SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

APR 11 2023

No. S 232804
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Conifex Timber Inc.

PETITIONER

AND:

The Lieutenant Governor in Council of British Columbia

RESPONDENT

PETITION TO THE COURT

ON NOTICE TO: **The Lieutenant Governor in Council**
Ministry of Justice
PO Box 9290 Stn Prov Govt
Victoria, BC V8W 9J7

The Attorney General of British Columbia
Ministry of Justice
PO Box 9290 Stn Prov Govt
Victoria, BC V8W 9J7

This proceeding has been brought for the relief set out in Part 1 below, by the persons named as petitioners in the style of proceedings above

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
(b) serve on the petitioner(s)
    (i) 2 copies of the filed response to petition, and
    (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

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Time for response to petition

A response to petition must be filed and served on the petitioner(s),

(a) if you were served with the petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe Street Vancouver, BC V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioner is: c/o McEwan Cooper Dennis LLP, 900 – 980 Howe Street, Vancouver, BC V6Z 0C8 Fax number address for service (if any) of the petitioners: E-mail address for service (if any) of the petitioner(s): kmcewan@mcewanpartners.com
(3)	The name and office address of the petitioners' lawyer is: McEwan Cooper Dennis LLP, 900 – 980 Howe Street, Vancouver, B.C. V6Z OC8, Attn: J. Kenneth McEwan K.C., Emily Kirkpatrick

CLAIM OF THE PETITIONERS

Part 1: ORDER(S) SOUGHT

1. The Petitioner applies for the following relief:

   a. an order in the nature of *certiorari* quashing Order in Council 692/2022 ("OIC 692") made by the Lieutenant Governor in Council ("LGIC") on December 21, 2022;

   b. an order setting aside OIC 692 as unauthorized or otherwise invalid;

   c. an order that the Petitioner be awarded its costs of this proceedings; and,

   d. such further and other relief as counsel may advise and this Court may allow.

Part 2: FACTUAL BASIS

Overview

2. The Petitioner seeks judicial review of OIC 692 (made by the LGIC on December 21, 2022), which directed the British Columbia Utilities Commission ("BCUC") to issue orders relieving the British Columbia Hydro and Power Authority ("BC Hydro") of its obligation to supply service respecting cryptocurrency mining projects for a period of 18 months.

3. On December 28, 2022, the BCUC issued a decision relieving BC Hydro of the obligation to provide service to new cryptocurrency mining projects ("BCUC Decision").

4. As a result of OIC 692, two of the Petitioner's high-performance computing ("HPC") data centre projects have been removed from BC Hydro's interconnection queue, and its ongoing system impact study agreements have been placed on hold.

5. As set out below, OIC 692 exceeds the statutory powers granted to the LGIC under the *UCA* and breaches statutory and common law constraints on the LGIC's decision-making process.

The Parties

6. The Petitioner, Conifex Timber Inc., is a company incorporated pursuant to the laws of Canada, with a registered and records office located at 1000 Cathedral Place, 925 W Georgia St, Vancouver, BC V6C 3L2.

7. The LGIC is the representative of the executive of British Columbia and made OIC 692.

Electricity Service and the Statutory Scheme

8. The bulk of electricity used in British Columbia is provided to its residents through BC Hydro.

Affidavit of Andrew McLellan made April 11, 2023 [McLellan Affidavit] at para 2, Exhibit A

9. BC Hydro operates two types of large load connections for commercial use:

   a. distribution connections connect customers to BC Hydro's medium voltage system, and are for loads exceeding 5 megawatts in a 25 kilovolt service area or loads exceeding 2.5 megawatts in a 12 kilovolt service area;

   b. transmission connections connect customers to BC Hydro's highest voltage systems for projects with load requirements exceeding 35 kilovolts.

McLellan Affidavit at para 3, Exhibit B

10. BC Hydro has implemented a business practice governing new requests for connections at transmission voltage. The business practice requires that new requests for transmission voltage be placed into an interconnection queue, which determines the order in which requests are processed. The load interconnection process consists of three mandatory steps: a system impact study, a facilities study, and implementation. In certain situations, additional studies may be undertaken, including preliminary conceptual reviews or feasibility studies, or a system impact study conceptual design at the conclusion of the system impact study.

McLellan Affidavit at para 4, Exhibit C

11. BC Hydro and potential customers enter into agreements at each stage of the interconnection process. These agreements, and the completion of the relevant studies and implementation, are contingent on customers paying certain fees and deposits to BC Hydro.

McLellan Affidavit at para 4, Exhibit C

12. As a public utility, BC Hydro is subject to regulation by the BCUC. The BCUC has general supervision over public utilities, including their facilities, rates, and statutory obligations to provide service.

Conifex's Cryptocurrency Operations

13. Conifex, in collaboration with the Tsay Keh Dene First Nation, is developing HPC data centres in British Columbia, initially for the purpose of mining cryptocurrency.

McLellan Affidavit at paras 5-6

14. On April 20, 2021, Conifex submitted a three-stage application for electricity service from BC Hydro to power an HPC centre located in the Mackenzie region (the "Mackenzie Site"). The first stage sought 30 megawatts of power, the second sought 44 megawatts of power, and the third phase sought 50 megawatts of power. The application was subsequently revised to seek three megawatts of power at the first stage and 25 megawatts at the second.

McLellan Affidavit at paras 7-8

15. A feasibility study agreement was made for the Mackenzie Site on June 4, 2021.

McLellan Affidavit at para 9, Exhibit D

16. The first stage of the Mackenzie Site became operational on November 1, 2021, pursuant to an amended electricity supply agreement with BC Hydro.

McLellan Affidavit at para 10, Exhibit F

17. Conifex subsequently applied for power for three more HPC centres.

18. A feasibility study agreement for an HPC centre requiring 150 megawatts of power near Salmon Valley (the "Salmon Valley Site") was concluded on February 25, 2022.

McLellan Affidavit at para 15, Exhibit H

19. A system impact study agreement was concluded for the Salmon Valley Site on June 15, 2022.

McLellan Affidavit at para 17, Exhibit J

20. On June 20, 2022, a system impact study agreement was concluded for another HPC centre requiring 150 megawatts of power near Ashton Creek (the "Ashton Creek Site").

McLellan Affidavit at para 19, Exhibit M

21. Another system impact study agreement for an additional site was concluded, but the project was later abandoned.

McLellan Affidavit at paras 18 and 21, Exhibit L

22. On August 26, 2022, Conifex and BC Hydro concluded a facilities agreement for the second stage of the Mackenzie Site. The second stage of the Mackenzie Site project is not impacted by the moratorium and is moving forward with BC Hydro.

McLellan Affidavit at paras 12-13, Exhibit G

23. Conifex has provided $154,350.00 to BC Hydro in deposits and fees for the studies and agreements concluded with BC Hydro in respect of the Mackenzie Site.

McLellan Affidavit at paras 9-10 and 12, Exhibit E

24. Conifex has provided $252,000 to BC Hydro in deposits and fees for the studies and agreements concluded with BC Hydro in respect of the Salmon Valley Site and the Ashton Creek Site.

McLellan Affidavit at paras 15, 17, and 19, Exhibits I, K, N

OIC 692 and the Cryptocurrency Moratorium

25. On December 21, 2022, the LGIC made OIC 692. OIC 692 was issued pursuant to section 3 of the *UCA*, which authorizes the LGIC to give directions to the BCUC in certain circumstances.

McLellan Affidavit at para 22, Exhibit P

26. OIC 692 effectively instituted a moratorium on new cryptocurrency projects gaining access to electricity in British Columbia. The OIC directed the BCUC to make certain final orders pertaining to cryptocurrency projects within 10 days of an application for those orders by BC Hydro.

27. Of relevance to this petition, OIC 692 directed the BCUC to make a final order relieving BC Hydro of the obligation to supply service to high-voltage cryptocurrency projects for 18 months. High-voltage projects are those that would receive an electricity supply of 60 kV or higher, in relation to which BC Hydro had not entered into a feasibility study agreement at the date of the OIC.

28. The direction relating to high-voltage projects specified that BC Hydro was relieved from the obligation to enter into system impact study agreements for any new applications for power. It also specifically identified four high-voltage projects as paused projects, two of which pertain to Conifex: the Salmon Valley Site and the Ashton Creek Site. The direction provided that BC Hydro would be relieved of the obligation to enter into feasibility study agreements in relation to paused projects.

29. On the same date, BC Hydro applied to the BCUC to obtain the final orders described in OIC 692. BC Hydro also wrote a letter to Conifex on that date, informing it of the upcoming moratorium on cryptocurrency projects, including the impact on the Ashton Creek Site and Salmon Valley Site.

McLellan Affidavit at para 23, Exhibit Q

30. Neither Conifex nor the Tsay Keh Dene Nation was informed of the existence, content, or effect of OIC 692 prior to December 21, 2022.

McLellan Affidavit at paras 24-25

31. On December 28, 2022, the BCUC issued Final Order No. G-390-22A, granting the relief sought by BC Hydro and instituting the moratorium on access to power for new cryptocurrency projects: *British Columbia Hydro and Power Authority, Application to Suspend Obligation to Supply Service to Cryptocurrency Mining Projects* (28 December

2022), Final Order No. G-390-22A, online: BCUC <https://www.ordersdecisions.bcuc.com/bcuc/orders/en/item/521460/index.do>.

McLellan Affidavit at para 26, Exhibit R

32. On January 23, 2023, BC Hydro wrote to Conifex informing it that the Ashton Creek Site and Salmon Valley Site were paused projects pursuant to OIC 692 and Final Order No. G-390-22A, and that interconnection activities regarding those projects would not be advanced.

McLellan Affidavit at para 27, Exhibit S

Part 3: LEGAL BASIS

33. This petition is brought pursuant to section 2 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 and rules 2-1(2)(b) and 16-1 of the *Supreme Court Civil Rules*. The Petitioner further relies on the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 [*UCA*] and the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 [*DRIPA*].

The Standard of Review

34. The standard of review in relation to the issuance of OIC 692 is reasonableness in accordance with the framework set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*.

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 [*Vavilov*]
1193652 B.C. Ltd. v. New Westminster (City), 2021 BCCA 176, leave to appeal to SCC ref'd 2021 CanLII 126365 [*New Westminster*] at paras 59-62
1120732 B.C. Ltd. v. Whistler (Resort Municipality), 2020 BCCA 101 [*Whistler*] at paras 34-46
Le v. British Columbia (Attorney General), 2022 BCSC 1146 [*Le*] at paras 56-61
Innovative Medicines Canada v. Canada (Attorney General), 2022 FCA 210 [*Innovative Medicines*] at para 34

35. None of the exceptions to the presumption of reasonableness review outlined in *Vavilov* (at para 33) apply.

36. Conducting reasonableness review requires a court to consider whether a decision is based on internally coherent reasoning and justified in light of the legal and factual constraints that bear on the decision.

Vavilov at para 101

37. When, as here, reasons are not provided for a decision, the court must determine whether the decision is reasonable in light of the relevant constraints on the decisionmaker. Here, those relevant constrains include the governing statutory scheme, other statutory and common law, and the principles of statutory interpretation.

Whistler at paras 50-51 and 84

OIC 692 is Unreasonable

38. OIC 692 is an improper (and "unreasonable" within the meaning of *Vavilov*) exercise of the statutory authority of the LGIC pursuant to the *UCA* for three reasons:

a. it directed the BCUC to exercise a power it does not have, namely, the power to make orders without any (or without adequate) procedural fairness;

b. it directed the BCUC to exercise powers without regard to its other statutory obligations (including its exclusive jurisdiction to judge whether there is, in any case, undue discrimination, preference, prejudice, or disadvantage); and,

c. it directed the BCUC to exercise powers without regard to the consultation and cooperation with Indigenous peoples necessary to give effect to the government's obligations pursuant to *DRIPA*.

39. The individual and cumulative impacts of these errors demonstrate that OIC 692 is unreasonable and should be quashed.

The LGIC's Statutory Authority

40. The reasonability of OIC 692 must necessarily be considered in the context of the statutory grant of power to the LGIC in section 3 of the *UCA*. The relevant portion of that provision reads:

> **3** (1) Subject to subsection (3), the Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the powers and the performance of the duties of the commission, including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation.
> (2) The commission must comply with a direction issued under subsection (1), despite
> (a) any other provision of
> (i) this Act, except subsection (3) of this section, or
> (ii) the regulations,
> (a.1) any provision of the *Clean Energy Act* or the regulations under that Act, or

(b) any previous decision of the commission.

(3) The Lieutenant Governor in Council may not under subsection (1) specifically and expressly

(a) declare an order or decision of the commission to be of no force or effect, or

(b) require the commission to rescind an order or a decision.

41. On its face, the LGIC's power to make subordinate legislation is extraordinarily broad. However, it is well established that the executive does not have unlimited, untrammelled power. Limits are imposed on the executive's exercise of discretion by a reasonable reading of the legislation granting it. Other statutory and common law obligations also constrain how and what a decision-maker can lawfully decide.

Vavilov at para 108 citing *Roncarelli v. Duplessis*, 1959 CanLII 50 (S.C.C.), and at para 111

Portnov v. Canada (Attorney General), 2021 FCA 171 at para 41

OIC 692 Directs the BCUC to Exercise a Power it Does Not Have

42. An administrative body may only exercise the powers granted to it by the legislature. By necessary implication, a power to direct another administrative body to engage in an activity is subject to the same limits, despite the scope of authority granted to the directing entity.

Catalyst Paper Corp. v. North Cowichan (District), 2012 SCC 2 at para 15
Vavilov at para 108

43. The express limit to the discretion granted to the LGIC under section 3 of the *UCA* on the face of the provision is that the LGIC may direct the BCUC "to exercise a power or perform a duty, or to refrain from doing either". In this case, OIC 692 exceeds this limit on the grant of statutory power by directing the BCUC to do something it does not have the power to do: making orders without any (or without adequate) procedural fairness.

44. The powers of the BCUC are set out in the *UCA*. Their scope is determined by analysis of the words of that statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

New Westminster at para 63, citing *Bell ExpressVu Ltd. Partnership v. Rex,* 2002 SCC 42 at para 26

(a) The *UCA* Mandates a Hearing for Relieving from the Obligation to Supply Service

45. The language pertaining to the BCUC's power to make orders relieving a public utility from service is found in subsection 28(3). That provision authorizes the BCUC to relieve from the obligation to supply service in the following circumstances:

> (3) After a hearing and for proper cause, the commission may relieve a public utility from the obligation to supply service under this Act on terms the commission considers proper and in the public interest.

46. On its face, the grammatical and ordinary meaning of subsection 28(3) of the *UCA* gives the BCUC the power to relieve a public utility from the obligation to provide service, but only after a hearing has been held, and only on a determination by the commission that the doing so is proper and in the public interest.

47. The context of the *UCA* as a whole further reinforces the importance of hearings in the statutory scheme, and confirms that holding a hearing is a fundamental feature of the BCUC's statutory authority to exercise this power.

48. As noted above, the *UCA* sets out the powers of the BCUC in detail, including not only the powers the BCUC holds, but the conditions under which those powers may be exercised.

49. The *UCA* provides that the BCUC has several powers whose exercise is contingent on a hearing being held, including the power to:

a. make orders requiring a public utility to provide improved service (s. 25);

b. set standards relating to the service provided by a public utility (s. 26);

c. make orders requiring a public utility to allow the joint use of its transmission facilities or other equipment (s. 27);

d. make orders allowing a public utility to extend its service (s. 35);

e. cancel or suspend a franchise, licence, or permit (s. 48);

f. declare a contract unenforceable or make any other order relating to that contract (s. 64); and,

g. make orders allowing the use of a public utility's electricity transmission facilities (s. 70).

50. By contrast, the *UCA* provides the BCUC with other powers that are not contingent on a hearing having occurred, including the power to:

a. make orders relating to the general supervision of public utilities, including orders relating to equipment, safety devices, the extension of works or systems, the filing of rate schedules, and other matters (s. 23);

b. make orders requiring a public utility to supply service if a supply line is distant from a potential customer (s. 29);

c. make an order regarding the extension of existing service (s. 30);

d. make orders regarding a public utility's use of municipal thoroughfares (s. 32); and,

e. make orders dispensing with a municipality's consent to a public utility's use of the municipality's streets, parks, and other public places (s. 33).

51. Other provisions suggest that a hearing is a mandatory part of the exercise of the powers outlined in paragraph 43. The legislature has provided the BCUC the discretion to determine if a hearing is necessary before:

a. making orders requiring a public utility to extend its service to a part of a municipality (s. 34);

b. making orders relating to the public utility's use of municipal structures (s. 36); and,

c. granting a certificate of public convenience and necessity (s. 46).

52. These provisions demonstrate that the legislature turned its mind to whether a hearing was a necessary component of a specific power of the BCUC. The legislature does not speak in vain and is presumed to express itself consistently, such that the use of different words intends a different result.

British Columbia Human Rights Tribunal v. Schrenk, 2017 SCC 62 [*Schrenk*] at para 45
Contino v. Leonelli-Contino, 2005 SCC 63 at para 25

53. In attaching a requirement to hold a hearing to the BCUC's power to relieve a public utility of the statutory obligation to supply service, while providing for optional hearings or no hearings as a condition of the exercise of other powers, the legislature has made it clear that a hearing is a mandatory component of the BCUC's exercise of this power.

Ewert v. Canada, 2018 SCC 30 at para 35

54. A purposive reading of the *UCA* supports the conclusion that hearings are a mandatory component of the BCUC's power to relieve a public utility of the statutory obligation to supply service.

55. The *UCA* establishes the BCUC to supervise and regulate public utilities as reflected in s. 23 and Part 3 of the *UCA* generally. The purpose of the legislation is to ensure that service is provided in an adequate, safe, efficient, just, reasonable, and not unduly discriminatory manner.

56. Numerous provisions of the *UCA* provide the BCUC the power to ensure that service provided by public utilities are adequate, safe, efficient, just, reasonable, and not unduly discriminatory, including ss. 25, 58, 59, and 64.

57. The *UCA* also sets out the obligations on public utilities to provide adequate, safe, efficient, just, reasonable, and not unduly discriminatory service.

UCA at ss. 39, 59.

58. A review of the powers of the BCUC reinforces this interpretation of the purposes of the *UCA*: all powers of the BCUC that are not tied to a mandatory hearing either relate to the extension of service (ss. 29, 30, and 34), facilitating the provision of service (ss. 32, 33, 36, and 46), or to the general supervision of public utilities (s. 23).

59. By contrast, any power of the BCUC that may result in a decrease in the adequacy, safety, efficiency, or existence of service are contingent on the BCUC holding a hearing: ss. 26, 27, 28, 48, 70. Even allegations of inadequate, unsafe, unreasonable, or unreasonably discriminatory service are sufficiently important within the context of the *UCA* to mandate a hearing: ss. 25 and 64.

60. The distinct approaches taken to mandating a hearing in relation to the exercise of a statutory power of the BCUC reinforce the purpose of the legislation is to ensure that service is provided in an adequate, safe, efficient, just, reasonable, and not unduly discriminatory manner.

61. Whenever the BCUC is asked to consider a matter that may run contrary to these purposes, a hearing is made a mandatory component of the exercise of its powers in relation to that matter. Considering the nature of the BCUC's powers in light of the purposes of the *UCA* reinforces the textual and contextual interpretation that a hearing is a mandatory component of the BCUC's power to relieve a public utility of the obligation to provide service.

62. The importance of public hearings under the *UCA* is reinforced by a review of the debates at the introduction of the legislation. The Honourable Mr. McCelland, then the

Minister of Energy, Mines and Petroleum Resources, in introducing the *UCA* for second reading stated that "[t]he significance of the legislation's provision for the energy reviews process is that it gives the general public direct access to energy decisions for the first time ever."

British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 32nd Parl., 2nd Sess., at 4063

63. Limiting the LGIC's power under s. 3 of the *UCA* in this manner is also consistent with the *Interpretation Act*, R.S.B.C. 1996, c. 238. Paragraph 41(1)(a) of that legislation provides that when the LGIC is empowered to make regulations, the "enactment must be construed as empowering the [LGIC] ... to make regulations as are ... not inconsistent with it."

64. By imposing a 10-day time limit for granting that application (OIC 692 at s. 3), OIC 692 effectively requires that the application be granted without a hearing (and pre-determines the outcome of that hearing in any event, as returned to below). This is in fact what occurred in the implementation of the OIC.

(b) Overriding the BCUC's Obligation for Procedural Fairness

65. Both the 10-day time limit, and the pre-determination of the outcome of any consideration by the BCUC of BC Hydro's obligation to supply service to consumers, also constituted a purported direction to the BCUC to act without regard to (and effectively setting aside) its general obligation to conduct itself with procedural fairness.

66. In this regard, OIC 692 deprived Conifex of its right to procedural fairness in the absence of statutory authority.

67. Any administrative decision that affects the rights, privileges, or interests of an individual triggers a duty of procedural fairness. The essence of the duty of fairness is to provide an opportunity for those affected by a decision to put forward their views and have them considered by the decision-maker.

Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (S.C.C.) [*Baker*] at paras 20, 22

68. OIC 692 and the associated BCUC Decision had a clear impact on the rights and interests of Conifex sufficient to trigger a duty of fairness.

69. The moratorium on the supply of power for cryptocurrency operations directly impacted Conifex's HPC developments, barring any access to power for the Salmon River Site and

the Ashton Creek Site. OIC 692 and the BCUC decision also explicitly targeted Conifex, singling out the Salmon River Site and Ashton Creek Site as paused projects.

70. Given the significant investment Conifex had already made into these projects, including over a quarter of a million dollars in deposits and fees paid to BC Hydro, and the complete bar on these projects proceeding at this time, the impact on Conifex's interests is severe.

71. At a minimum, the scope of the duty of procedural fairness owed to Conifex in this context would have included the right to a hearing statutorily mandated by subsection 28(3), and, by necessary implication, the opportunity to give submissions at that hearing to give effect to its participatory rights. Further, Conifex had a legitimate expectation that such a hearing would be held, in compliance with the statutory procedure outlined in subsection 28(3).

Baker at para 29

72. The complete absence of any opportunity to participate in the process leading to the BCUC Decision constitutes a breach of the duty of fairness owed to Conifex, regardless of the scope of that duty.

73. However, the question in this case is not whether the BCUC breached Conifex's right to procedural fairness. Rather, the focus is on OIC 692 depriving Conifex of those rights in the absence of authority, expressly or by necessary implication, to do so.

74. While legislation may, with sufficiently express language or by necessary implication, override a rule of natural justice, courts are generally hesitant to assume legislators enact procedures running contrary to the principles of natural justice.

Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), 2001 SCC 52 [*Ocean Port*] at paras 21-22

75. Even in the face of a statutory regime speaking to procedural matters, the common law principles of procedural fairness may supplement a statutory regime.

Isinger v. British Columbia (The Superintendent of Motor Vehicles), 2015 BCSC 2220 at para 64

Allard v. Assessor of Area #10 – North Fraser Region, 2010 BCCA 437 at paras 6-8

76. In this case, the *UCA* contains no language that could be interpreted as providing the LGIC the authority to override the BCUC's common law duty of fairness.

77. Although s. 3 of the *UCA* provides the LGIC the authority to direct the BCUC to exercise a power or duty, or refrain from doing so, despite any provision of the Act, this language is not sufficiently precise to authorize the LGIC to override the BCUC's common law duty of procedural fairness.

78. In the *HPAA*, legislation intimately related to the *UCA*, the legislature specifically provided the LGIC the power to override the common law and other statutory law relating to certain agreements made by BC Hydro.

HPAA at s. 12(11).

79. This section suggests that, within the context of the complex statutory scheme governing the provision of electricity in British Columbia, the legislature turned its mind to when the LGIC was to have the authority to override the common law.

80. Including such a power in the LGIC's authority to direct the BCUC under the *UCA* would have been straightforward, and one that was within the awareness of the legislature. In its absence, and considering the express statutory language required to override the common law duty of procedural fairness, such a power cannot be inferred to exist.

Coast Capital Savings Credit Union v. British Columbia (Attorney General), 2011 BCCA 20 at para 35
Ocean Port at paras 21-22

81. By purporting to direct the BCUC to make a decision that deprived Conifex of its rights to procedural fairness, a power neither the BCUC nor the LGIC is granted under the *UCA*, OIC 692 runs against the purposes of the legislation and exceeds the statutory authority granted to the LGIC under the Act. OIC 692 should be quashed as unreasonable on this basis.

OIC 692 Imposes Discrimination Between Consumers

82. OIC 692 is a discriminatory regulation enacted in the absence of statutory authority.

83. It is well established that a municipality may not enact a discriminatory bylaw absent explicit or necessarily implied statutory authorization

R. v. Sharma, 1993 CanLII 165 (S.C.C.), [1993] 1 S.C.R. 650 at 667-668; *School District No. 61 v. District of Oak Bay*, 2006 BCCA 28 [*Oak Bay*] at para 19.

84. Like a municipal bylaw, discriminatory regulations may also be overturned in the absence of statutory authorization.

Waffle v. Lieutenant Governor In Council For B.C., 1996 CanLII 541 (B.C. S.C.) at paras 12-14 and 23; *Grace v. British Columbia (Lieutenant Governor in Council)*, 2000 BCSC 923 [*Grace*] at paras 48-57.

85. Even a broad grant of authority that permits the amendment of a statute by subordinate legislation is limited by the overriding purpose or object of the enabling statute.

References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 at para 87.

86. Discrimination in the administrative context means an administrative measure that draws a distinction which is not authorized by the enabling legislation.

Oak Bay at para 21

87. By barring cryptocurrency projects from access to electricity service from BC Hydro, OIC 692 draws a distinction between cryptocurrency projects and other commercial consumers of electricity in British Columbia. The discrimination is even more acute as it applies to Conifex, as the proponent of two of the four specifically identified paused projects under the OIC and the BCUC Decision.

88. This discrimination is not statutorily authorized.

89. The *UCA* sets out a comprehensive regime with express regard to precluding all "unjust, unreasonable, unduly discriminatory or unduly preferential" treatment in provision of utility service. The BCUC is expressly appointed as the "sole judge" of the existence of any undue discrimination.

UCA at s. 59(4)

90. Although the LGIC has been authorized to give directions to the BCUC despite "any other provision of, (i) this Act…", it does not authorize the BCUC to exercise a power that it does not have: *i.e.* the power to make orders *notwithstanding* the existence of any undue discrimination.

91. Nor does the section authorize the enactment of discriminatory regulations by necessary implication. Unlike the authority to enact zoning bylaws, which are by their nature discriminatory, there is nothing inherently discriminatory in the power to give directions to the BCUC with respect to the exercise of its powers and performance of its duties.

Dong v. Bowen Island Municipality, 2016 BCSC 553 at paras 84-86

92. Unlike a zoning bylaw, which by its very exercise discriminates between uses of land, the LGIC's power under s. 3 does not necessarily involve creating distinctions between or within classes of electricity consumers. The exercise of this power could be used to

implement standard rates for all commercial or residential consumers or to extend service to new communities, provided that this was done in compliance with the extent of the powers granted to the BCUC under the *UCA*.

93. This is in fact how this power has been exercised by the LGIC.

Direction to the British Columbia Utilities Commission Respecting Residential and Commercial Customer Account Credits, B.C. Reg. 224/2022

94. Nothing about the nature of the authority under s. 3 necessarily implies a power to direct discrimination between consumers of electricity on any basis. By directing the BCUC to discriminate between consumers, OIC 692 exceeds the statutory authority granted to the LGIC under the *UCA*.

OIC 692 Breached Obligations Under DRIPA

95. Finally, OIC 692 is unreasonable for failing to provide an adequate process to discharge the statutory obligations the government has imposed on the LGIC by the implementation of *DRIPA*.

96. On November 28, 2019, British Columbia passed *DRIPA*, which attaches the *United Nations Declaration on the Rights of Indigenous Peoples* [the "Declaration"] as a schedule. *DRIPA* is aspirational legislation designed to be implemented in collaboration with the Indigenous peoples of British Columbia, including the Tsay Keh Dene Nation.

97. To achieve its goals, *DRIPA* places certain obligations on the government. Section 3 of that Act provides that "the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration."

98. The importance of *DRIPA*, and by extension the government's compliance with that legislation, is demonstrated by recent amendments to the *Interpretation Act*, which provides that "every … regulation must be construed as being consistent with the Declaration." (at s. 8.1).

99. The subordinate legislation at issue in this petition clearly falls within the meaning of the phrase "the laws of British Columbia".

100. On its plain meaning, "all measures necessary" is extraordinarily broad, and includes any possible means available to the government to ensure that all of the laws of the province are compliant with the Declaration.

101. The context of *DRIPA* reinforces the breadth of the phrase:

a. *DRIPA* imposes an obligation on the government to develop and implement an action plan to achieve the objectives of the Declaration, that must be done in consultation and cooperation with the Indigenous peoples in British Columbia.

DRIPA, s. 4

b. *DRIPA* also provides that the LGIC may authorize a member of the Executive Council to negotiate and enter into decision-making agreements with Indigenous governing bodies on behalf of the government.

DRIPA, s. 5

102. By imposing an additional obligation on the government to take "all measures necessary to ensure the laws of British Columbia are consistent with the Declaration" in addition to its obligation to prepare and implement action plans and power to enter into decision-making agreements, this section places obligations on the government to achieve this goal through means over and above those outlined in sections 4 and 5 of *DRIPA*.

103. Any such measures must be taken in consultation and cooperation with the Indigenous peoples in British Columbia.

DRIPA, s. 3

104. The importance of consultation and cooperation is reinforced by a review of the Hansard debates of *DRIPA*.

105. In the committee stage of the Hansard debates relating to *DRIPA*, the Honourable Scott Fraser, Minister of Indigenous Relations and Reconciliation, who is responsible for *DRIPA* spoke to the meaning of this phrase in response to a question from a member of the opposition:

> **M. Lee**: Well, let me just try and go through another section of this section, which is the term that's utilized: "all measures necessary." Can I ask the minister to explain, on behalf of the government, what that test is?
>
> **Hon. S. Fraser**: It would involve introduction of legislation, if there's new legislation, or amendments to existing legislation.

British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 4th Sess., No. 299 [No. 299] at 10807

106. The Minister also reinforced, in response to a question from the same opposition member, that any new legislation or amendments would involve working with Indigenous groups to seek their input:

> **M. Lee**: I appreciate that we will be talking about the action plan and the priorities of the government with First Nations leadership in this province. But section 7, with respect, does not read with any limitations on it. When we talk about "all measures necessary," and it says "to ensure the laws of British Columbia are consistent," that will suggest that whether it's reasonable or otherwise, this government has the obligation to use all measures necessary.
>
> This means from any considerations, including considerations from a cost point of view and other priorities of government, presumably. That is what is required here in order to ensure that the laws of British Columbia, and not just some laws of British Columbia, are consistent with the declaration. Is that the case? Am I reading this section correctly?
>
> **Hon. S. Fraser**: I'll take a stab here. The requirement to align laws in consultation and cooperation with Indigenous peoples means that government will have to work with First Nations, treaty nations, Métis and Inuit to determine the best way to seek their input. Then what we have available to us as government, the means to do that, will be through new legislation, consequential amendments — those things.

No. 299 at 10808

107. The Minister made similar comments to this effect elsewhere in the debates at committee.

No. 299 at 10807-10810

108. It was plainly the intention of government that compliance with *DRIPA* would involve two key features: the introduction or amendment of legislation and consultation and cooperation with Indigenous peoples in developing that legislation.

109. In the context of this petition the former feature is engaged by the implementation of subordinate legislation through OIC 692. However, in developing and passing OIC 692, the LGIC failed to engage in the cooperation and consultation necessary to comply with the letter and spirit of *DRIPA*.

110. OIC 692 and the BCUC Decision were made without the involvement of the Tsay Keh Dene Nation or any other Indigenous group.

111. Articles 3, 20, and 21, of the Declaration all speak to the importance of Indigenous peoples' rights to pursue their economic interests and development. As a planned partner in Conifex's HPC projects, the Tsay Keh Dene Nation's economic interests are directly impacted by OIC 692.

112. Further, the absence of consultation with the Tsay Keh Dene Nation is a violation of both Article 19 of the Declaration, which provides that Indigenous peoples should be

consulted prior to the implementation of any legislative or administrative measures that may affect them, and the government's own description of its obligations under the Act in Hansard.

DRIPA, Schedule 1, Article 19

113. In the absence of any consultation with the Tsay Keh Dene Nation, and by removing the mandatory hearing required by subsection 28(3) of the *UCA*, it cannot be said that the LGIC could reasonably conclude that it met its obligation to take "all measures necessary" to ensure that new subordinate legislation was compliant with the Declaration.

114. By effectively requiring the BCUC to relieve BC Hydro of its obligation to provide service to cryptocurrency projects without a hearing, OIC 692 failed to provide for, and actively eviscerated, the process through which the impacts of the moratorium on the Tsay Keh Dene Nation could be explored and the government's obligations of consultation and cooperation could be discharged.

115. This regressive approach fails to meet the government's statutory obligations under *DRIPA*. The complete failure to consult with the Tsay Keh Dene Nation regarding OIC 692, the BCUC Decision and the impact both would have on the Tsay Keh Dene Nation's interests, results in there being no reasonable basis for the LGIC to conclude that OIC 692 complied with the government's statutory obligations imposed by *DRIPA*.

116. The LGIC's failure to comply with other statutory obligations acting as a constraint on the scope of its authority further demonstrates the unreasonableness of OIC 692.

Conclusion

117. OIC 692 is unreasonable and must be quashed.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Andrew McLellan, made April 11, 2023

2. Such other material as counsel will advise and this Court will permit.

The petitioners estimate that the hearing of the petition will take 2 DAYS.

Dated: April 11, 2023

Lawyer for the Petitioner
Conifex Timber Inc.
J. Kenneth McEwan, K.C.
McEwan Cooper Dennis LLP

To be completed by the court only:

Order made
[ ] in the terms requested in paragraphs of Part 1 of this petition
[ ] with the following variations and additional terms:

Date:

nature of [ ] Judge [ ] Master