation stage of the OEP.

¶ 78 The applicants seek to have the Minister's decision to amend their 1996/97 outfitting licences quashed and to have their current outfitting licences reissued to them on the same terms and conditions as their pre-OEP licences.

¶ 79 The applicants are entitled to the relief they seek with respect to the Glaslyn District and I quash the decision of the Minister to amend each applicant's 1996/97 licence in that district. Counsel have agreed that, in the event of this relief being granted, a grace period should be fixed. Thus, to ensure the orderly implementation of this order, it is suspended and will come into effect on May 1, 2000.

¶ 80 The applicants are not entitled to relief respecting their allotment in the Spiritwood District since, as I have found, each of them unconditionally consented and agreed to their allocated AOAs in that district. Their consents and agreements were not subject to settlement of their allotment in the Glaslyn District and I refuse to change the allotments in the Spiritwood District by interfering with the consensual negotiations and agreements achieved by the applicants and the other outfitters in that district.

¶ 81 The parties have leave to speak to costs.

KRAUS J.

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JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN CANADA

BY

DONALD J.M. BROWN, Q.C.

AND

THE HONOURABLE JOHN M. EVANS
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CANVASBACK PUBLISHING
TORONTO, ONTARIO
Fettering of Judgment

Overview

An allegation that a tribunal has “fettered its judgment” is similar to a charge of “prejudgment,” in that the complaint is that the decision-maker has decided the matter without regard to the particular circumstances. In particular, an agency may not fetter the exercise of its statutory discretion, or its duty to interpret and apply the provisions of its enabling statute, by mechanically applying a rule that it had previously formulated, other than where it is properly enacted pursuant to a statutory power to make subordinate legislation. “Fettering” can also occur if, without exercising any independent judgment in a matter, a decision-maker makes a decision in accordance with the views of another, or where a contract, or some other undertaking, is regarded as determinative of the exercise of a statutory power.

On the other hand, it is not in itself unlawful for a decision-maker to take into account informal rules or guidelines, previous decisions, contractual commitments or the views of others. Indeed, formulating guidelines and written reasons for decision can enhance the quality of decision-making and administrative justice by increasing certainty, reducing inconsistencies and raising the level of accountability to the public. Thus, the issue in each case is not whether the rule, guideline, precedent, policy, or contract was a factor, or even the determining factor, in the making of a decision, but whether the decision-maker treated it as binding or conclusive, without the need to consider any other factors, including whether it should apply to the unique circumstances of the particular case. In the result, in each instance a tension will exist between the desirability of consistency on the one

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171 As to “prejudgment,” see topic 11:4510, ante, and for review of discretion generally, see topics 14:2600, 15:2243, post.

172 E.g. Stafford v. Newfoundland (Milk Marketing Board) (1987), 67 Nfld. & P.E.I.R. 198 (Nfld. S.C.) (appeal tribunal deferred to decision of Milk Marketing Board). See also Labi y v. Canada (Solicitor General) (2004), 261 F.T.R. 149 (FC) (officer wrongly concluded decision had been made by her Director and that she was bound by it); Amerato v. Ontario (Registrar Motor Vehicle Dealers Act) (2005), 257 D.L.R. (4th) 146 (Ont. C.A.) (by allowing Registrar to automatically revoke licence for any breach of order, tribunal fettered its discretion).

173 To refuse to exercise discretion based on an error of law, while it may be described as “fettering,” e.g. Electrical Power Construction Systems Association v. Ontario Allied Construction Trades (1993), 12 OR. (3d) 768 (Ont. Div. Ct.), is more properly viewed as an instance of legal error which may or may not result in judicial intervention.
hand, and encouraging administrative decision-makers to be mindful of the particular circumstances of individual cases on the other. As one judge has observed: "The principle [that decision-makers must not fetter their judgment] is easy enough to state. But, in truth, it is a principle [that is] vague in its limits with a good deal of the chancellor's foot in its application."\(^{174}\)

There may also be some circumstances in which it is concluded, (because, for example, of the unstructured nature of the statutory power or the underlying purpose of the legislative scheme) that a decision-maker may lawfully adopt a general rule without having to examine the facts of a particular case to see whether an exception was appropriate. Thus, it has been held that the head of a government institution could adopt a policy of refusing to reveal whether personal information sought by an applicant under the *Privacy Act* existed: to require a case-by-case consideration would effectively undermine the unstructured power not to reveal the existence of such information.\(^{175}\)

12:4420  Policies, Rules and Guidelines

12:4421  Generally

A decision-maker will fetter his or her discretion by automatically following policies, rules, guidelines, or precedent, notwithstanding that their existence is proper. In other words, although courts have often acknowledged that policies and guidelines may be desirable as tools of effective and fair administration,\(^{176}\) and that their creation may be implicit in the statutory grant of discretionary decision-making authority,\(^{177}\) decision-makers cannot *confine* their exercise of their discretion by refusing to consider other factors that are legally


\(^{175}\) *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589 (FCA), where the Court also noted the existence of statutory checks on potential abuse.


relevant.\textsuperscript{178}

Accordingly, a decision-maker must be prepared to entertain and consider representations that are designed to show not only that, properly interpreted, a rule or policy does not cover the facts of a particular matter, but also that even if it does, an exception should be made in light of the facts of the particular case.\textsuperscript{179} However, it has been suggested in an English case that to respond to a submission for an exemption by making an \textit{ad hoc} exception, rather than a more general modification of the policy, may expose the decision-maker to judicial review for arbitrariness.\textsuperscript{180} Indeed, in referring to a decision-maker’s duty to consider making exceptions to a policy, it was noted that:

\[ \text{The inclusion of thought-out exceptions in the policy} \]


\textsuperscript{179} See e.g. Heisler v. Saskatchewan (Minister of Environment and Resource Management) (1999), 16 Admin. L.R. (3d) 215 (Sask. Q.B.), where it was stipulated that the opportunity to make representations must be provided early enough in the decision-making process as to be meaningful.

\textsuperscript{180} R. v. Ministry of Agriculture, Fisheries & Food, Ex p. Hamble (Offshore) Fisheries Ltd., [1995] 2 All E.R. 714 (Q.B.D.). However, it is unclear whether in Canada inconsistency would render the exercise of discretion unlawful: compare Domtar Inc. v. Québec (Comm. d’appel en matière de lésions professionnelles), [1995] 2 S.C.R. 756. And the legitimate expectations doctrine in Canada seems so far to give rise only to procedural rights: see topic 7.2430, ante.
itself may well be exhaustive of the obligation. While any further candidates for exemption must be considered, it will always be a legitimate consideration that to make one such exception may well set up an unanswerable case of partiality and arbitrariness. The decision-maker must therefore balance the case for making no such exception against the case for generalising it.\textsuperscript{181}

Moreover, a policy that is so detailed and definitive that it is replete with exceptions, is apt to be regarded as an exercise of a legislative power that the agency does not possess.\textsuperscript{182}

Nevertheless, valid guidelines\textsuperscript{183} and policies can be considered in the exercise of discretion, provided that the decision-maker puts his or her mind to the specific circumstances of the case.\textsuperscript{184} Indeed, this principle has been affirmed in many different contexts, including decision-making by public utility boards,\textsuperscript{185} assessment appeal boards,\textsuperscript{186} a mining commissioner,\textsuperscript{187} a forestry appeal board,\textsuperscript{188} workers’ compensation boards,\textsuperscript{189} residential tenancy commissions,\textsuperscript{190} a welfare

\begin{footnotesize}
\begin{enumerate}
\item 183 See, however, Hui v. Canada (Minister of Employment & Immigration) (1986), 18 Admin. L.R. 264 (FCA), where the guidelines were inconsistent with the statute. As to invalid guidelines generally, see topic 14:3420, post.
\item 184 Maple Lodge Farms Ltd. v. Canada, [1982] 2 S.C.R. 2; see also Clare v. Thomson (1983), 83 B.C.L.R. (2d) 263 (BCCA).
\end{enumerate}
\end{footnotesize}
housing authority, \^{191} agricultural marketing schemes, \^{192} livestock inspectors, \^{193} directors of planning, \^{194} recycling boards, \^{195} the C.R.T.C., \^{196} the Ontario Municipal Board, \^{197} immigration officers, \^{198} police officers, \^{199}


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fisheries officers, 200 labour relations boards, 201 the Family Benefits Review Committee, 202 a veterans’ appeal board, 203 privacy commissioners, 204 and the National Parole Board. 205

On the other hand, the law reports are replete with cases in which decisions were set aside because the agency failed to make an independent judgment and instead merely applied a policy or guideline without considering the specific circumstances of the particular case. 206

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204 Ruby v. Canada (Solicitor General), [2000] 3 F.C. 589 (FCA), rev’d in part on basis certain in camera provision of Act overbroad 2002 SCC 75; Canada (Information Commissioner) v. Canada (Minister of Industry) (2001), 14 C.P.R. (4th) 484 (FCA).


Conversely, it has been held that the exercise of a statutory discretion is not unlawful on the ground that it was based on a misinterpretation of a non-binding guideline or policy, or that the decision-maker disregarded it. However, in a more recent English case, the opposite conclusion was reached. Further, a court may refer to guidelines issued to those entrusted with the exercise of discretion as an indication of the factors to be considered by the decision-maker and, perhaps, their relative weight, when reviewing a discretionary decision for unreasonableness.

12:4422 Statutory Authority

Some statutes confer express authority on agencies to formulate rules or guidelines that are legally binding. However, as with all grants of statutory authority, whether such powers confer authority to create rules that have the force of law, or merely guide the judgment of decision-makers in much the same way as those made without explicit statutory authority, will depend upon their construction. Moreover, as to that, it has been held that the word "guidelines" is not determinative of their meaning.

Accordingly, in some circumstances an express statutory power to issue guidelines may be construed as a grant of authority to promulgate

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207 Maple Lodge Farms Ltd. v. Canada, [1982] 2 S.C.R. 2. This is subject to the legitimate expectations doctrine, however: see topic 7:2430, ante.

208 Ho v. Canada (Minister of Employment & Immigration) (1994), 88 F.T.R. 146 (FCTD); but see Cheng v. Canada (Secretary of State) (1994), 25 Imm. L.R. (2d) 162 (FCTD).


211 E.g., Department of the Environment Act, R.S.C. 1985, c. E-10, s. 6; Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 159(1)(h) and 161; compare Penitentiary Act, R.S.C. 1985, c. P-5, s. 37(3) (commissioner's directives); see also Securities Act, R.S.O. 1990, c. S.5, s. 143.8 [en. 1994, c. 33, s. 8], which recognizes, rather than confers on the Commission, the power to issue policies.

212 As to the power to make subordinate legislation generally, see topic 13:2000, post.

213 Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3. The Ontario Securities Act, R.S.O. 1990, c. S.5 [as am. 1994, c. 33, s. 8] makes it clear that the Commission's policies are not binding by defining "policy" in s. 143.8(1)(d) as, inter alia, "something that is not of a legislative nature."
Dokuchia v. St. Paul Fire & Marine Insurance Company

[1947] O.J. No. 515
Also reported at:
[1947] O.R. 417

Ontario
Court of Appeal
Henderson, Roach and Hogg JJ.A.

April 30, 1947.

J.W. Pickup, K.C. (J.S. McKinnon, with him), for the defendant, appellant: On the case as presented, the plaintiff has shown no cause of action against the defendant, because he has not proved that his claim is one for which indemnity is provided by the insurance, and this is essential: The Continental Casualty Company v. Yorke, [1930] S.C.R. 180, [1930] 1 D.L.R. 609. In fact, the loss is shown not to have been covered by the policy. The loss did not arise from the use, operation or ownership of a motor vehicle, but from the use of gasoline: see the reasons of Laidlaw and Henderson JJ.A. in Dokuchia v. Domansch, [1945] O.R. 141, [1945] 1 D.L.R. 757.

[ROACH J.A.: Was the trial judge entitled to look at the reasons for judgment in Dokuchia v. Domansch?] A judgment is conclusive proof, against all the world, of the existence, date and legal consequences of the judgment, but no further: 13 Halsbury, 2nd ed. 1934, p. 685.

C.L. Yoerger, for the plaintiff, respondent: The plaintiff's right, under s. 205(1) of The Insurance Act, R.S.O. 1937, c. 256, is a higher one than the right of the insured against his insurer. The plaintiff makes out his case by proving his judgment against the insured, and he is entitled, for this purpose, to rely upon the reasons for the judgment. [ROACH J.A.: You must surely prove that your judgment is of a type which brings it within the section.] It is clear, from The Continental Casualty Company v. Yorke, supra, and The Century Indemnity Company v. Rogers, [1932] S.C.R. 529, [1932] 2 D.L.R. 582, that the insurer is bound by the judgment against its insured, both as to the fact of the judgment and as to its amount. [ROACH J.A.: Did the insurer, in the Rogers case, defend the action against the insured?] That does not appear from the reasons for judgment, but until 1935 the insurer had no right to be made a party.

The judgment in Dokuchia v. Domansch decides a matter of status, and is therefore a judgment in rem. Even a judgment inter partes creates an estoppel as against parties and their privies.

The trial in Dokuchia v. Domansch proceeded upon the basis of negligence in the operation of a motor vehicle. The dangerous substance, gasoline, was being carried merely as fuel, and the plaintiff's injuries resulted from negligent operation of the vehicle. [ROACH J.A.: There is no evidence in this record to show whether the accident arose from negligence in operation, or from the presence of a dangerous substance.] It is submitted, in that event, that there should be a new trial rather than a dismissal. Even a new trial would work an injustice to the plaintiff, since the present defendant has already had two chances to defeat our claim.

We refer also to Musgrove v. Pandelis, [1919] 2 K.B. 43; Read v. J. Lyons Co. Ltd., [1946] 2 All E.R. 471.
J.W. Pickup, K.C., in reply.

Cur. adv. vult.

¶ 1 ROACH J.A.:— This is an appeal from the judgment of the Honourable Mr. Justice Mackay, pronounced on the 9th July 1946, by which it was adjudged that the plaintiff recover from the defendant the sum of $4,925 and costs.

¶ 2 The plaintiff recovered a judgment, dated the 16th June 1944, against one Domansch, in the sum of $4,361 damages and $564 costs on account of personal injuries received and out-of-pocket expenses incurred. (Dokuchia v. Domansch, [1944] O.W.N. 461, [1944] 3 D.L.R. 559, affirmed [1945] O.R. 141, [1945] 1 D.L.R. 757.) In an effort to obtain satisfaction of the judgment, the plaintiff caused a writ of fi. fa. to be issued against the goods and lands of Domansch. That writ of fi. fa. was returned nulla bona by the sheriff, and that judgment remains unsatisfied.

¶ 3 Under date 27th October 1942 the defendant in this action issued a policy of insurance to the said Domansch in respect of a motor truck, which policy included a coverage for legal liability for bodily injury or death to one person in the sum of $5,000. That policy would appear to have been in full force and effect at the time when the plaintiff received the injuries to which reference has already been made. There are certain limitations as to the liability of the insurer under that policy. By it:

"The Insurer agrees to indemnify the Insured ... against the liability imposed by law upon the Insured ... for loss or damage arising from the ownership, use or operation of the automobile ..."

"Provided always that that Insurer shall not be liable ..."

"(d) For any loss or damage resulting from bodily injury to or the death of any person being carried in or upon or entering or getting on to or alighting from the automobile; or"

"(e) For loss or damage resulting from bodily injury to or the death of any employee of any person insured by this Policy while engaged in the operation or repair of the automobile".

¶ 4 In the present action the plaintiff sues on behalf of himself and all persons having judgments or claims against the judgment debtor Domansch for which indemnity is provided by the said policy of insurance. The action is brought under the provisions of s. 205 of The Insurance Act, R.S.O. 1937, c. 256, the relevant portion of which reads as follows:

"(1) Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall, notwithstanding that such person is not a party to the contract, be entitled, upon recovering a judgment therefor against the insured, to have the insurance money payable under the policy applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied."

¶ 5 In the action of Dokuchia v. Domansch, the endorsement on the writ of summons was as
follows: "THE PLAINTIFF'S CLAIM is for $5,000 damages for injuries sustained by the Plaintiff while working for the defendant on truck being driven by the Defendant."

¶ 6 The statement of claim in that action originally contained the following allegations:

"2. The plaintiff was employed at Arbor Vitae as driver for the defendant's truck and on the 23rd of November, 1942, the defendant who was driving in the truck with the plaintiff said he would drive and directed the plaintiff to pour gasoline in the carburetor while he, the defendant, drove.

"3. While obeying the instructions of his employer, the defendant, there was an explosion and the plaintiff was thrown to the ground and the truck heavily loaded ran over him.

"4. The plaintiff thereby suffered such injuries as necessitated the amputation of both legs above the knee.

"6. The said defendant was grossly negligent in directing his said employee to undertake work which was dangerous and which caused the injuries complained of."

¶ 7 Paras. 3 and 6 of that statement of claim were later amended and as amended are as follows:

"3. While obeying the instructions of the defendant, there was an explosion and the plaintiff was thrown to the ground and before he could move out of the way the truck heavily loaded ran over him."

"6. The said defendant was grossly negligent in directing the said plaintiff to undertake work which was dangerous and which caused the injuries complained of and was also negligent in striking the plaintiff while the plaintiff was standing on the ground."

¶ 8 The statement of defence in that action was not filed as an exhibit in the present action and, therefore, is not before us.

¶ 9 The defences put forward by the present defendant in its pleading are several, but for the purposes of this appeal it will suffice to say that they include the defence that the claim for which the plaintiff recovered judgment is not one for which the insured Domansch was indemnified by the policy of insurance.

¶ 10 It should be here stated that the insurer did not defend the action of Dokuchia v. Domansch. It was notified by Domansch that the action had been commenced, but, as would appear from certain correspondence between the insurer and its agent, entered as exhibits, it refrained from defending the action upon the ground that the plaintiff's claim in that action was not one included in the coverage provided by the said policy. By virtue of s. 205(1) of The Insurance Act, the plaintiff is required to prove that his judgment against Domansch is based on a claim for which indemnity is provided by the policy. This involves proving, first, that his loss or damage arose "from the ownership, use or operation of the automobile", and, that having been proved, second, that his loss or damage did not come within the exceptions in the policy for which no indemnity is provided.

¶ 11 No evidence was tendered as to the circumstances under which the plaintiff received the
injuries for which he recovered judgment, or as to whether or not at the time he received those injuries he was in the employ of the insured. The plaintiff proved the policy of insurance, the original judgment, the judgment on the appeal and the reasons therefor, the plaintiff's pleading in the original action, that both the original and the amended statement of claim had been served on the insurer's agent and sent by him to the insurer, and that the judgment was unsatisfied. The plaintiff did not give evidence, and counsel for the defendant submitted no evidence.

¶ 12 In this Court, counsel for the appellant relied upon the judgment of the Supreme Court of Canada in The Continental Casualty Company v. Yorke, [1930] S.C.R. 180, [1930] 1 D.L.R. 609, in support of his argument that the plaintiff here had not established a prima facie case. There the right of action was given by s. 85(1) of The Insurance Act, R.S.O. 1927, c. 222, which read as follows:

"In any case in which a person insured against liability for injury or damage to persons or property of others has failed to satisfy a judgment obtained by a claimant for such injury or damage and an execution against the insured in respect thereof is returned unsatisfied, such execution creditor shall have a right of action against the insurer to recover an amount not exceeding the face amount of the policy or the amount of the judgment in the same manner and subject to the same equities as the insured would have if the said judgment had been satisfied."

¶ 13 Lamont J., in delivering the judgment of the Court, said that the section gave the respondent therein a right of action against the insurer, to be exercised in the same manner as if the insured had paid the judgment and brought the action, and to be exercised also subject to the same equities which would prevail between the insurer and the insured; that had the insured paid the judgment and brought the action, the insured, in order to succeed, would have to establish: (1) the agreement to indemnify; (2) that the injury insured against had been inflicted by the insured's automobile; and (3) that the insured was legally liable for damages for those injuries.

¶ 14 In my opinion, the effect of the present section is to give a claimant, who has recovered a judgment for damages, more than a mere "right to sue". That is to say, the present statute does more than merely authorize procedure. It creates a substantive right in such judgment creditor enforceable by action against the insurer, all of course, depending upon the claim, which becomes merged in the judgment, being one for which indemnity is provided by the policy.

¶ 15 The plaintiff here did not prove in this action the nature of his original claim merely by proving the judgment, except to the extent that it was one for damages, nor is it possible by looking at the statement of claim in the original action to determine whether the claim which became merged in the judgment was one covered by the policy. A judgment, even inter partes, is not evidence of any fact which was neither directly decided nor a necessary ground of the decision. Thus, it is never evidence of matters which merely came collaterally in question, or were incidentally cognizable, or which can only be inferred by argument from the decision: 13 Halsbury, 2nd ed. 1934, p. 684.

¶ 16 It is impossible on the present record to determine whether the plaintiff, at the time he was injured, was or was not in the employ of the insured. There is no evidence one way or the other. In order to succeed, the plaintiff must prove, inter alia, that he was not. For the same reason, it is impossible to determine whether the plaintiff's loss or damage comes within the exception (d) contained in the policy. In order to succeed, the plaintiff must also prove, inter alia, that it does not.

¶ 17 That is sufficient for the determination of this appeal; but I go further and say that, in my opinion, neither the statute nor the terms of the policy has lessened the burden which rests on the
plaintiff, and that, as in The Continental Casualty Company v. Yorke, supra, he must still prove: (1) that
his loss or damage arose from the use or operation of the motor truck in respect of which the policy of
insurance was issued; (2) that the insured Domansch was legally liable to him in damages for those
injuries; and (3) the agreement to indemnify, I say that for this reason, namely, that in proving, as he
must, that his claim against Domansch was one for which indemnity was provided by the policy, he
thereby proves all the foregoing. If he proves less, he fails. In my opinion, the statute has not displaced
the common law principle quoted by Mr. Justice Lamont and now found in 13 Halsbury, art. 756, p.
686:

"A judgment in personam or inter partes is conclusive proof as against parties and
privies of the truth of the facts upon which such judgment is based, but, excepting as
above stated, to prove its existence, date, and consequence, it is inadmissible in
evidence as against strangers, except (1) where it determines a question of public right
and is admissible as evidence of reputation; (2) in bankruptcy or administration
proceedings; (3) in divorce cases; and (4) to some extent in patent actions."

¶ 18 The appeal must be allowed with costs. I would not dismiss the action. I think there should be a
new trial and the plaintiff should have another opportunity of proving what he or his advisers conceive
to be a proper claim against this defendant. If the appellant fails on such new trial there should be no
costs of the former trial. If the appellant succeeds on the new trial then it should also have its costs of the
former trial.

New trial ordered.