COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Conifex Timber Inc. v. British Columbia (Lieutenant Governor in Council),* 2025 BCCA 62

Date: 20250303
Docket: CA49716

Between:

Conifex Timber Inc.

Appellant
(Petitioner)

And

The Lieutenant Governor in Council

Respondent
(Respondent)

And

British Columbia Hydro and Power Authority

Respondent

Before: The Honourable Madam Justice Fenlon
The Honourable Justice Fleming
The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated February 2, 2024 (*Conifex Timber Inc. v. British Columbia (Lieutenant Governor in Council)*, 2024 BCSC 177, Vancouver Docket S232804).

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Counsel for the Respondent, Lieutenant Governor in Council:	H.E. Cochran T. Bant R.L. Shaw
Counsel for the Respondent, British Columbia Hydro and Power Authority:	M. Vesely, K.C. J.S. Andrews
Place and Date of Hearing:	Vancouver, British Columbia November 25, 2024
Place and Date of Judgment:	Vancouver, British Columbia March 3, 2025

2025 BCCA 62 (CanLII)

Written Reasons by:
The Honourable Justice Riley

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Justice Fleming

2025 BCCA 62 (CanLII)

Summary:

The appellant, Conifex, appeals from the dismissal of a petition for judicial review with respect to an Order in Council (OIC) directing the British Columbia Utilities Commission to effect an 18-month pause on new and pending electrical service applications to B.C. Hydro for cryptocurrency mining operations. The respondents, B.C. Hydro and Power Authority (B.C. Hydro) and the Lieutenant Governor in Council (LGIC), argue that the appeal is moot because the OIC has been supplanted by a new regulatory scheme. In the alternative, they argue that the LGIC's decision to issue the Order in Council was not unreasonable. Held: Appeal dismissed. The appeal is not moot, as it addresses a controversy that could have practical implications for Conifex's pending electrical service requests. On the merits, Conifex has not established that the OIC was outside the scope of the LGIC's regulation-making authority in s. 3 of the Utilities Commission Act, R.S.B.C. 1996, c. 473.

2025 BCCA 62 (CanLII)

Reasons for Judgment of the Honourable Justice Riley:

Introduction

[1] Cryptocurrency mining involves the use of computers to solve complex mathematical problems to validate cryptocurrency transactions, in exchange for payments in the form of new cryptocurrency. Massive quantities of electricity are required to run and cool the computers used in cryptocurrency mining operations. This appeal has to do with the validity of measures taken by Cabinet to effect a pause on delivery of electrical services to new cryptocurrency mining operations in British Columbia while the government studied the policy implications of supplying large quantities of electricity to this new industry.

[2] The appellant, Conifex Timber Inc. ("Conifex"), is a forestry and independent power company seeking to diversify its operations by developing high-performance computing ("HPC") facilities in northern British Columbia. Conifex's initial plan was to devote its HPC facilities to cryptocurrency mining, before extending service to clients in the artificial intelligence and machine learning industries.

[3] Conifex submitted electrical service applications for a number of its proposed HPCs to the British Columbia Hydro and Power Authority ("B.C. Hydro"). While two of Conifex's applications were under consideration, the Lieutenant Governor in Council (the "LGIC" or "Cabinet") issued Order in Council No. 692 (the "OIC") under

s. 3 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 (the "*UCA*") directing the British Columbia Utilities Commission (the "Utilities Commission") to relieve B.C. Hydro of its obligation to provide electrical service to new cryptocurrency mining operations for a period of 18 months.

[4] Conifex challenged the validity of the OIC by way of a petition for judicial review, which was dismissed by a judge of the Supreme Court. Conifex now appeals, maintaining that the LGIC's decision to issue the OIC was unlawful because it failed to respect the limits of Cabinet's regulation-making authority under s. 3 of the *UCA*.

[5] The respondents, the LGIC and B.C. Hydro, contend that the appeal is moot because the 18-month pause provided for under the OIC has now run its course, and the OIC has since been overtaken by a new regulatory framework. Accordingly, they say the OIC is spent and has lost any practical effect. Conifex disagrees, asserting among other things that the OIC resulted in the unlawful removal of two of its projects from the B.C. Hydro "interconnection queue". Conifex says that if the appeal is successful and the OIC is found to be invalid, it will take steps to compel B.C. Hydro to re-insert its projects into the interconnection queue.

[6] With regard to the merits of the appeal, Conifex maintains that the OIC was unlawful for three reasons. First, it contemplated a denial of electrical service on the basis of statutorily impermissible discrimination between customers. Second, it was inconsistent with the broader purpose of the *UCA* to establish and enforce the "regulatory compact" by which public utilities are obliged to provide service to all customers at rates that are not discriminatory. Third, it was beyond Cabinet's regulation-making authority to direct the Utilities Commission to effect a pause on the delivery of electrical service for Conifex's pending HPC sites, because the Utilities Commission could not have taken such measures without holding a hearing affording procedural fairness to the affected parties.

[7] The respondents maintain that the OIC was lawfully issued.

2025 BCCA 62 (CanLII)

[8] The LGIC's primary position is that it was not unreasonable to interpret Cabinet's regulation-making authority under the *UCA* as permitting the pursuit of policy objectives beyond the considerations that the Utilities Commission is required to take into account. The LGIC argues in the alternative that, even if Cabinet's regulation-making authority is limited in the manner Conifex alleges, it was not unreasonable for Cabinet to conclude that, in light of the sheer volume of electricity required by cryptocurrency mining operations, the 18-month pause provided for in the OIC was entirely consistent with the purposes of the *UCA* and did not involve "undue discrimination" within the meaning of the statute.

2025 BCCA 62 (CanLII)

[9] B.C. Hydro supports the LGIC's position, asserting that it was open to Cabinet, as it would have been open to the Utilities Commission itself, to pause or otherwise limit delivery of electrical service to cryptocurrency mining operations due to their distinctive electrical consumption characteristics. In other words, B.C. Hydro says the differential treatment of cryptocurrency mining operations involves no improper discrimination, because it is based on cost and economic concerns arising from the distinctive electrical consumption characteristics of these operations.

[10] Finally, both respondents maintain that it was within the scope of Cabinet's authority, and not procedurally unfair, to direct the Utilities Commission to make an order pausing B.C. Hydro's obligation to service cryptocurrency operations without a hearing. While the Utilities Commission would have been obliged to hold a hearing before taking such measures on its own, s. 3(2) of the *UCA* empowered the LGIC to direct the Utilities Commission to take a particular action notwithstanding any other provisions of the *Act*.

Facts

B.C. Hydro's Status and Role as a Public Utility

[11] The *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212 provides that B.C. Hydro is a Crown corporation, and an agent of the government with a statutory obligation to report to the Minister of Energy, Mines and Low Carbon Innovation.

[12] B.C. Hydro is also a public utility regulated by the Utilities Commission under the *UCA*. As a public utility, it is responsible for safely supplying electricity at reasonable rates to customers throughout British Columbia.

[13] B.C. Hydro currently provides approximately 95% of the electrical service in British Columbia. It generates electrical power through hydroelectricity, transmits that electrical power throughout the province, and supplies electricity to residential, commercial, and industrial customers.

2025 BCCA 62 (CanLII)

B.C. Hydro's Electrical Service Obligations

[14] One of B.C. Hydro's key obligations as a public utility is to provide electrical service to its customers at reasonable rates, without undue discrimination amongst classes of users as to rates and terms of service (*UCA* ss. 38, 39, 59). Rates are set by the Utilities Commission, usually based on an application by B.C. Hydro and after a public hearing before the Commission. Once a rate is set for a particular class of customers, B.C. Hydro is generally required to supply electricity to customers in that class in accordance with the applicable rate schedule.

B.C. Hydro's Obligation to Plan for and Meet Future Demand

[15] Another of B.C. Hydro's key obligations as a public utility is to maintain the electrical system to meet current demand, and to plan and develop infrastructure to meet anticipated future demand. In this regard, B.C. Hydro is required to periodically produce an Integrated Resource Plan ("IRP") for presentation to the Utilities Commission: *UCA* s. 44.1. This involves an outline that addresses anticipated future demand and future planning for the construction of additional facilities or contracting for additional supply required to meet future demand that cannot be addressed through conservation measures: *UCA* s. 44.1(2)(d).

[16] At the time material to the judicial review proceedings in this case, B.C. Hydro's most recent IRP had been filed with the Utilities Commission on 21 December 2021. In it, B.C. Hydro projected an energy surplus until approximately 2031. B.C. Hydro places ongoing reliance on this projected surplus to achieve its

government-mandated objectives, including meeting future electrical energy needs of British Columbians, and facilitating reduction of greenhouse gas emissions by substituting clean energy sources like hydroelectric power in the place of fossil-fuel-based energy sources. The projections set out in the 2021 IRP were based on data collected before the marked increase in demand for electricity from cryptocurrency mining operations.

2025 BCCA 62 (CanLII)

"Interconnection Queue" for New High-Voltage Service Requests

[17] Customers or prospective customers seeking to obtain electrical service from B.C. Hydro for new high-voltage or medium-voltage projects must make what is referred to as an "interconnection request", as follows:

a) Upon submitting an interconnection request, the applicant is placed in the "interconnection queue", which determines the order for applications moving through the interconnection process.

b) The request proceeds through three mandatory stages: (i) a system impact study, (ii) a facilities study, and (iii) implementation. At each stage, the applicant is required to enter into an agreement with B.C. Hydro.

c) Once a new customer has completed the interconnection process, electricity is provided pursuant to pre-set rate schedules and tariff supplements, which have been approved by the Utilities Commission based upon an application by B.C. Hydro and a public hearing process.

The Cryptocurrency Mining Industry in Canada

[18] Cryptocurrency mining is a rapidly growing industry that requires massive amounts of electricity. Many companies involved in cryptocurrency mining have sought to establish operations in Canadian jurisdictions where hydroelectric power is produced, at least in part because hydroelectricity is considered to be a cost-effective and clean source of electrical energy.

2025 BCCA 62 (CanLII)

Conifex's High Performance Computer Projects

[19] In pursuit of its planned move into the field of high-performance computing, Conifex initially sought to develop four separate HPC sites in British Columbia, using electricity supplied by B.C. Hydro: (i) the Mackenzie Site, (ii) the Kennedy Creek Site, (iii) the Salmon Valley Site, and (iv) the Ashton Creek Site. As noted, Conifex's plan was to initially deploy these HPC sites for cryptocurrency mining, before expanding into other fields of high-performance computing.

[20] On 20 April 2021, Conifex submitted an interconnection application for electrical service to the Mackenzie HPC Site. Conifex originally proposed to operate this site at a capacity of 30 to 50 megawatts, but after discussion with B.C. Hydro the project was revised downward to start at a capacity of 3 megawatts, with the potential to expand to 25 megawatts in the future. The Mackenzie Site has successfully passed through the system impact study stage and is partway through the facilities study stage of the interconnection process. This site was not caught by the service pause mandated by the OIC, as discussed in greater detail below.

[21] Conifex abandoned its plans for the Kennedy Creek Site early in the interconnection process.

[22] Conifex submitted interconnection applications for its Salmon Valley and Ashton Creek HPC Sites in April 2022. Conifex proposed to operate each of these sites at a capacity of 150 megawatts, in three phases of 50 megawatts each. In June 2022, Conifex and B.C. Hydro entered into separate system impact study agreements in connection with each of these sites. Under those agreements, B.C. Hydro was required to make all reasonable efforts to complete the necessary reports by the end of April 2023, with further steps to follow in the impact study phase of the interconnection process.

Emerging Concerns About Energy Demands of Cryptocurrency Mining

[23] In recent years, governments and utilities regulators in both Quebec and Manitoba have taken steps to delay or suspend processing of new electrical service

requests by industrial-scale cryptocurrency mining operations, due to concerns about their impact on the available supply of electricity for all other ratepayers.[1]

[24] By 2022, B.C. Hydro was experiencing an unprecedented number of requests for electrical service to power cryptocurrency mining operations. In B.C. Hydro's view, these new interconnection requests posed a number of challenges. In particular, B.C. Hydro had concerns that the unanticipated increase in demand attributable to cryptocurrency mining: (i) had not been addressed in the 2021 IRP and therefore had the potential to undermine B.C. Hydro's ability to meet future service needs while achieving its other government-imposed objectives, including B.C.'s transition away from fossil fuel dependence, and (ii) had the potential to increase electricity rates for all B.C. Hydro customers.

[25] On 3 October 2022, B.C. Hydro furnished the Ministry of Energy, Mines, and Low Carbon Emissions with details about the number of cryptocurrency mining operations currently being serviced by B.C. Hydro, the number of pending interconnection requests, and the electricity capacity and consumption needs associated with these requests. These included Conifex's pending interconnection requests. The total consumption capacity of the Salmon Valley and Ashton Creek HPC projects alone would be 300 megawatts. The parties disagree about the significance of this. That issue is discussed in greater detail below.

The Order in Council and the Resulting Utilities Commission Order

[26] On 21 December 2022, the LGIC issued Order in Council No. 692, pursuant to s. 3 of the *UCA*. It required the Utilities Commission, within 10 days, to issue final orders relieving B.C. Hydro of its obligation to supply service or process interconnection requests with respect to any new or pending cryptocurrency mining

[1] In November 2022, the Manitoba government suspended new connections to the electricity grid for cryptocurrency mining while it considered changes to its regulatory framework. In 2019, the Regie de L'Energie du Quebec suspended connection requests for cryptocurrency mining operations, and Hydro Quebec later implemented a new framework for service to cryptocurrency mining operations, which includes higher rates, and a cap on the amount of electricity made available to such operations.

2025 BCCA 62 (CanLII)

projects for a period of 18 months. The OIC expressly referred to four specific high-voltage cryptocurrency mining projects that would be "paused", including Conifex's Salmon Valley and Ashton Creek HPC Sites.

2025 BCCA 62 (CanLII)

[27] On 28 December 2022, the Utilities Commission issued Final Order No. G-390-22A, which relieved B.C. Hydro of its obligation to provide electrical service to, or process interconnection requests for, pending cryptocurrency mining projects, including the Salmon Valley and Ashton Creek HPC Sites. On 23 January 2023, B.C. Hydro advised Conifex in writing that its interconnection requests for the Salmon Valley and Ashton Creek HPC Sites were paused and had therefore been removed from B.C. Hydro's interconnection queue.

The Petition for Judicial Review

[28] Conifex filed a petition for judicial review in the Supreme Court, challenging the validity of the OIC. The petition was heard on 23 and 24 October 2023. On 2 February 2024, the chambers judge gave reasons dismissing the petition.

New Regulatory Framework

[29] On 16 May 2024, the Legislature enacted the *Energy Statutes Amendment Act, 2024*, S.B.C. c. 20. This statute amended the *UCA* by adding s. 21.1, which expressly authorizes the LGIC to make regulations respecting a public utility's provision of electrical service for the purpose of cryptocurrency mining.

[30] On 28 June 2024, the 18-month suspension period for provision of electrical service to cryptocurrency mining operations in the OIC elapsed. On the same day, acting on the authority of the newly granted regulation-making power in s. 21.1 of the *UCA*, the LGIC issued the *Cryptocurrency Power Regulation*, B.C. Reg. 163/2024. This regulation provided that B.C. Hydro must not supply service to certain cryptocurrency projects, including Conifex's Salmon Valley and Ashton Creek HPC Sites, for a further 18 months.

2025 BCCA 62 (CanLII)

Conifex's Change in Focus

[31] Conifex now intends to pivot away from the use of its proposed HPC sites for cryptocurrency mining. Instead, Conifex intends to offer its HPC services to clients in the artificial intelligence and machine learning industries. Conifex advised B.C. Hydro of this position on 24 May 2024, after the chambers judge's decision, but prior to the LGIC's promulgation of the new regulation. Conifex says this change in end use does not affect the particulars of its interconnection requests for the Salmon Valley and Ashton Creek HPC Sites, which should be allowed to proceed through the B.C. Hydro interconnection process without further delay.

The Chambers Judge's Decision

[32] The chambers judge accepted Conifex's submission that the LGIC's regulation-making authority under s. 3 of the *UCA* is subject to: (i) an express constraint in that s. 3 only authorizes the LGIC to issue regulations directing the Utilities Commission to exercise powers it already possesses, and (ii) an implied constraint in that the LGIC could only exercise its regulation-making authority in a manner consistent with the overall objective of the *UCA*: reasons at paras. 45–46.

[33] On the first of these two points, Conifex argued that Cabinet exceeded the express constraints in s. 3 of the *UCA* because the OIC singled out cryptocurrency mining operations and denied them service based on their end use of electricity, which constitutes statutorily impermissible discrimination amongst ratepayers. This argument rests on the statutory prohibition against "undue discrimination" based on rates or terms of service as provided for in ss. 39 and 59 of the *UCA*.

[34] In addressing this argument, the chambers judge considered prior rulings of the Utilities Commission under ss. 39 and 59 of the *UCA*, and jurisprudence discussing "undue discrimination" against ratepayers at common law. He concluded that it would not have been unreasonable for the LGIC to read ss. 39 and 59 of the *UCA* as prohibiting differential treatment of ratepayers "who are similarly situated or who share similar electricity consumption characteristics": reasons at para. 57. On

this interpretation, it would not be unduly discriminatory for a public utility to differentiate amongst customers for "economic or cost-of-service" reasons, including "electricity consumption characteristics" of a particular customer or customer class: reasons at para. 57.

2025 BCCA 62 (CanLII)

[35] Turning to the facts, the chambers judge concluded that there was ample evidence in the record to show that cryptocurrency mining operations have "unique electricity consumption characteristics" forming the basis for differential treatment in the provision of electrical service. The judge's discussion of the evidence is set out in the following passage of his reasons:

> [58] Applied in the present context, the OIC cannot be said to be unduly discriminatory. The evidence amply establishes that cryptocurrency mining centres have unique electricity consumption characteristics. Vast amounts of power are required virtually around the clock to permit the high-performance computers and cooling systems to operate. The total amount of megawatt hours that would have been required to service all the interconnection requests from cryptocurrency operations in 2023 grossly exceeded the projections of BC Hydro in its December 2020 load forecast. Mr. O'Riley estimated that the total usage of those requests would have been 16,000,000 megawatt-hours per year. That equates to the amount of electrical energy needed to service 1.5 million residential customer premises. BC Hydro currently services 2 million residential customer premises.
>
> [59] Mr. O'Riley's evidence satisfies me that there are currently no BC Hydro customers similarly situated or in the same customer class as cryptocurrency mining centres. That is evident from the previously quoted portion of his affidavit, which estimates that the Petitioner's projects would use far more than twice as much electricity as any of the nine largest current BC Hydro customer sites. In short, the consumption characteristics of cryptocurrency mining centres provide a clear cost-of-service basis for the differential treatment directed by the OIC.

[36] In the chambers judge's view, the inevitable conclusion was that the OIC was not unduly discriminatory. It would have been open to the Utilities Commission itself to make an order suspending B.C. Hydro's obligation to provide service to cryptocurrency mining operations under s. 28(3) of the *UCA*.[2] It therefore could not

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[2] The chambers judge acknowledged that the Utilities Commission could only have made such an order after a hearing, but the OIC required the Commission to issue a final order within 10 days, without a hearing: reasons at para. 60. That was the basis for Conifex's procedural fairness argument, addressed later in the judge's reasons.

be said that the OIC required the Utilities Commission to "exercise a power it did not possess": reasons at para. 60.

[37] The chambers judge moved on to the second prong of Conifex's argument, namely that the LGIC's decision to issue the OIC was unreasonable because it was not consistent with the broader purposes of the *UCA*. The judge accepted the LGIC's position that when issuing a direction under s. 3(1) of the *UCA*, Cabinet may take into account policy considerations that are beyond the matters the Utilities Commission is mandated to consider when exercising its authority under the *Act*. It was thus reasonable for Cabinet to "move swiftly" by temporarily suspending B.C. Hydro's obligation to provide electrical service to cryptocurrency mining operations, giving the government time to "consider the broader policy implications of providing so much of the available electricity supply to that industry": reasons at para. 68.

[38] Conifex argued that because the underlying purpose of the *UCA* is to give effect to the "regulatory compact" by which public utilities are obliged to provide service to all customers without undue discrimination, a suspension of service could only be effected by the legislature through an amendment to the statutory scheme. The chambers judge disagreed, finding that it was not an unreasonable exercise of Cabinet's regulation-making authority under s. 3 of the *UCA* to effect a "pause" on the provision of electrical service to cryptocurrency operations for broad policy reasons: reasons at paras. 68–69.[3] He further reasoned that the OIC was "consistent with the overriding purposes of the *UCA*, one of which is to ensure availability of affordable sources of energy to all customers": reasons at para. 69.

[39] The chambers judge next considered Conifex's procedural fairness argument. Conifex's position was that: (i) the LGIC could only issue a regulation requiring the Commission to exercise a power that the Commission itself possessed under the *UCA*, (ii) pursuant to s. 28(3) of the *UCA*, the Commission could only relieve a public

[3] While the chambers judge concluded that it was open to Cabinet to use its regulation-making power in s. 3 of the *UCA* to effect a service pause, he went on to express the opinion that "legislative change" would be required to effect a "complete moratorium" on the supply of electricity to cryptocurrency mining operations: reasons at para. 68.

2025 BCCA 62 (CanLII)

utility of its obligation to provide service after holding a hearing, and (iii) the duty to afford procedural fairness was of such importance that the LGIC could not relieve the Utilities Commission of its statutory obligation to hold a hearing.

[40] The chambers judge did not find this argument convincing. He explained that s. 3(1) of the *UCA* authorized Cabinet to pass regulations directing the Utilities Commission to exercise any of its powers under the *UCA*, and s. 3(2) required the Utilities Commission to comply with such a direction despite any other provision of the *Act*. In this instance, the Utilities Commission had the power under s. 28(3) of the *UCA* to relieve a utility of its obligation to provide service, and by virtue of s. 3(2), the Utilities Commission was compelled to comply with the LGIC's direction to do so, notwithstanding the statutory requirement to hold a hearing. In other words, "the OIC relieved the [Utilities Commission] of its statutory duty to provide procedural fairness to [Conifex] by holding a hearing": reasons at para. 77. The chambers judge noted that if Conifex felt aggrieved by the Utilities Commission's decision to issue the final order relieving B.C. Hydro of its obligation to provide service, it could have applied for leave to appeal that decision to this Court under s. 101 of the *UCA*, which Conifex did not do: reasons at para. 79.

[41] Finally, the chambers judge considered Conifex's argument that the OIC was invalid because the LGIC failed to consult with interested Indigenous peoples prior to its issuance, in contravention of the government's duty to consult under the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 ("*DRIPA*"). The chambers judge declined to deal with the merits of this argument, finding that Conifex did not have standing to allege non-compliance with *DRIPA*: reasons at para. 86. Conifex has not pursued this issue on appeal.

<u>Analysis</u>

Mootness

[42] The doctrine of mootness is a manifestation of the broader notion that courts generally ought not to rule on matters that are entirely academic, abstract, or purely

2025 BCCA 62 (CanLII)

hypothetical. An appeal is moot where “the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties”: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353; *Byelkova v. Fraser Health Authority*, 2022 BCCA 205 at para. 21.

2025 BCCA 62 (CanLII)

[43] When an issue of mootness arises, the analysis generally proceeds in two steps. At the first step, it is necessary to determine “whether the required tangible and concrete dispute has disappeared” such that the matter has become “academic”. If there is no longer any continuing “live controversy”, the analysis proceeds to the second step, where the court must decide whether to exercise its discretion to hear the matter despite its mootness: *Borowski* at 353; *Independent Contractors and Business Association v. British Columbia (Attorney General)*, 2020 BCCA 245 at para. 8. This second step involves a consideration of: (a) the requirement for an adversarial context, (b) concern for judicial economy, and (c) the proper law-making function of the court: *Borowski* at 358–363; *Independent Contractors* at para. 9.

[44] The respondents assert that Conifex’s appeal is moot because the OIC has lapsed and therefore has no practical effect. Moreover, it has been overtaken by a new regulatory framework. Under the new regime, B.C. Hydro is relieved of any obligation to deliver electrical service to any new or pending cryptocurrency mining projects—including Conifex’s Salmon Valley and Ashton Creek HPC Sites—until the end of 2025. The respondents say the original OIC is therefore no longer of any continuing relevance, and there is no “live controversy” as to its validity.

[45] B.C. Hydro cites a number of cases in which courts have found proceedings to be moot in circumstances where an impugned administrative instrument or decision no longer presented a live controversy: *Webber v. Anmore (Village)*, 2012 BCCA 390; *Kassian v. British Columbia*, 2023 BCCA 383; *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427; *C.M. v. Alberta*, 2024 ABCA 136.

[46] In *C.M.*, for example, the impugned COVID-19 order had been rescinded, and substantially replaced by a cabinet regulation issued after the initial judicial review decision had been rendered. The Alberta Court of Appeal dismissed the appeal as moot, finding that there was no longer any live controversy concerning the original order. This was so even though the subsequently enacted regulation imposed restrictions similar to those imposed by the order under appeal: *C.M.* at para. 33.

[47] Conifex disagrees that there is no longer any live controversy in this case, arguing that the validity of the OIC has continuing relevance to the status of its pending interconnection requests. Having abandoned its original focus on cryptocurrency mining, Conifex now intends to redirect its proposed HPC facilities to artificial intelligence and machine learning applications, without modification to the terms of its pending interconnection requests. If B.C. Hydro refuses to restore the pending projects to their original positions in the interconnection queue, then Conifex will apply to the Utilities Commission for an order compelling B.C. Hydro to do so. Against this backdrop, if the appeal is successful and results in a definitive ruling that the OIC was not validly enacted, Conifex will be in a position to say the removal of its projects from the interconnection queue was based on an unlawful Cabinet direction, and its projects should be restored to their original queue positions.

[48] B.C. Hydro does not accept some of the premises of Conifex's position. On the motion to quash, B.C. Hydro tendered affidavit evidence from its Senior Manager of "Customer Interconnections and Policy", who asserts that Conifex's Salmon Valley and Ashton Creek HPC projects were "at the beginning of this first stage", and "very early in the interconnection process" when the Utilities Commission made its order pausing B.C. Hydro's obligation to service them. Furthermore, while interconnection requests are placed in the queue in the order in which they are accepted, the queue position is not set in stone. Where a particular project does not proceed as scheduled for one reason or another, other projects may be moved up in the queue. If an applicant makes changes to its project over the course of the interconnection process, B.C. Hydro will "review and assess" the changes. If they

2025 BCCA 62 (CanLII)

materially impact (i) the scope of the required electrical facilities, or (ii) other customers in the queue, this may affect the applicant's queue position. Based on this evidence, B.C. Hydro says it would be impractical or even impossible to restore Conifex's two pending projects to their original places in the interconnection queue.

2025 BCCA 62 (CanLII)

[49] Conifex's response is twofold. First, it says that if the removal of the two projects from the queue was based on an order that is found on appeal to be unlawful, this will strengthen Conifex's position before the Utilities Commission in arguing that B.C. Hydro should be obligated to restore the projects to their original queue positions. Second, Conifex says the pending projects can now proceed as HPC facilities servicing artificial intelligence and machine learning clients, without any modification to its interconnection requests.

[50] In my view, this is not the proper forum in which to resolve any continuing dispute between Conifex and B.C. Hydro about whether Conifex's HPC projects can proceed without modification, and whether it would be possible or realistic to simply restore them to their original queue positions. The proper forum for a first-instance decision on such a matter would most likely be a hearing before the Utilities Commission, the body charged with overseeing the manner in which B.C. Hydro fulfils its mandate as a public utility.

[51] For present purposes, it is enough to say that a finding that the OIC was not lawfully issued <u>could</u> have some practical effect on Conifex's position regarding the status of its pending projects in B.C. Hydro's interconnection queue. In other words, the appeal <u>could</u> "have the effect of resolving some controversy which affects or <u>may affect</u> the rights of the parties": *Borowski* at 353 (emphasis added); see also *Centurion Apartment Properties Limited Partnership v. Sorenson Trilogy Engineering Ltd.*, 2024 BCCA 25 at para. 139. I therefore conclude, at the first stage of the analysis, that the appeal is not moot.

[52] Even if one were to characterize the simmering dispute concerning the queue position of Conifex's pending HPC projects as a matter that is entirely collateral to

the legal issues raised in this appeal, then at the second stage of the mootness analysis, I would exercise this Court's discretion to determine the merits of the appeal. There is a continuing adversarial context in which all of the relevant points pertaining to the validity of the OIC can be, and indeed were, fully argued.

2025 BCCA 62 (CanLII)

[53] Given the manner in which the proceedings unfolded, concerns about judicial economy actually militate in favour of deciding the appeal on its merits. I say that because the motion to quash was argued on the date set for the hearing of the appeal, and the mootness issue was not so clear cut as to allow the Court to rule on it immediately. Having heard full argument on all of the issues, dismissing the appeal as moot would produce negligible savings of judicial resources.

[54] Nor is this a case where deciding the matter on its merits will take the Court beyond its proper institutional role. In judicial review proceedings, the role of the courts is to "ensure that exercises of state power are subject to the rule of law": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 82. Even if one were to take the view that the legal status of the OIC is now moot, the issues in this appeal and the arguments advanced by the parties were focused on that question. The appellant is seeking a ruling on the merits of an issue that is clearly justiciable in an administrative law context, namely, the scope of Cabinet's regulation-making authority under a particular statutory provision.

Appellate Standard of Review

[55] In an appeal from judicial review, the appeal court's role is to ask whether the chambers judge "identified and applied" the correct standard of review for the first-instance decision. Thus, while the chambers judge's reasons and any alleged errors may "shape [the] analysis", in effect the appeal court "step[s] into the shoes" of the chambers judge, reviewing the first instance decision or order on the applicable administrative law standard: *Central Saanich (District) v. McHattie*, 2023 BCCA 461 at paras. 28–30; see also *Sunshine Coast (Regional District) v. Vanderhaeghe*, 2024 BCCA 169 at para. 30; *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101 at para. 48.

2025 BCCA 62 (CanLII)

[56] The respondents point out that in circumstances where the chambers judge is called upon to make “original findings of fact” in a judicial review proceeding, those findings are reviewable on a standard of palpable and overriding error. There is plenty of authority to support that position: *Sunshine Coast* at para. 30; *Pringle v. Peace River (Regional District)*, 2024 BCCA 322 at para. 28; *C.S. v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2019 BCCA 406 at para. 44. However, I agree with the appellant that such “original findings” arise in “limited situations” where it is necessary for the chambers judge to go beyond the decision or order under review, for example to determine whether a particular legal position was in fact advanced at first instance in the context of deciding whether to hear a new issue, or what procedures were in fact followed by the first-instance decision-maker in the context of addressing a procedural fairness argument: *Crook v. British Columbia (Director of Child, Family, and Community Services)*, 2020 BCCA 192 at para. 36; *C.S.* at para. 44.

[57] I acknowledge that the decision in issue was the LGIC’s decision to issue the OIC, made without any hearing, and without any formal record. However, that does not mean the chambers judge was called upon to make “original findings” in relation to the factual underpinnings of the OIC. Rather, the judge’s function was simply to consider the information reasonably available to Cabinet when the OIC was issued with a view to determining its validity or *vires* under the standard of review articulated below.

Standard of Review for Subordinate Legislation

[58] In *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, Justice Newbury determined that the presumption in favour of a reasonableness standard of review articulated in *Vavilov* applied to the review of subordinate legislation, “even where the target of judicial review is a regulation enacted without reasons by a body such as a provincial cabinet”: *Le* at para. 95 (per Newbury J.A. in dissent); para. 119 (per Harris and Voith JJ.A., concurring on this issue). Justice’s Newbury’s view has

now been affirmed in *Auer v. Auer*, 2024 SCC 36 and *TransAlta Generation Partnership v. Alberta*, 2024 SCC 37.

[59] In *Auer*, one of the parties in a family law proceeding challenged the validity of the *Federal Child Support Guidelines*, SOR/97-175, arguing that their promulgation exceeded the scope of the Governor in Council's regulation-making authority under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The lower courts struggled with the question of whether the threshold formulated in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 under which subordinate legislation would only be *ultra vires* where it was "irrelevant", "extraneous", or "completely unrelated" to the statutory purpose, continued to apply after *Vavilov*. The Supreme Court of Canada put this question to rest, ruling conclusively that the threshold in *Katz* had been overtaken by the "sea change brought about by *Vavilov* in favour of a presumption of reasonableness": *Auer* at para. 32. Since the legislature gave no indication that the decision to issue the *Guidelines* was subject to review on a different standard, and none of the other *Vavilov* exceptions applied, the *vires* of the *Guidelines* was reviewable on the standard of reasonableness: *Auer* at para. 25.

[60] In reaching these conclusions, the majority in *Auer* affirmed the continued importance of certain principles for assessing the *vires* of subordinate legislation as originally articulated in *Katz*. I would summarize these in three points. First, subordinate legislation is presumed to be valid, and courts will generally adopt an interpretation that is consistent with and authorized by the enabling statute, where such an interpretation is possible: *Auer* at paras. 29(ii), 33, 37–40. Second, the party seeking to challenge the *vires* of subordinate legislation must show that it is "inconsistent with the objective of the enabling statute or the scope of the statutory mandate": *Auer* at paras. 29(i), 33, 35. Third, the court's role is not to assess the wisdom or efficacy of the subordinate legislation, inquire into the underlying "political, economic, social, or [even] partisan considerations", or ask whether it will actually achieve the objectives of the enabling statute: *Auer* at paras. 29(iii), 33, 35, 56–58.

2025 BCCA 62 (CanLII)

2025 BCCA 62 (CanLII)

[61] In the present matter, the impugned OIC is a form of subordinate legislation promulgated under the LGIC's regulation-making authority in s. 3 of the *UCA*. The central issue in this appeal is therefore whether it was reasonable for the LGIC to conclude that the OIC was within the scope of this delegated law-making authority. This is fundamentally a question of statutory interpretation, having regard to the relevant constraints on the exercise of the LGIC's exercise of its authority. The governing statutory scheme, relevant principles of statutory interpretation, and other applicable statutory or common law are "particularly relevant constraints": *Auer* at para. 60; *TransAlta* at para. 17.

The Appellant's Arguments

[62] Conifex's first two arguments on appeal align with the proposition in *Auer* that a party seeking to challenge the *vires* of subordinate legislation must show that it is "inconsistent with the objective of the enabling statute or the scope of the statutory mandate". The first argument is that the OIC is inconsistent with the express grant of authority set out in s. 3 of the *UCA*, because it directed the Utilities Commission to exercise a power it did not possess, namely the power to discriminate in the provision of electrical service on the basis of end use. The second argument is that the OIC is inconsistent with the implied limits of s. 3, because it contravened one of the overall objectives of the *UCA*: to ensure that public utilities provide service without undue discrimination.

[63] Although Conifex's third argument invokes concerns about procedural fairness, it also turns primarily on the scope of the LGIC's power under s. 3 of the *UCA*. Conifex submits that the LGIC can only direct the Utilities Commission to exercise a power it possesses under the *UCA*. The Utilities Commission has the power to relieve a public utility such as B.C. Hydro of its obligation to provide utility service to a particular individual, but only after a hearing. Conifex submits that this statutory procedural fairness requirement is one of the legal constraints on the LGIC's regulation-making authority in s. 3 of the *UCA*.

[64] All three arguments raise questions about the reasonableness of the LGIC's interpretation of the scope of its delegated law-making authority under s. 3 of the *UCA*. In a case such as this, where reasons are not required, the reviewing court must "look to the record as a whole to understand the decision": *Vavilov* at paras. 76, 137. Further, where "neither the record nor the larger context sheds light on the basis for the decision", the focus will inevitably be on the reasonableness of the outcome in light of the relevant constraints: *Vavilov* at para. 138.

Express Delegation of Regulation-Making Authority in the *UCA*

[65] The terms of the statutory grant of authority in s. 3 of the *UCA* represent a key constraint on the LGIC's interpretation of delegated law-making power. This is because, as explained in *Vavilov* at para. 101, it would be "impossible to justify" a decision that strays beyond the "limits set by the statute", bearing in mind that the reviewing court's function is not to undertake its own interpretation of the statutory grant of authority, but rather to determine whether the LGIC's interpretation was a reasonable one.

[66] Section 3 of the *UCA* reads as follows:

> **Commission subject to direction**
>
> 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

2025 BCCA 62 (CanLII)

> (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.

2025 BCCA 62 (CanLII)

[67] Section 3(1) provides the LGIC with the delegated authority to issue regulations directing the Utilities Commission to exercise any of its statutory powers, perform any of its statutory duties, or refrain from doing either of those things. In other words, by way of a regulation made under s. 3(1), the LGIC can direct the Utilities Commission to do anything it has the power to do under the *UCA*.

[68] Subsection 3(3) contains an express statutory constraint, prohibiting the LGIC from using its regulation-making power to negate a prior decision made by the Utilities Commission. There is no suggestion that the OIC ran afoul of this constraint.

The Statutory Scheme

[69] Although the parties disagree as to the *UCA*'s overall purpose, both the LGIC and Conifex cite *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, in which the Court discussed the "regulatory compact" said to underlie public utilities legislation. Writing for the majority, Justice Bastarache described this "regulatory compact" in the following terms (at para. 63):

> … Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated (see Black, at pp. 356-57; Milner, at p. 101; *Atco Ltd.*, at p. 576; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186 ("*Northwestern 1929*"), at pp. 192-93).

[70] What follows is a brief summary of *UCA* provisions reflecting the regulatory compact model of public utilities legislation.

[71] The term "public utility" is defined in s. 1 of the *UCA* to include anyone engaged in the delivery or provision of "electricity, natural gas, steam or any other agent for the production of light, heat, cold or power", for compensation. Various provisions in the *Act* refer to the "franchise" enjoyed by public utilities. The

2025 BCCA 62 (CanLII)

exclusivity of such a franchise is exemplified by s. 45(1), which states that no one can construct or operate any new public utility without first obtaining a certificate from the Utilities Commission stating that "public convenience and necessity" require such an undertaking. Under s. 48, if the Utilities Commission determines, after a hearing, that a public utility has failed to exercise the "right and privilege" granted by a "franchise, licence or permit", the Commission may cancel it.

[72] Part 1 establishes or continues the Utilities Commission. Section 23 provides that the Utilities Commission has "general supervision of all public utilities", and goes on to list specific aspects of public utilities operations that are subject to supervision. The Utilities Commission is recognized as an expert tribunal, with exclusive power to conclusively determine matters under its jurisdiction as set out in Part 6, subject, of course, to judicial review and the statutory rights of appeal set out in the *Act*.

[73] Various provisions in Part 3 of the *UCA* set out the obligation of public utilities to provide service at reasonable rates that are subject to review and approval by the Utilities Commission. The most relevant of these provisions for current purposes are ss. 28 to 29, 38 to 39, 44.1, 59, and 60 to 62.

[74] Sections 28 and 29 set out the obligation of public utilities to provide service to premises, depending on their proximity to an existing service line. Section 28 provides that on request of an owner or occupier, a public utility must provide service to premises within 200 meters of a supply line, subject to the Utilities Commission's authority to relieve the utility of this obligation, after a hearing and for proper cause. Section 29 provides that, on application, the Utilities Commission may order a public utility to provide service to premises more than 200 meters from a supply line, on terms, including terms requiring the party seeking the service to pay all or part of the cost to extend service to the premises.

[75] Under s. 38, public utilities are required to provide "safe, efficient, just and reasonable" service. Further, s. 39 provides that public utilities must provide "suitable service", "without undue discrimination", to all those who apply for it, are

reasonably entitled to it, and agree to pay established rates. As the chambers judge aptly stated, these two provisions represent a “partial codification” of the “regulatory compact”, under which a public utility is granted exclusive rights to sell its service, “assumes a duty to adequately and reliably” provide that service, and is “required to have its rates and other operations regulated” by a commission charged with that responsibility under the statute: reasons at para. 21.

2025 BCCA 62 (CanLII)

[76] Further detail concerning the concept of “undue discrimination” is contained in s. 59. For example, s. 59(4)(b) provides that what constitutes “undue discrimination, preference, prejudice or disadvantage in respect of a rate or service” is a question of fact, to be determined solely by the Utilities Commission.

[77] Under s. 44.1, every public utility must file a long-term resource plan as and when directed by the Utilities Commission, to include (among other things), the public utility’s estimate of demand, plans to reduce demand, and descriptions of any facilities to be constructed or extended to meet any anticipated increase in demand.

[78] Under s. 60, the Utilities Commission is charged with the responsibility of overseeing rates. Section 60(1)(b) provides that rates must be set with due regard for: (i) what would constitute unjust or unreasonable rates under s. 59, (ii) fair rates of return on a public utility’s demand-reducing investments, and (iii) encouragement of the public utility’s increased efficiency, reduced cost, and enhanced performance. Section 60(4) provides a mechanism for rate increases, which require approval by the Utilities Commission. Section 61(5) states that where a new rate schedule is confirmed, the Utilities Commission may, on application or on its own motion, direct an inquiry at which it can consider the requirement that rates not be unjust or unreasonable. Sections 61 and 62 provide that rate schedules must be filed with the Utilities Commission and made available to the public.

(1) Whether the LGIC's Decision to Issue the OIC Rested on an Unreasonable Interpretation of the Express Constraints in s. 3 of the UCA

[79] Conifex maintains that the OIC was not a direction "with respect to" the exercise of the Utilities Commission's powers as contemplated in s. 3 of the *UCA*, because the Utilities Commission does not have the power to authorize "undue discrimination" in a public utility's provision of service. To put it another way, Conifex says the decision to issue the OIC was unreasonable because it required the Utilities Commission to exercise a power that it did not have.

[80] Key to this position is Conifex's assertion that there is no "cost-of-service" justification for the denial of electrical service to its new HPC facilities, such that the LGIC's direction to relieve B.C. Hydro of its obligation to provide service to these facilities resulted in "undue discrimination" within the meaning of the *UCA*.

[81] Conifex's position that there is no "cost-of-service" justification for the denial of service to its proposed HPC sites rests on the existing system of rate schedules and tariff supplements that govern B.C. Hydro's provision of electrical service to industrial, high-voltage customers. In particular, Conifex refers to Rate Schedule 1823 (applicable to industrial customers receiving high voltage service), Tariff Supplement No. 5 (setting out the "non-price" terms and conditions of electrical service to industrial customers under Rate Schedule 1823), and Tariff Supplement No. 6 (setting out the "Facilities Agreement" that a customer must enter into to obtain industrial electrical service under Rate Schedule 1823 at a particular premises or facility). The Utilities Commission approved of and oversees this regime.

[82] According to Conifex, the net effect of the regime is twofold. First, B.C. Hydro is not required to provide service to particular premises or a particular facility unless it is "willing and able to do so". Second, the regime ensures that any "additional costs" to the electrical system associated with the delivery of service to a new facility are borne by the customer. Thus, Conifex submits, the regime is set up in such a way that "there cannot be a cost-of-service impact" to ratepayers when a new

2025 BCCA 62 (CanLII)

industrial customer obtains electrical service from B.C. Hydro, nor can there be "a circumstance in which a customer is provided with electricity when the electricity system cannot service the new load". Conifex says that in the absence of any cost-of-service justification, the decision to relieve B.C. Hydro of its obligation to provide service based solely on Conifex's intended "end use" of electricity constituted "undue discrimination", which the Utilities Commission had no power to countenance under the *UCA*.

2025 BCCA 62 (CanLII)

[83] The two respondents offer alternative answers to this argument.

[84] The LGIC submits that Conifex's argument confuses the power of the Utilities Commission to relieve a public utility of its obligation to provide service with the basis on which the Utilities Commission can exercise that power. The LGIC says s. 3 of the *UCA* expressly authorizes Cabinet to pass regulations directing the Utilities Commission to exercise any of its powers, and this regulation-making authority is not limited by the factors the Utilities Commission must consider in exercising its powers. Thus, the LGIC does not accept the premise of Conifex's position, that the LGIC's regulation-making authority is limited by the same considerations that bind the Utilities Commission in the discharge of its decision-making functions.

[85] B.C. Hydro meets Conifex's argument more directly, submitting that it was reasonably open to Cabinet to conclude that an order relieving B.C. Hydro of its obligation to provide service to Conifex's proposed HPC sites did not involve any impermissible "discrimination" within the meaning of the *UCA*. This position rests on two propositions, one legal and the other factual. The legal proposition is that it is not unreasonable to interpret the relevant provisions of the *UCA* to allow for the regulation of service based on intended "end use", so long as there is a "cost-of-service or economic justification" for doing so. Such a justification may arise in relation to a "group of customers" who share "distinct electrical consumption characteristics". The factual proposition is that the record discloses a basis on which one could reasonably conclude that cryptocurrency mining projects have "distinct

electricity consumption characteristics” providing a cost-of-service or economic justification for the OIC.

[86] For the reasons that follow, I find that both respondents have advanced interpretations of s. 3 of the *UCA* that are reasonable in light of the relevant factual and legal constraints. On either basis, it was reasonably open to the LGIC to conclude that the OIC was within the scope of s. 3 of the *UCA*.

2025 BCCA 62 (CanLII)

(1)(a) No Undue Discrimination

[87] I will first deal with B.C. Hydro’s position as to the scope of the LGIC’s power under s. 3, which focuses on the concept of “undue discrimination” within the meaning of the *UCA*. The key constraints in evaluating this concept are the relevant provisions of the statute, prior Utilities Commission decisions interpreting those provisions, and the common law.

[88] The most relevant *UCA* provisions are ss. 39 and 59, which have the following notable features:

(a) Section 39 obliges public utilities to provide suitable service “without undue discrimination”, to those who seek service, are reasonably entitled to it, and agree to pay the established rates.

(b) Section 59(1) provides that a public utility must not make, demand, or receive a rate that is, as described in subparagraph (a), “unjust, unreasonable, unduly discriminatory or unduly preferential”.

(c) Section 59(2)(b) provides that an agreement concerning terms of service must be “uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description”.

(d) Section 59(3) gives the Utilities Commission authority to issue regulations declaring “the circumstances … that are substantially similar”.

(e) Section 59(4) states that it is a question of fact for the Utilities Commission whether (a) a rate is unjust or unreasonable, (b) a rate or service is unduly discriminatory, or (c) a service is offered or provided under “substantially similar circumstances and conditions”.

(f) Section 59(5) states that a rate will be “unjust or unreasonable” (a) if it is more than what would be fair and reasonable for the service provided, (b) if it fails to fairly and reasonably compensate the utility for its services or use of assets, or (c) for any other reason.

[89] For present purposes, two aspects of these provisions are of particular note. First, rates and rate schedules are closely related to terms of service. It is therefore reasonable to conclude that a particular rate schedule may be linked with and offered to customers on particular terms of service. Second, the question of whether terms of service are unduly discriminatory is informed by the extent to which the “circumstances and conditions” of customers are or are not “substantially similar”. This implies that distinctive electrical consumption characteristics can provide a basis for differential treatment that will not constitute “undue discrimination”.

[90] I turn next to a review of prior rulings of the Utilities Commission considering the meaning of undue discrimination under the *UCA*.

[91] Both Conifex and B.C. Hydro cite the Utilities Commission ruling on B.C. Hydro’s 2015 rate design application. In considering an intervener’s submission suggesting preferential rates for low-income ratepayers, the panel reasoned that the *UCA* did not allow for differential rates absent an “economic or cost-of-service justification”. The panel found that a special rate for low-income customers would be “unduly discriminatory”, since it would draw distinctions based on “personal characteristics” as opposed to “electrical consumption characteristics”: *In the Matter of British Columbia Hydro and Power Authority 2015 Rate Design Application* (20 January 2017), Decision and Order G-5-17 (B.C.U.C.) at p. 27–28, 53–54, 59 [*Order*

2025 BCCA 62 (CanLII)

G-5-17]; leave to appeal refused: *British Columbia Old Age Pensioners' Organization v. British Columbia Utilities Commission*, 2017 BCCA 400.

[92] In a 2015 ruling on a B.C. Hydro application for approval of its shore power rate schedule, a Utilities Commission panel authorized differential treatment of shore-power ratepayers on the basis of "end use". The panel accepted B.C. Hydro's (unopposed) submission that the differential treatment was not unduly discriminatory under s. 59 of the *UCA* because "the rate structure has been designed to deal with a class of customer that has specific distinguishing features that warrant specific rate treatment", such that "customers in substantially similar circumstances are being treated equitably": *In the Matter of British Columbia Hydro and Power Authority Application for Approval of Shore Power Rate* (25 June 2015), Decision and Order No. G-111-15 (B.C.U.C.) at p. 7 [*Order G-111-15*]. This is further support for the view that differentiation in rates or service offered to a class of customers with distinctive consumption characteristics that have cost-of-service or economic implications does not constitute undue discrimination within the meaning of the *UCA*.

[93] Finally, I turn to the case law dealing with the concept of undue discrimination in rates or terms of service offered by public utilities.

[94] Conifex cites a number of cases holding that it is impermissible for a public utility to discriminate on the basis of customer identity or end use. For example, a municipal by-law denying a rate deduction for water supplied to customers in federal buildings was found to be a source of "unwarranted discrimination against a particular consumer of water": *Attorney General (Canada) v. Toronto (City)*, (1893) 23 S.C.R. 514 at 522. In the same vein, a by-law imposing higher water rates for distillery businesses in comparison to rates charged to other customers was held to involve a form of discrimination not authorized by the enabling statute: *City of Hamilton v. Hamilton Distillery Co.* (1907), 38 S.C.R. 239 at 251–254 per Idington J., 255–256 per Maclennan J. The same reasoning was invoked to invalidate municipal by-laws discontinuing water service to a rendering business based on public disapproval of noxious emissions, where the applicable public utilities statute only

2025 BCCA 62 (CanLII)

allowed for discontinuance of service based on a failure to pay one's water bill: *St. Lawrence Rendering Company Ltd. v. The City of Cornwall*, [1951] O.R. 669 (Ont. S.C.) at 16–18.

2025 BCCA 62 (CanLII)

[95] B.C. Hydro points out that none of these cases involved circumstances where discrimination between customers was said to be justified on a cost-of-service or economic basis. Nor do any of these cases hold that it would be impermissible to draw distinctions between consumers or classes of consumers based on their distinct consumption characteristics.

[96] In *Chastain v. British Columbia Hydro and Power Authority* (1972), 32 D.L.R. (3d) 443 (B.C.S.C.), several plaintiffs sued B.C. Hydro seeking, among other things, a declaration invalidating the practice of requiring security deposits from customers deemed by B.C. Hydro to be at risk of default due to their financial circumstances. This practice was reflected in a rate schedule promulgated under the regulation-making authority in B.C. Hydro's constituting statute. Justice McIntyre (as he then was) reasoned that even though B.C. Hydro was not at that time governed by the *Public Utilities Act*, R.S.B.C. 1960, c. 323, it was still subject to the "general law relating to public utilities". B.C. Hydro therefore had a general duty to "supply its product to all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers": *Chastain* at 454, 456. The delegated authority to make regulations under B.C. Hydro's constituting statute could not authorize differential treatment of customers with respect to security deposits as a "departure from the well-established principles governing utilities": *Chastain* at 458. In effect, B.C. Hydro had no lawful authority to treat customers differently based on personal financial circumstances.

[97] Unlike the other cases cited by Conifex, *Chastain* involved differential treatment based on an economic concern, namely the risk of bad debts arising from non-payment. However, the problem for B.C. Hydro in *Chastain* was that the impugned tariff invited discrimination based on personal financial circumstances of customers, rather than distinctive electrical consumption characteristics. In this

sense, the result in *Chastain* aligns with the Utility Commission's reasoning in *Order G-5-17.* Moreover, McIntyre J.'s analysis in *Chastain* left room for permissible discrimination between consumers who are not "similarly situated".

[98] All of the aforementioned legal constraints allow for an interpretation of the *UCA* in which distinctions in rates and terms of service may be drawn on the basis of electrical consumption characteristics that have cost-of-service or economic implications. It follows that it was reasonably open to the LGIC to interpret s. 3 of the *UCA* to provide authority for the issuance of an OIC requiring a pause on service for a particular class of projects with distinctive electrical consumption characteristics that had cost-of-service or economic implications.

[99] This brings me to the factual constraints on the LGIC's regulation-making authority. I pause to note that the court's role in assessing the *vires* of subordinate legislation is not to question the legitimacy, wisdom, or efficacy of Cabinet's policy choices, but simply to ask whether Cabinet acted within the scope of authority granted by the legislature. With that principle in mind, I have no difficulty concluding that on the basis of the record in the court below—reflecting the information available to the LGIC at the time the OIC was issued—there was reason for Cabinet to be concerned about B.C. Hydro's extension of electrical service to new cryptocurrency mining projects, as a class of projects with distinctive electrical consumption characteristics that had both cost-of-service and economic impacts.

[100] There was evidence before the chambers judge to show that cryptocurrency mining facilities have a high utilization rate relative to other industrial consumers, because cryptocurrency mining involves the use of computers that operate on an "almost-always-on" basis. Furthermore, cryptocurrency mining requires vast amounts of electricity. Conifex's two proposed HPC sites alone had a total capacity of 300 megawatts. At a utilization rate of 95%, these two projects would consume some 2,500,000 megawatt hours of electrical energy per year. To put this figure in context, in 2022 B.C. Hydro delivered more than 500,000 megawatt hours of electrical energy to each of its nine largest customer sites, but no single site used

2025 BCCA 62 (CanLII)

more than 1,000,000 megawatt hours of electricity. In the result, Conifex's two proposed HPC sites alone would use more than twice the electrical energy currently consumed in a year by B.C. Hydro's largest customer site. The Conifex projects would use almost half the projected energy output of the Site C Dam, currently under development at a cost of some $16 billion. Finally, in recent years B.C. Hydro has received an "unprecedented" number of new interconnection requests for cryptocurrency mining projects. The unanticipated increase in demand attributable to cryptocurrency mining had not been addressed in B.C. Hydro's resource planning and therefore had the potential to undermine its ability to meet future service needs. It also had the potential to increase electricity rates for all B.C. Hydro customers.

[101] Conifex says the chambers judge made palpable and overriding errors of fact in his assessment of this evidence, arguing that certain figures relied upon by the judge were false comparators that in effect compared apples to oranges. However, if cryptocurrency mining operations have truly distinctive electrical consumption characteristics, comparison to any other class of consumers would be subject to criticism on that basis. In any event, Conifex's submission misses the point. The chambers judge's role was not to make original findings of fact but rather to take the evidence into account in assessing whether the LGIC's issuance of the OIC was reasonable in light of the relevant factual and legal constraints. The nature of the decision maker is important in this regard. Cabinet decisions are not the product of an "adjudicative process", and cabinet deliberations may take into account "the widest range of polycentric and diffuse factors": *Manitoba Metis Federation Inc. v. Brian Pallister*, 2020 MBQB 49 at paras. 80, 139; aff'd 2021 MBCA 47 at para. 100. The record indicates that Cabinet had before it information about the distinctive electrical consumption characteristics of cryptocurrency mining operations, and the attendant cost-of-service and economic implications.

[102] Conifex maintains that the applicable tariff regime is set up in such a way that (i) B.C. Hydro would only have to provide electricity to Conifex's HPC sites when able to do so, and (ii) Conifex would ultimately bear both the direct and indirect costs

2025 BCCA 62 (CanLII)

of extending service to its new sites. Thus, in Conifex's submission, the extension of service to its new HPC sites could not have any cost-of-service implications or economic impact on other ratepayers. There are two flaws with this position.

2025 BCCA 62 (CanLII)

[103] First, Conifex's position assumes an unlimited supply of electricity, when the evidence reflects that cryptocurrency mining operations have such significant demand implications that they could materially impact the availability of electricity for all ratepayers. It would not have been unreasonable to infer from the available information that if the pending cryptocurrency mining projects proceeded as proposed, B.C. Hydro might have had to make unplanned-for capital expenditures to meet the unanticipated increase in demand. This afforded a reasoned economic justification for differential treatment of cryptocurrency mining operations.

[104] Second, while the tariff regime would require cryptocurrency mining projects to bear any additional supply-side costs associated with their connection to and use of the electricity transmission system, this would not address demand-related impacts of new cryptocurrency mining operations. As noted above, there was reason to believe that the increase in overall demand arising from the extension of service to new cryptocurrency mining operations had the potential to increase rates for all B.C. Hydro customers. This afforded a reasoned cost-of-service justification for differential treatment of cryptocurrency mining operations.

[105] To sum all of this up, even assuming that the LGIC's authority under s. 3 was constrained by the concept of "undue discrimination", it was reasonable for the LGIC to conclude that it nevertheless had the authority to issue an OIC requiring a pause in the delivery of service to cryptocurrency mining operations, based on cost-of-service and economic concerns tied to their distinctive electrical consumption characteristics.

(1)(b) LGIC Not Constrained by Considerations that Bind the Utilities Commission

[106] I return to the LGIC's position. The LGIC's argument starts with the text of s. 3 of the *UCA*, which provides Cabinet with the delegated authority to issue regulations directing the Utilities Commission to exercise any of its powers or perform any its duties under the *Act*. The impugned OIC directed the Utilities Commission to exercise its power under s. 28(3) of the *UCA* to "relieve a public utility from the obligation to supply service". On its face, the OIC fell squarely within the scope of the LGIC's statutory grant of authority.

[107] I agree with the LGIC that the text of s. 3, taken together with all of the other relevant constraints, does not confine the basis on which Cabinet can exercise its delegated law-making authority to the same considerations that the Utilities Commission is required to consider and apply in exercising its statutory powers. As Justice Côté confirmed in *Auer* at para. 56, the court's role in reviewing the *vires* of subordinate legislation is not to delve into the underlying "political, economic, social, or [even] partisan considerations" underlying the impugned regulation or order. Rather, the court's responsibility is to consider whether the decision to issue the impugned regulation was based on a reasonable interpretation of "the scope of the statutory mandate", and the "objective of the enabling statute": *Auer* at para. 29.

[108] While the *UCA* establishes the Utilities Commission as the body responsible for regulating public utilities, the statute also leaves a role for the LGIC. Under s. 3, the LGIC is authorized to issue regulations directing the Utilities Commission to take any action or perform any duty assigned to it under the statute. Under s. 5, the LGIC may seek advice from the Utilities Commission, or refer any matter to it for an inquiry. Under s. 13, the Utilities Commission is required to submit an annual report to the LGIC. Under s. 53, the LGIC has the final say on any consolidation, merger, or amalgamation involving a public utility.

[109] I agree with the LGIC's submission that the *UCA* contemplates a division of responsibility between the Utilities Commission and the LGIC. The Utilities

2025 BCCA 62 (CanLII)

Commission is an expert tribunal, responsible for regulating public utilities. It reports to the LGIC, which is responsible for setting the government's energy policy. The relationship between these two bodies was discussed in *B.C. Hydro and Power Authority v. Terasen Gas (Vancouver Island) Inc.*, 2004 BCCA 346 at para. 9, in which Justice Mackenzie described a Cabinet direction comparable to the OIC in the case at bar as an "instrument of government policy" intended to take precedence over legal constraints that would otherwise bind the Utilities Commission.

2025 BCCA 62 (CanLII)

[110] In my view, the LGIC could reasonably interpret s. 3 of the *UCA* to authorize the issuance of a regulation compelling the suspension of B.C. Hydro's obligation to provide service to cryptocurrency mining projects, based on policy considerations that go beyond the factors the Utilities Commission is bound to consider and apply in exercising its statutory authority under s. 28(3). The LGIC could make such a regulation for any number of policy reasons, so long as the resulting OIC was not contrary to the broader objectives of the *UCA*.

(2) Whether the LGIC's Decision to Issue the OIC Rested on an Unreasonable Interpretation of the Overall Objective of the UCA

[111] Conifex submits that a primary or key purpose of the *UCA* is to give effect to the regulatory compact by preventing public utilities from engaging in undue discrimination in the delivery of their services. Conifex says the LGIC exceeded its authority by issuing an OIC that required the Utilities Commission to make orders contrary to that purpose. In Conifex's submission, the OIC required the Utilities Commission to issue final orders that unduly discriminated against Conifex's pending cryptocurrency mining projects.

[112] I do not find this argument convincing for two reasons.

[113] First, even if one could say that the overarching purpose of the *UCA* is to oversee the regulatory compact by ensuring that public utilities provide service without undue discrimination, this would not render the OIC invalid. This is because, as explained above, it would not have been unreasonable for the LGIC to conclude

that the direction requiring B.C. Hydro to suspend service to new cryptocurrency projects was based on distinctive consumption characteristics and thus did not involve any undue discrimination within the meaning of the *UCA*. This conclusion is fatal to Conifex's argument that the OIC compelled undue discrimination that was inconsistent with the overarching objective of the *UCA*.

2025 BCCA 62 (CanLII)

[114] Second, and quite independent of the first point, I agree with the LGIC's position that even though preventing undue discrimination is a key part of the Utilities Commission's mandate under the *UCA*, this is not the sole or exclusive purpose of the *Act*. Nor is it necessarily the overarching purpose. As explained in more detail below, it would not be unreasonable to interpret the *UCA*'s overall objective as ensuring that the public's current and future energy needs are met, in a manner that is safe, reliable, just, and consistent with the government's policy objectives concerning energy conservation, production, and consumption. Thus, even if distinguishing between cryptocurrency mining projects and other end uses of electricity constituted "undue discrimination", this would not make the OIC inconsistent with the overall objective of the *UCA*.

[115] I have already referred above to the concept of the "regulatory compact" said to underlie public utilities legislation. In exchange for an exclusive right to deliver its service in a particular locality or field of endeavor, the public utility is expected to adequately, reliably, and fairly serve all customers within the scope of the franchise, under the supervision of the regulator: *ATCO* at para. 63.

[116] The delivery of service to all customers at fair rates without discrimination is an important feature of this regulatory compact. However, to paraphrase Justice Locke's description of the predecessor to the *UCA*, the "whole tenor" of the legislation is "safeguarding of the interests of the public" in the delivery of public utility services: *District of Surrey v. British Columbia Electric Company Ltd.*, [1957] S.C.R. 121 at p. 126.

2025 BCCA 62 (CanLII)

[117] The current *UCA* is replete with references to the public interest. For example, the Utilities Commission can only approve a public utility's long-term resource and conservation plan if it is in the public interest: s. 44.1(6). In determining whether the plan is in the public interest, the Utilities Commission is directed to consider: (a) British Columbia's energy objectives, (b) the requirements of the *Clean Energy Act*, S.B.C. 2010, c. 22, (c) whether the plan shows that the public utility is seeking to pursue adequate "demand-side" conservation measures, and (d) the interests of those in British Columbia who receive or may receive service from the public utility: s. 44.1(8).

[118] The Utilities Commission is mandated to consider similar criteria in deciding whether to issue a "certificate of public convenience and necessity" granting or extending a public utility's franchise (s. 46(3.1), or granting or extending a franchise to B.C. Hydro (s. 46(3.3)).

[119] The *UCA* also makes the Utilities Commission responsible for deciding whether to approve an "energy supply contract" for the sale of energy to a public utility. The Utilities Commission must decide whether the contract is in the public interest: s. 71(2). Where the proposed energy supply contract involves B.C. Hydro, the Commission is required to consider a variety of factors, including British Columbia's energy objectives, B.C. Hydro's most recent resource planning document, the contract's consistency with the relevant provisions of the *Clean Energy Act*, and the quantity and price of the energy to be supplied: s. 71(2.1).

[120] All of these features of the *UCA* demonstrate that the concept of undue discrimination, while an important aspect of the "regulatory compact", is by no means the exclusive or overarching objective of the statute. It would not have been unreasonable for the LGIC to conclude that, at the highest level, the object and purpose of the *UCA* is to ensure that the public's current and future energy needs are met, in a manner that is safe, reliable, just, and consistent with the government's policy objectives concerning energy conservation, production, and consumption.

[121] Furthermore, as noted above, while the *UCA* establishes the Utilities Commission as the body responsible for regulating public utilities, the statute also leaves room for the LGIC to play a role in the setting of policy. One might reasonably conclude that s. 3 of the *UCA* is a recognition of this.

2025 BCCA 62 (CanLII)

[122] All of this lends support for the view that while the regulation of the manner in which public utilities provide service to their customers is an important feature of the *UCA*, the statute can reasonably be interpreted to have broader objectives. The LGIC's use of its regulation-making power under s. 3 of the *UCA* to address matters of energy policy beyond the technocratic competence of the Utilities Commission is not inconsistent with these broader objectives.

[123] Returning briefly to the facts, there is a body of evidence reflecting that the LGIC made the decision to order a pause on the delivery of service to new cryptocurrency mining projects to give the government time to consider not only the cost-of-service and economic impacts of these projects, but also to assess the impact of these projects on B.C. Hydro's ability to meet demand, and the broader implications for the government's energy policy. Against this backdrop, and considering the relevant legal constraints discussed above, it was not unreasonable for the LGIC to conclude that the OIC was consistent with the overarching objectives and purposes of the *UCA*.

(3) Whether the LGIC Had Authority to Direct that B.C. Hydro Be Relieved from its Obligation to Provide Service to New Cryptocurrency Projects without a Hearing

[124] Conifex repeats its submission that the LGIC can only use s. 3 of the *UCA* to direct the Utilities Commission to exercise a power that the Commission has under the statute. Conifex acknowledges that the Utilities Commission has the power under s. 28(3) of the *UCA* to relieve a public utility of its obligation to provide service, but only, "[a]fter a hearing" to determine whether there is proper cause for doing so. Thus, in Conifex's submission, the LGIC could only direct the Utilities Commission to

relieve a public utility from the obligation to provide service after a hearing before the Utilities Commission.

[125] Conifex stresses that the Utilities Commission can only grant relief under s. 28(3) after a hearing. The requirement for a hearing is not a discretionary matter, but rather a statutory pre-requisite to the Utilities Commission's authority to grant a public utility relief from its obligation to provide service. Indeed, Conifex says the requirement for a hearing is not only a statutory pre-requisite, but a fundamental component of the Utilities Commission's power under s. 28(3). In Conifex's submission, the legislature has carefully delineated the Utilities Commission's power to grant such relief, and the conditions under which this power may be exercised.

[126] Conifex submits that the requirement for the Utilities Commission to hold a hearing before exercising its authority under s. 28(3) is an important procedural protection, designed to ensure that a public utility is not relieved from its service obligations without affording those who may be affected an opportunity to be heard.

[127] Although Conifex's argument invokes concerns about procedural fairness, Conifex's submission is at its core an argument about statutory interpretation. I say this because Conifex did not appeal the final order of the Utilities Commission. Rather, Conifex filed a petition for judicial review challenging the validity of the OIC. The petition questions the LGIC's authority under s. 3 of the *UCA* to direct the Utilities Commission to relieve B.C. Hydro of its service obligation without requiring a hearing which would otherwise be statutorily mandated by s. 28(3).

[128] Under the reasoning in *Auer*, the applicable standard of review is reasonableness. The ultimate question is whether it was unreasonable for the LGIC to conclude that it had the authority under s. 3 of the *UCA* to direct the Utilities Commission to issue final orders relieving B.C. Hydro of its service obligations in regard to new or pending cryptocurrency mining projects without the requirement for a hearing under s. 28(3).

2025 BCCA 62 (CanLII)

[129] Section 3(1) authorizes the LGIC to pass a regulation directing the Utilities Commission to exercise any one of its powers under the *Act*. Section 3(2) provides that the Utilities Commission "must comply" with a direction of the LGIC under s. 3(1), "despite any other provision" of the *Act* or regulations, except s. 3(3). Section 3(3) provides that the LGIC cannot use a direction under s. 3(1) to negate a prior order or decision of the Utilities Commission. Read together, the effect of these provisions is that the LGIC can direct the Utilities Commission to exercise any of its powers under the *Act*, provided that the direction does not negate a prior order or ruling of the Utilities Commission, and the Utilities Commission must then comply with the direction notwithstanding any other provision of the *Act* or regulations.

[130] Reading s. 3(1) of the *UCA* harmoniously with ss. 3(2) and (3), in a manner that is consistent with the scheme of the *UCA* and its broader objects and purpose, it was not unreasonable for the LGIC to issue an OIC directing the Utilities Commission to exercise its statutory power to relieve B.C. Hydro of its service obligation toward new or pending cryptocurrency mining operations, despite the requirement in s. 28(3) for the Utilities Commission to hold a hearing before independently exercising that statutory power.

[131] In my view, Conifex's alternative interpretation of s. 3(1) conflates the LGIC's authority to direct the Utilities Commission to exercise one of its powers under the *Act* with the circumstances or basis on which the Utilities Commission is permitted to independently exercise that power. I also agree with the LGIC that Conifex's interpretation would produce an absurd result. Conifex's interpretation would allow the LGIC to issue a regulation under s. 3 directing the Utilities Commission to make a final order relieving B.C. Hydro of its service obligation, but only after a hearing that would serve no purpose, given the Utilities Commission's statutory obligation under s. 3(2) to comply with the LGIC's direction.

2025 BCCA 62 (CanLII)

Conclusion

[132] I would dismiss the application to quash the appeal as moot, and dismiss the appeal on its merits.

"The Honourable Justice Riley"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Justice Fleming"

2025 BCCA 62 (CanLII)