IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1071583 BC Ltd. v. TM Mobile Inc.,*
2024 BCSC 2018

Date: 20241105
Docket: S057461
Registry: Kamloops

Between:

1071583 BC Ltd.

Plaintiff

And

TM Mobile Inc.

Defendant

Before: The Honourable Justice Schultes

Reasons for Judgment

Counsel for the Plaintiff:	J. Frame L. Kozak
Counsel for the Defendant:	R.E. McLarty M.J. Neathway
Place and Dates of Trial:	Kamloops, B.C. November 20-24, 2023
Place and Date of Judgment:	Kamloops, B.C. November 5, 2024

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Introduction

[1] In this action for trespass, the plaintiff company seeks damages from the defendant, a subsidiary of Telus, for the intrusion of a power line, including poles, that ran across the plaintiff's property to the defendant's cell tower under an expired statutory right of way. The line was in place when the plaintiff bought the property in 2016, and remained on the property until the defendant removed it in 2019.

[2] The damages being sought include the plaintiff's costs of providing temporary electricity to the property, on the basis that the presence of the defendant's line, and its refusal to negotiate the replacement of it by a line owned by FortisBC ("Fortis"), prevented the plaintiff from acquiring its own electrical connection.

[3] The defendant takes the position that the plaintiff consented to its trespass during the process of negotiating payment for a new right of way and exploring the possibility that Fortis would take over the line, that it effectively paid rent for a portion of that time and offered to pay for the balance, and that in any event it did not cause the plaintiff to incur the costs that are complained of. An additional technical issue raised by the defendant is that these costs were not directly incurred by the plaintiff, but rather by a related company that operates its business from the property.

Evidence

Background

[4] The property is located off of Highway 97 in Kaleden. It consists of 150 acres of varied terrain, including hills, pasture, wetlands and heavily treed areas. A creek flows through part of it. The plaintiff bought it in June 2016.

[5] The directing minds of the plaintiff are Belinda and Ken Hiebert. They incorporated it to serve as a holding company - specifically to buy the property and act as the landlord to the company through which they operate their contracting business. They used this corporate vehicle for property ownership mainly for tax purposes. For practical purposes, the actions of the plaintiff as described in the evidence were those of the Hieberts.

[6] At the time that the plaintiff bought the property, there was no electricity connected to it. The Hieberts eventually intended to live on it and operate their business there. They also had longer term plans for developing it, such as operating a recreational vehicle park.

[7] The defendant's power line crossed the plaintiff's property pursuant to a statutory right of way that had expired in July 2015. It was allowed to expire through an administrative oversight on the part of the defendant.

[8] The defendant is permitted to construct power lines for its own use but not to provide electricity to consumers. Fortis is the electricity provider in that part of the province. The electricity that was conveyed along the defendant's line to its cell tower came from a Fortis line that runs beside the property along Highway 97.

[9] Although the defendant is the legal entity that potentially committed the trespass in this case, most of the interactions with the Hieberts were carried out by employees of its parent company, and no distinction was drawn in the evidence between the actions and responsibilities of the two companies.

Negotiations About the Right of Way

[10] In June 2016, shortly after the plaintiff bought the property, Ms. Hiebert contacted Mike Reitenbach, a real estate manager with the defendant's parent company, about the expired right of way. After an initial phone call from Ms. Hiebert, their communications were mainly by email.

[11] Ms. Hiebert's initial question was whether the defendant still required the right of way. She wrote that she and her husband needed to know because they were "prepared to move forward" with their development of the property. In response, Mr. Reitenbach said he would be proposing a new fee agreement for the defendant's continued use of the right of way.

[12] In August he provided a draft agreement to the Hieberts that offered to pay them $2000 per year for that use.

[13] Ms. Hiebert responded in October, expressing dissatisfaction with several points in the draft agreement, and suggesting that the defendant pay a monthly fee of $416.67 until they could come to an agreement.

[14] Mr. Reitenbach explained to her that the amount being offered was due to the fact that the expired right of way had covered three different properties (which previously had the same owner) and had included road access to the cell tower, whereas the one over the plaintiff's property was only for part of the line. He told Ms. Hiebert that in light of her comments, he was prepared to offer as much as $2500 per year. Ms. Hiebert conceded on cross-examination that this was a fair amount.

[15] Mr. Reitenbach testified that he took the Hieberts' demand for payment in that higher amount to be part of their negotiations, rather than as an ultimatum failing which the defendant would remove its line. He conceded that there was no explicit statement from them to that effect though.

[16] In December, Ms. Hiebert provided Mr. Reitenbach with a draft of the agreement containing her requested changes. She agreed with the suggestion in cross-examination that at this stage she and her husband wanted to enter into a new agreement with the defendant to have its line on their property.

[17] Later that month Mr. Reitenbach responded that "for the most part your changes are ok" and enclosed a revised version of the agreement for her review. He told her that once she had advised him whether there were any additional concerns, he would provide a "clean version" for execution by the parties.

[18] Ms. Hiebert did not accept the suggestion in cross-examination that she and her husband were "ready to go" with the agreement by this point. She said that instead, they were beginning to consider the option of "pulling power" from the defendant's line, and described the situation as being "kind of fluid".

[19] In keeping with this assertion, Mr. Reitenbach agreed that an email from Ms. Hiebert on December 15, 2016, in which she asked him if he "had made any

headway regarding pulling power from that same line" referred to a telephone conversation that he had had with the Hieberts on that subject "a couple of days before" that email. He added that "perhaps she asked me to look into it a little bit", but there was no clear expectation or deadline. He did not pass that suggestion on to anyone else within his company.

[20] In cross-examination he agreed that there were several areas of the agreement in which changes that had been proposed by the Hieberts had not been resolved – for example, with respect to their ability to terminate or assign it. However, in his view the provisions in question were not "material".

[21] The Hieberts did not respond in written form to Mr. Reitenbach's revised agreement, and Ms. Hiebert could not recall having had any verbal communications with him about it.

Initial Efforts to Obtain Electricity

[22] Concurrently with these early communications with Mr. Reitenbach about the right of way, the Hieberts were considering how to get electricity to the property so that they could live there. For that purpose, they had discussions with Hugh Barbour of Allteck Line Contractors, a company that does work for Fortis.

[23] Starting in May 2016, before the purchase of the property had been concluded, they began to discuss a route with Mr. Barbour that would connect with the Fortis line at the north end of the property, cross a wetland area, and then ascend a steep hill towards their intended building site.

[24] This process resulted in Fortis providing them with a letter agreement in December 2016 setting out the "ball park" costs to construct such a line, which were just over $55,000. That same month they paid Fortis the $5500 deposit that was required to proceed under that agreement. Both Hieberts emphasized in their testimony that the quote was only for the cost of the work to be done by Fortis, and that they would have had additional costs to actually connect electricity from the last Fortis pole to the buildings on the property.

[25] Ms. Hiebert rejected the suggestion in cross-examination that this estimate in December 2016 meant that they could have begun the process of connecting electricity to their property as early as that month. She maintained that additional steps were still required, in particular an investigation of the proposed path of the line across an environmentally sensitive part of the property. The information that she said they had received about the need for such an assessment was not preserved in any written record.

[26] She added that this route was “not an intelligent choice to make” economically. Nevertheless, she agreed that she and her husband were the ones who decided that it was not viable, and that no one had told them that they would not be able to install a line along such a route.

[27] Mr. Hiebert was even more emphatic about the challenges posed by this route, especially the difficulties with connecting with the Fortis line in that part of the property, the sensitive area near the Fortis line along the highway (which would require an environmental engineer to supervise), and the very steep terrain on which some of the poles would have to be placed. Despite the environmental concerns, he agreed that he was never told that this route would not meet the applicable environmental requirements.

[28] He also stressed that this Fortis quote was for discussion purposes only, and that it progressed no further than the concept and budgeting. They did not proceed with this route because the “rough costs” of the line and their connection from the end of it, which they hoped to run underground to at least some of the structures, exceeded what they thought it was appropriate to spend.

[29] He agreed that until December of 2016 they had been concentrating on obtaining electricity through that end of the property. He explained that they wanted to “price it out first”. It was the only route for which they requested a plan from Fortis at this stage.

[30] He conceded that rejecting this route could possibly have delayed the connection of electricity by “a couple of months”, and that they rejected it despite the fact that they were “desperate” for electricity by then.

[31] The defendant called Levi Nelson, who at the time was employed by Allteck and had been involved in designing this northern route, as a witness. He testified that the Hieberts paid the required 10% deposit in relation to the quote in May 2017 (this date seems to be at odds with all of the other evidence, but nothing ultimately turns on it). He could not recall why the construction of that line did not proceed, but said that from a design perspective there was nothing preventing it, although it had the most difficult terrain of all of the routes that the Hieberts ever considered for electricity. It would have required the building of an access road that was sufficient to allow Fortis trucks to service the line and, as the Hieberts had described, it involved crossing the environmentally sensitive wetland area.

[32] Mr. Nelson explained that the construction of the road would be the responsibility of the customer before construction of the line began, and would not be included in the cost quoted. Nor would the costs of helicopter access or blasting, which Mr. Barbour had mentioned as possible requirements of the construction in his email commenting on the route, be included.

[33] Mr. Hiebert testified that they considered other options as well during this period.

[34] One was installing their own line parallel to the defendant’s, which he said turned out to be impossible because the defendant’s line had “used up all the good ground” in that area. In particular, based on his discussions with Mr. Barbour, the position of the defendant’s line at the steep part of the property would be a problem for adding another one. This concept of a parallel line along the defendant’s route was the subject of “a few verbal discussions” and “ended in the early discussion phase”, he said.

[35] In contrast, Mr. Nelson testified that it would have been possible to build a new line parallel to the existing one, while still maintaining the required minimum horizontal distance of five metres between them, although it would have required removing some trees. To his knowledge, this possibility was never discussed.

[36] According to Mr. Hiebert the possibility of them putting a pole on the top of the hill and connecting it to the defendant's line ("pulling power" from that line, as he and Ms. Hiebert described it) foundered on the difficulty of getting a sufficient amount of voltage to the connecting line.

[37] Mr. Barbour also raised the possibility, if Fortis could not provide a suitable line, that the Hieberts could install and own their own line privately, which would be metered at a Fortis pole at the highway. A designer from Fortis gave them the ballpark costs for that option, but it was abandoned by them when it turned out to cost more than a Fortis-owned line.

[38] On July 29, 2016 Mr. Barbour wrote to them proposing that Fortis take over the defendant's existing power line as an alternative to the route from the north:

> We need to discuss how we might go forward with speaking with TELUS to have Fortis own the 6 poles on your property.
>
> I would also speak with Fortis in regards to their conditions to own the 6 poles. I assume Fortis would need the 6 poles replaced in order to turn the system over to them. The existing TELUS private poles are 1994 vintage…
>
> I look forward to discussing a game plan to execute this option and get your power to this site (Fortis owned infrastructure).
>
> [Emphasis added]

[39] A few days earlier, Mr. Barbour had emailed them suggesting that they "have a closer look at using the existing line that TELUS owns". When it was suggested that he had rejected that option at the time, Mr. Hiebert said he did not know if they talked about it, but conceded that they could have, since they "talked about everything all up and down the property". He added that they wanted to explore options that would not involve using a third party, and that he had discussed

pursuing the northern route with Mr. Barbour because it would not involve the defendant.

[40] After initially maintaining that he did not know that the defendant's poles would need to be replaced under this new plan, he agreed that he had accepted Mr. Barbour's advice in the July 29 email that they did.

[41] Similarly, in response to the suggestion that, based on this information, they knew that the defendant's poles could not be utilized to provide them with power, Ms. Hiebert said "it seems that way". She also agreed with the suggestion that by July 2016 they knew that it was "at least unlikely" that they could draw electricity from the defendant's existing line. (At another point in her evidence however, she testified that they were aware "by the end of 2016" that they could not do so.)

[42] Mr. Hiebert agreed that working with a third party such as the defendant would make things more complicated, although at the time he hoped that it would not do so "by much".

[43] Mr. Hiebert was cross-examined on a note by Mr. Barbour of a subsequent meeting they had on August 9, in which Mr. Hiebert was described as still being "adamant about the shorter route option" (that is, from the north of the property), to the extent that he was willing to build bridges across the creek for Fortis's trucks to access it. He agreed that that "was what we wanted to do at the time". The note also described him wanting a ball park quote for the option of owning the line privately.

Proposal to the Defendant

Continuing Discussions with Mr. Reitenbach

[44] In late February 2017, Ms. Hiebert left Mr. Reitenbach a voice mail message, which she followed up with an email on March 1 that included the following:

> We have been reviewing options for the TELUS line going through our property. We wanted to make sure when we spoke to you that we had a good idea of how we wanted to move forward and we have a different option that we would like to discuss with you. Please give Ken or myself a call so that we

> can do a quick overview to see if it would be a viable option that you would be willing to consider.

[45] It is common ground that the Hieberts now wished to explore using a replacement for the defendant's line to acquire electricity, in accordance with the possibility that Mr. Barbour had raised with them the preceding July. Ms. Hiebert accepted the suggestion that they "wanted TELUS to be involved in providing power", and that this was a completely different option than what they had previously been negotiating with Mr. Reitenbach (although, as her email to Mr. Reitenbach in December indicated, at least the option of "pulling power" from the existing line had been raised, and he agreed that he was aware that they hoped to have Fortis rebuild along the defendant's route).

[46] Mr. Reitenbach testified that based on a conversation that he had with the Hieberts, they were looking for the defendant to fund the rebuilding of the powerline in return for a renewed statutory right of way at a nominal cost.

[47] On March 2 he sent an email to a program manager in his company in which he explained the need for a renewal of the right of way, and went on to explain:

> The issue is that Belinda and Ken also need power and Fortis will not run power on our line for them. Belinda and Ken are suggesting a rebuild of the powerline (rough estimate $50K) and that TELUS pay for it but in exchange will provide us with an agreement for their property for $1. Fortis would of course own the new powerline. There may be some side benefits (Fortis taking over maintenance, etc) but at this point we need to know if TELUS and Fortis would entertain this general idea. I proposed that a local TELUS Project Manager, Fortis and Ken/Belinda meet on site to review.
>
> [Emphasis added]

[48] Mr. Reitenbach agreed on cross-examination that since none of this additional information was in Ms. Hiebert's email of March 1, it must have come from their conversations the previous December. He did not remember whether they had "come right out" and said that they wanted the defendant to pay for the line, but said that if he had put it in his email it was "quite possible" that they had. However, he then agreed that his use of the term "suggestion" meant that it was something that

he had gleaned, rather than that the Hieberts had expressed. He believed that they "wanted to have a discussion" regarding the issue.

[49] Because Ms. Hiebert's March 1 email had raised an issue that was outside of his area of expertise, Mr. Reitenbach put the Hieberts in contact with Paul Kwasnycia, another project manager. Based on Ms. Hiebert's email coordinating the visit, it appears that Mr. Kwasnycia went to the property on March 16, and that Hugh Barbour was there as well – on behalf of Fortis according to the email.

[50] Ms. Hiebert testified that during this site visit Mr. Kwasnycia told them that the defendant would "look at this option", and asked them to provide a quote so that he could determine what was involved. Mr. Hiebert said that he, Mr. Barbour and Mr. Kwasnycia agreed that they should have a design created for Fortis to replace the defendant's line so they could cost it out and determine whether it was a viable option. He did not recall any discussion of the price of such a process during this meeting (although he knew in general what Fortis's "cost per pole" was), nor did he recall any discussion about "who would pay for what".

[51] The Hieberts began living on the property in March.

[52] A note from a Fortis official on April 27 quoting Mr. Barbour as saying that "Instead of TELUS paying Hiebert a yearly rental, Hiebert wants TELUS to help pay the costs to have Fortis… take over the line" was put to Mr. Hiebert. He first responded that the position attributed to him in that quote was not correct, and that he did not recall ever making that suggestion to Mr. Barbour. He then said that he was "sure" that Mr. Barbour would have suggested that there "could be cost-sharing" if the defendant hooked up to the end of the Fortis line, but he could not recall if he had "wanted help paying". He added that it was not up to them whether the defendant wanted to hook on to the end of the line. The reason that a yearly rental fee payable by the defendant for the right of way would no longer be a consideration, he explained, was because it would be then a Fortis line.

[53] When pressed, he agreed that it was possible that he had told Mr. Barbour that he wanted the defendant to help pay, and added that he "would [have] appreciate[d]" if it did so. He reiterated that it was up to the defendant whether it hooked up to the line, and that the only plan he and his wife had in relation to the line was for them to be provided with electricity.

[54] At the Hieberts' request, on May 16, Fortis provided them with a written quote setting out a cost to them of just over $60,000 for putting a new power line along the defendant's route, after deducting the $5500 deposit that they had previously paid for the now-abandoned northern route. This quote was to be valid until August 14, 2017.

[55] While he acknowledged that this quote was more expensive than the previous one, Mr. Hiebert pointed out that it represented a "more complete plan", although once again it did not cover the cost of actually connecting the line to their buildings.

[56] He understood that the defendant's permission was required in order to decommission its existing line, because Fortis was not otherwise permitted to turn off the electricity on a paying customer.

[57] Mr. Nelson was also involved in the design of the route described in this Fortis quote. The issues that he said would have had to be addressed in order for this plan to be carried out were changing the location of the metering unit, building an access road for service trucks and a bridge over the creek, and relocating one of the poles so that it was no longer on a neighbour's property. He described these as "access and environmental concerns".

[58] The pole that actually connected the line to the Hieberts' dwelling would have been installed and owned by them. The provision of electricity beyond that point to the defendant's cell tower was also not included in the quote. Mr. Nelson said that instead it would have been negotiated between the Hieberts and the defendant.

[59] On May 25 the Hieberts received a second quote for this work, from Advanced Powerlines, which estimated the cost as just over $53,000.

[60] They provided the Fortis quote to Mr. Reitenbach on May 29. Although her email to Mr. Reitenbach said that both quotes were attached, for some reason Ms. Hiebert did not provide the slightly lower Advanced Powerlines quote to the defendant at that time.

[61] On the same date they provided a document setting out what they estimated would be the defendant's costs of reconnecting to the new line, as well as the work that their contracting company, which was an approved Fortis contractor, was able to do on the project to reduce their costs. Mr. Hiebert said they added this in-kind contribution because they were "just trying to make [the arrangement] happen." By breaking down the costs specific to the defendant, they felt they were costing out the process in accordance with the meeting with Mr. Kwasnycia. The defendant's listed costs would be for a new metering unit for the electricity to its cell tower, and other related requirements of it continuing to receive electricity form Fortis.

[62] Ms. Hiebert emphasized in her testimony about this period that they were not seeking to have the defendant reimburse them for the costs of the new line. Mr. Hiebert said that they "never got to discuss the allocation of costs" with the defendant, but later asserted that the amount quoted to them by Fortis would be their responsibility, because they were the property owners. When he was asked why, in that case, they did not just tell the defendant that they were putting in a line at their own expense that it could use, and that they only needed its permission to remove and replace its line, he repeated that they never got that far in their discussions and that the defendant "wouldn't talk about the proposal with us". They were prepared let the defendant "have power for nothing" because the right of way was so narrow at the edge of their property that it was not worth anything. He claimed that they sent the defendant the quote from Fortis only because it was what Mr. Kwasnycia had requested.

[63] While he took the position that the May 2017 quote from Fortis was in effect a request to the defendant to remove its line, since it would be replaced by a Fortis line, Mr. Hiebert agreed that there was no actual request from them to remove the

line at that time, and that the proposal was not a demand that they do so. They were requesting to "work amicably" with the defendant, and did not feel that they had to make any demand.

[64] In an internal email that he sent on June 12, Mr. Reitenbach once again included a reference to the apparent wishes of the Hieberts:

> Belinda and Ken suggested a rebuild of the powerline at mostly TELUS' cost in exchange for providing TELUS with an agreement in perpetuity for $1.
>
> [Emphasis added.]

[65] In a similar manner to his characterization of his earlier email on this issue, Mr. Reitenbach agreed in cross-examination that "suggested" in this context meant "no express demand or request", but rather "something that [he] inferred from the conversation". However, he would not accept the further proposition that he had drawn this inference based solely on the facts that Fortis would not run electricity through the line for the Hieberts unless it was upgraded and that the cost to do so would be approximately $50,000. As he put it, the Hieberts "must have said something more specific than that for me to write it". He went on to say that he is "not the best" on email, and that he did not recall what had been said. He also believed that there had just been one discussion between them about this issue.

[66] In re-examination he clarified that this reference to the proposal in this email was based on his previous "discussions or correspondence" with the Hieberts.

[67] With respect to the addition of "mostly" to his description of their wish that the defendant assume the costs, he explained that he and the Hieberts had not discussed the issue enough for him to be concrete about the portion of the costs that they were proposing to take on.

[68] This internal email also contained Mr. Reitenbach's description of the issue from the defendant's perspective:

> On its own, the [real estate] piece doesn't justify the ~$100K cost to rebuild the powerline but perhaps with Paul [Kwasnycia]'s comments the 2 components of the deal [the other being an agreement with respect to the

> right of way] will justify the project. If it doesn't, we would likely need to acquire the right to use the powerline from Ken and Belinda and pay an annual fee (may be more than $2.5K).

[69] In a follow up email on June 13, Mr. Kwasnycia made some recommendations about further negotiations with the Hieberts:

> My take on this is that eventually this stretch of poles will need to be replaced and the logistics of this may prove difficult and expensive as there is a creek that runs through this portion of the property. With the [Hieberts'] proposal, Fortis/KRS/Advanced Powerline will replace and maintain this new section of poles.
>
> I would approach him with what he has on the table so far which is.
>
> $60,692.90 (FORTIS/ALTECH)
>
> $18-20K (KRS/ADVANCED POWERLINES)
>
> $5050.87 (DEPOSIT PAID BY [the Hieberts])
>
> $85,743.77
>
> This would be 35 years of rent @ $2500.00/year. Of course if rent increased [return on investment] would be sooner. Maybe he would take a lump sum of a lesser amount? Not sure but I think negotiations for past and future rent may be a little more difficult if his proposal isn't accepted.
>
> [Emphasis added.]

[70] In the weeks following the sending of the Fortis quote Ms. Hiebert and Mr. Reitenbach exchanged emails about the status of the project.

[71] On July 6 he told her that there had been a meeting that day with "all of the internal stakeholders" and that "[d]ue to the size and implications of the request it is taking some time to review". In his testimony Mr. Reitenbach described the Hieberts' request as a "fairly significant ask" of the defendant, hence the extent of the review process.

[72] On July 11, in response to her expression of concern about the amount of time that the process was taking, he told her that the request was "being reviewed by senior management" and that he would let her know when he heard back. That was the final communication to the Hieberts from him and the end of his involvement in the negotiations.

[73] The Hieberts then retained a lawyer (not their trial counsel) who wrote to the defendant on July 13, expressing their concerns in a more comprehensive way:

> Our clients' proposal was to replace your existing works with updated infrastructure which would become the property of FortisBC and which would allow our client access to power and preserve a power supply to your cellular transmission works without you having to pay our clients an annual fee for a right of way. This proposal was presented to you on May 29, 2017. Your review of the proposal has taken far too long as our clients have had to incur fuel and generator costs to supply electricity to their property while you decide.
>
> [Emphasis added]

[74] The letter set a deadline of July 20 to come to a "satisfactory accommodation" on this issue, failing which the defendant was to remove the line by August 19. It also sought payment in relation to the right of way for the period of July 1, 2015 to June 30, 2017 at the $2500 per year rate that Mr. Reitenbach had previously offered, and at $250 per month from July 1 onwards.

[75] Ms. Hiebert's understanding was that their lawyer and a lawyer on behalf of the defendant then discussed the matter, and recommended that it would be better for the Hieberts to work with the defendant to reach a solution, without the lawyers being involved.

Ms. Kahlon Takes Over the Negotiations

[76] From this point Harmenjit Kahlon, a senior manager with the defendant's parent company whose duties included real estate matters, began dealing with the Hieberts. She testified that she was brought in to serve as a local contact (Mr. Reitenbach is based in Ontario), and that her purpose was to obtain a new right of way over the property, although she came to understand that the Hieberts' primary focus was on obtaining electricity.

[77] The emails between the Hieberts and Mr. Reitenbach were not provided to her, and she did not know specifically what had been discussed in them.

[78] On July 26, in response to an email from Ms. Kahlon in which she had introduced herself, Ms. Hiebert continued to stress the urgency of the situation from

their perspective, and her hope that a "settlement" could be reached between them and the defendant by August 1. This was a date that she understood had been discussed between their lawyer and a lawyer on behalf of the defendant.

[79] Ms. Kahlon responded on the same date that this was the first she had heard of a deadline for the resolution of the issue, and that it was short notice in that regard. She also offered to refer their correspondence to the defendant's "legal team" if the Hieberts wanted it dealt with as a "legal matter". In cross-examination, she said that she had been aware of the Hieberts' concerns about having electricity for the coming winter, but not this specific deadline. She also had not received a copy of the quote from Fortis to the Hieberts from May addressing electrical service along the defendant's current line, although she later became aware of it.

[80] In her testimony Ms. Kahlon explained because this request involved Fortis taking over the line, it was in that company's hands and was driven by its timelines, which the defendant did not control. Her goal was to expedite this process with Fortis on a "business to business" basis. If Fortis took the line over it would have to be built to Fortis's specifications, and she did not know what Fortis wanted to do yet because she had not received a response on its behalf. Mr. Kwasnycia's response to the Hieberts was not sufficient, she explained. Instead, she needed a formal response from Fortis's property group, and its engineer had not yet been to the site. The conversations that had occurred between the Hieberts and Fortis representatives to that point were not the equivalent of proceeding through "formal channels".

[81] In cross-examination she emphasized that while she was taking the lead on securing a new agreement on the right of way, she made clear to the Hieberts that the defendant was "not a power provider" (in terms of its ability to influence their acquisition of electricity, I took her to mean).

[82] Ms. Hiebert's follow up email expressed to Ms. Kahlon her concerns about delay even more vehemently:

> I understand that there are always hoops to jump through but as to a decision of whether TELUS wants to move forward working with us on this powerline or not should not take up any more time than that given. It has been approximately 8 weeks since TELUS has received the quotes from the relevant electrical companies. This is 8 weeks of time to analyze and come up with a decision to move forward with the quote submitted, remove their works from our property or discuss with us whether there is another option. I am expecting that one of these three situations will come to fruition by August 1,2017.
>
> [Emphasis added]

[83] Ms. Hiebert said that there were also phone conversations with Ms. Kahlon during this period. In them, Ms. Kahlon told her that their options were drawing electricity privately (that is, connecting their property to the defendant's existing line with Fortis's authorization), or Fortis taking over the line on an "as is where is" basis. In relation to the second option, Ms. Hiebert testified that the defendant was already aware that Fortis would not be accepting the existing poles in the condition they were in. In what may be a reference to the phone conversation in which Ms. Kahlon presented these options, Ms. Hiebert's email of July 27 included the following:

> The reason this quote had been presented to TELUS originally is because we have done the leg work you are doing right now and been told that the options you presented to us today were not viable. This was stated directly from Fortis.

[84] In the same email, Ms. Hiebert requested that whatever options Ms. Kahlon brought to their next scheduled meeting, which was to be on August 8, would be "actionable" and would not "require further investigation or time in which to find out if they are viable."

[85] Ms. Kahlon responded that she needed information from Fortis's property group in order to move forward in the manner that the Hiebert's were requesting. She testified that she found it "a bit strange" that the Hieberts would be the ones proposing the solution, by which I took her to mean that she expected that the defendant would arrive at it through discussions with Fortis. Normally a customer

has to go through a web portal or phone number with Fortis in order to initiate a request of this nature, she explained. The solution being proposed by the Hieberts "did not necessarily work with everyone", and in any case Fortis's property group was not yet aware of it. Both companies had to perform their due diligence and ensure that the proposal met their needs.

[86] Ms. Kahlon disagreed with the suggestion that in dealing with her the Hieberts were supposed to "go back to square one" with their proposal – her point was that there were channels that she had to go through, and the issues of Fortis owning the line and obtaining its own right of way were not clear. She was not prepared to accept that as a result of this email from Ms. Hiebert the defendant knew that the May 2017 Fortis quote was the option that the Hieberts would be presenting, because she "did not know what's happened, and who they've been talking to."

[87] On July 31 Ms. Hiebert sent Ms. Kahlon an email that included the following:

> This is a situation which cannot remain static. We must move forward quickly to secure the services that we need to support the requirements, at minimum, of a basic standard of living. That standard of living is inclusive of energy for cooking, heating, lighting and food storage. The lengthy delay in addressing this issue continues to affect our ability to provide adequate housing for our family.
>
> During our discussion on July 27, 2017 you stated you were confident you would bring actionable options to the table at our next meeting on August 8th, 2017. If you cannot do that we will have no choice but to go forward with securing electrical service to our property which will, as has been explained previously, require the use of the area on our property which was formerly the subject of the expired agreement between TELUS and a previous owner of our land. We would, however, prefer to reach an agreement with you that would be to our mutual benefit. We hope this can be achieved.
>
> [Emphasis added]

[88] Ms. Hiebert agreed with the suggestion that as of that date they were willing to continue "to have a conversation" with the defendant about this issue, and to allow the defendant the amount of time that it had agreed to get back to them. It was not to be an unlimited amount of time, until the defendant decided to remove its line, she stressed. She also agreed that they had permitted the defendant to remain on the property up to that date.

[89] Ms. Kahlon testified that this was the first indication that she had from the Hieberts that they were interested in potentially taking over the line themselves. They had previously responded to her suggestion that they simply attach to the existing line by an additional pole to their buildings by informing her that they needed electricity to the entire property. It remained unclear to her how specifically this was to be achieved.

[90] In response to that most recent email, Ms. Kahlon explained on August 1 that "Fortis is moving forward at their end to evaluate their work" and that the defendant, as a private company, "need[ed] to go through the appropriate processes and discussions to determine what Fortis['s] interest, if any could be in the powerline."

[91] Ms. Hiebert's notes of a telephone conversation that they had on August 8, quote Ms. Kahlon as advising that she had contacted Nick Mirsky (her counterpart at Fortis), and was "in negotiation for Fortis to take over the TELUS line". Ms. Kahlon informed them that their options were a "secondary drop" (another expression for pulling power) from the defendant's line or Fortis taking it over. She also explained that she could not use the quote that the Hieberts had provided because the defendant needed to receive a bid directly from "Fortis Properties".

[92] According to the notes, they explained to her why the secondary drop would not work (according to Fortis, their house was too far away from the line) and that they would be unable to use the line for future development because it would still be owned by the defendant. They told her that they were "fine" with Fortis taking over, "except that it couldn't drag on" and they needed "the situation to advance at a faster rate".

[93] In addition, the notes indicate that Ms. Kahlon told them that if they "wanted to discuss recompense for [their] living requirements and/or go in a different direction" they could use their lawyer for negotiations. She also told them that "there are federal regulations protecting Telus and she is hoping to not invoke them."

[94] Mr. Hiebert's impression was that they were starting at the beginning of the discussion again and that Ms. Kahlon was not "up to speed". He rejected the suggestion that they understood by that point that the quote did not work for the defendant and that things were "not going anywhere" with them.

[95] Ms. Kahlon recalled presenting the first of the options described in these notes – the secondary connection to the defendant's line - to the Hieberts, and said that it was an option that she had been advised of by Fortis. However, the Hieberts were not interested in pursuing it. Her understanding of their opposition to this option, which she characterized as the "fastest" one, was that they needed to be able to develop the property in the future, not the technical one that Ms. Hiebert had described in her notes.

[96] She said that this was the first she had heard of those development plans as an aspect of their request for electricity. She disagreed with Ms. Hiebert's note that she was well aware of these plans based on their previous discussions.

[97] Although she could not recall specifically, it "sound[ed] correct" that she would have told them that she needed something directly from Fortis in order to have them take over the line.

[98] She made the comment about them using a lawyer for negotiations because it sounded like they were looking for damages for the cost of running a generator for electricity, and for having to live below a reasonable standard. She had not previously negotiated agreements in such situations, which are usually handled by the defendant's legal department.

[99] On August 22 she explained that she was "still working with Fortis" to get their input on the matter and on August 24 she advised that "Fortis got back to me, they are reviewing the line."

[100] In explaining the communications with the Hieberts during this period, Ms. Kahlon returned to her overall theme that the arrangements had to be made between the defendant and Fortis. It was not open for the defendant to accept a plan

directed to a private party, and while the Hieberts wanted a mutual resolution, the defendant "from a policy or standards perspective would not have a third party such as a landlord design a power line for us and tell us that it was the only thing that could be done". In cross examination she added that it was "not typical" to design a line involving the defendant's asset without going through Fortis as the public utility provider. Regardless of whether the Hieberts' proposed design had been prepared by Fortis, what mattered from her perspective was who was going to own the line, and on what terms. Crucially, the line put forward in the May 2017 Fortis quote was designed for the Hieberts (rather then relating to whatever property arrangement could be reached between Fortis and the defendant, I took her to mean).

[101] Although the letter from the Hieberts' lawyer had required the defendant's line to be removed if no agreement was reached, Ms. Kahlon testified that as a result of their conversations, Ms. Hiebert "understood" that the defendant had to work with Fortis on a solution, and indicated to her that the defendant's continued presence while a solution was being pursued "was okay". This indication by Ms. Hiebert was provided some time in August, Ms. Kahlon stated.

[102] In her testimony Ms. Kahlon also reviewed her email correspondence with Fortis officials up to this point.

[103] Following her initial request on July 25 for Mr. Mirsky to tell her what options would be available to the Hieberts to obtain electricity from the defendant's line, she followed up with an inquiry on the 27th about whether Fortis would be interested in taking the line over. Mr. Mirsky indicated on July 31 that he had forwarded the request to his regional engineer so that the engineer could assess the condition of the line, after which he would be in a position to comment about Fortis's willingness to take it over. When she advised him that the Hieberts wanted to know the answer by August 9, Mr. Mirsky told her that he would try to accommodate the request, but that he could not guarantee that it would take priority over Fortis's core work.

[104] She provided information directly to the Fortis engineer on August 24, including informing him that the Hieberts wanted the line upgraded so that they could

subdivide the property, and adding her expectation that the purchasers of those lots would be Fortis customers. She explained in her testimony that these ongoing communications were intended to "keep the momentum going" and ultimately obtain electricity for the Hieberts' property.

[105] She also explained that she had a contact person at Fortis in addition to Mr. Mirsky. This person was not working on the Hieberts' file, and asked her not to provide the Hieberts with his name.

[106] She did not find it unusual that her contact at Fortis would not be aware of the quote that Fortis had provided in May. The group that she was dealing with at Fortis was responsible for property and obtaining rights of way for its lines. She did not bring that quote to her Fortis contact's attention because it was "not for [her] to say" – that is, it was not between the defendant and Fortis. She reiterated yet again that notwithstanding that quote, what mattered for the defendant was whether Fortis wanted its line and on what basis, which was information that would come from Fortis's property group.

[107] On August 25 Ms. Kahlon sent a cheque to the Hieberts for $5000. This was intended to cover payment for the right of way from the date of its expiry on July 31, 2015 to July 31, 2017, even though the plaintiff had only owned it from May 2016 onwards. In the letter enclosing the cheque Ms. Kahlon expressed the hope that the parties could "come to a resolution" of the matter by January 2018, but proposed paying $208.33 per month (which is also approximately $2500 a year) for a temporary right of way in the meantime. She testified that the Hieberts had previously requested compensation and the defendant wanted to work collaboratively with them, by providing it for the time that it had been on the property without an agreement, and for the future period within which she hoped that the power line issue would be resolved.

[108] Ms. Hiebert eventually deposited the cheque but did not sign and return the letter enclosing it, in which she and her husband were to confirm that the proposed terms were agreeable to them. She agreed that in cashing the cheque she had

accepted Ms. Kahlon's valuation of the appropriate amount. Mr. Hiebert agreed that when they accepted the cheque it was open to them to demand that the defendant leave the property, but that they had elected not to do that.

[109] On September 26, Ms. Hiebert re-sent the May 2017 quote from Fortis for providing electricity to the property along a line that would replace the defendant's. She confirmed that this was the only quote that Fortis would be submitting. She wrote that they were sending the email "with the intention of entering into negotiations with TELUS" and that "[a]s the contract that TELUS had with us has expired I'm sure you are wanting to remediate this situation in a timely manner as well" (emphasis added). In her testimony Ms. Kahlon said that the Hieberts' direction to her to proceed with this quote did not reflect the process that she was familiar with.

[110] On September 27, in response to an email from Ms. Kahlon advising that she would be speaking to Mr. Mirsky of Fortis about the situation, Ms. Hiebert repeated that the quote she had sent was the only quote that Fortis would be providing and "the only option that will be available if Fortis is to take over the TELUS portion of the line". She added that "moving forward the negotiations are directly between TELUS and ourselves to come to an agreement".

[111] The assertion that there was only one Fortis quote was not consistent with Ms. Kahlon's conversations with Mr. Mirsky, who had indicated that "a few different things" had been submitted. She also understood that his group was working on the issue and that the involvement of the Fortis engineer had been delayed by other commitments. As to who the negotiations were between, as asserted in Ms. Hiebert's last email, she testified that at this stage she still did not know specifically what was being negotiated.

[112] She had the same reaction to Ms. Hiebert's follow up email on October 4, which inquired whether she was "moving forward with the negotiations regarding the quote".

[113] When it was put to her that her Fortis contact had no idea that the May quote had been provided to the Hieberts she clarified that it was a design, whereas Fortis's responsibility was to determine whether Fortis would be taking over the line and to obtain a right of way. Once again, she emphasized that it was "a completely different ballgame" if the line was to be Fortis's asset instead of the defendant's, and that she did not know at that point what Fortis was going to do. The quote and the information provided by the Hieberts showed that there had been a proposal, not what was going to happen from Fortis's end. Later in her cross-examination she said that by this point her contact was aware of "the other proposals".

[114] On October 6 Ms. Kahlon wrote to advise that "Fortis has let us know that they are not interested in purchasing the powerline off of us". She had received this information from Mr. Mirsky during a "business to business" meeting. In her testimony she quoted him as saying that Fortis no longer wanted to work directly with the Hieberts and that they could "get in line like regular customers".

[115] On the same day, in response to Ms. Kahlon's follow up email about the status of the letter agreeing to the payment and ongoing rate for the right of way, which she needed to "move forward with some options" Ms. Hiebert advised that they would not be signing anything at that point and added:

> …We are wanting a negotiation to move forward immediately. When we had spoken to you initially we had emphasized how important it was for us to have power through the winter months. It is our expectation that you will be giving us an answer as to whether you are willing to use the quote presented or if you will be removing your works from our property. We had expected this answer to come when you found out the information you needed from Fortis. We have provided you with the quote that is relative to changing the powerline from a TELUS line to a Fortis line. At this point we feel the only answer we need from you is whether you are going to accept this quote and negotiate or if you are going to remove your works from our property. Please advise us as to your status.

[116] Ms. Kahlon replied that she would have to "take this back to the team". She also expressed her understanding that two quotes had been provided by Fortis and asked that the second one be sent to her.

[117] Ms. Hiebert then sent an email stating “here is the quote from Advanced Powerlines” (the second of the two quotes that they had received in May 2017 in relation to the defendant’s existing route), along with the breakdown of the available contributions from the Hieberts’ contracting business. Despite this, Ms. Kahlon repeated her understanding that there were two quotes and her request for the second one, because only the Hieberts, as the customer, could obtain it from Fortis. Ms. Hiebert clarified that “[t]he other quote was not for the TELUS powerline” and that Ms. Kahlon already had the quotes “that were relevant to the project.”

[118] She explained that the options that she wanted to discuss with the Hieberts arose from the fact that although Fortis did not want to take over the line or be involved with it, the defendant’s line was still there and so they had to “go back to the table”. It was the defendant’s intention to keep paying for the right of way, but they needed an agreement with the Hieberts in order to do it. She was still under the assumption that she would be working with the Hieberts to resolve the matter of the right of way.

[119] Later in the day on October 6, Ms. Kahlon sent an email to various officials of the defendant’s parent company, including her supervisor and one of its legal counsel. It included the following:

> I’m concerned with the way this powerline negotiation is going.
>
> Fortis no longer wants to talk to the landlord as they are annoyed with them. Fortis no longer wants to talk to us because they see this as our problem and do not want to deal with the landowners any more.
>
> My concern is this: the attached [Ms. Hiebert’s email from earlier that day] clearly notes that the customer is the landlord and they have requested one design – a design which we know will allow them to subdivide their property. They could have power through other designs. They sent us one of two quotes which were provided to them (Fortis contact let me know they provided two quotes and that they could build a powerline to their RV/Cabin/dwelling). I have requested the other quote from them.
>
> They are looking to get TELUS to pay the cost of the upgrade. The letter clearly notes that FORTIS requires a [statutory right of way] for the powerline in FORTIS’ name.
>
> I don’t see why TELUS would pay for a powerline upgrade (60K) and then abandon the asset to FORTIS.

> [To Mr. Kwasnycia and the defendant's manager of operations] – what other options are available to them for power? Can we drop a pole and connect them that way? I want to give them alt options for their request. They have not been honest or forthcoming with me, and it's not negotiating in good faith.
>
> It would be more expensive for them to build their own powerline that to be honest and work fairly with us.
>
> [To legal counsel] – I am concerned with the below as they have not returned the letter we previously sent. What position does this put us in legally in terms of the overholding?

[120] Ms. Kahlon testified that it was Mr. Mirsky who was annoyed with the Hieberts and did not want to work with them anymore. He was the one who had advised her that the single quote that they were pursuing was the one that would allow them to subdivide the property. Ms. Kahlon's understanding was that the Hieberts had another quote that would allow them to obtain power to the residence on the property. Fortis was also the source of her understanding that they wanted the defendant to pay for the upgrade to the line, which Fortis no longer wished to carry out.

[121] She said that her comments about the Hieberts' honesty reflected her views at that point in time, but that she would not say that about them later on in the process. She did not communicate her later change of view about their honesty because she did not think they were interested in her feelings, but rather in finding a solution. However, when she was asked at the conclusion of her cross-examination whether she thought that the Hieberts were not honest, she said that she did not know.

[122] She testified that the problem she had in dealing with this situation was that Fortis was not interested in the single design that the Hieberts wanted, but she was unable to access the other designs that she had been told were available, and could not assess whether there was a plan that would work for the defendant's infrastructure.

[123] After her request to Ms. Hiebert on October 10 to "please send [the additional quote] over", Ms. Kahlon did not reply to any of Ms. Hiebert's further emails, in which

Ms. Hiebert asked her who at Fortis had advised that there were two quotes (so that she could follow up with that person) and then asked for updates on the status of the matter. These emails were sent in October and early November 2017, and then in April and May of 2018. They included a request to another official at the defendant's parent company for the contact information of someone else they could speak to about the situation, or a different number at which Ms. Kahlon could be reached.

[124] Ms. Kahlon testified that she did not reply to the October emails because Fortis had asked the Hieberts to put their request "in the queue" and it would come to the defendant as a request by that route. Also, because of the way the conversations between them had been going, she felt that there was "not a lot to reply to".

[125] She did not share the information about Fortis's position with the Hieberts.

[126] In June 2018 the Hieberts sent Ms. Kahlon the following email:

> For several months we have tried to have communications with TELUS regarding the powerline that is in trespass on our property. It is apparent through TELUS's inaction and lack of reciprocation that TELUS has no intention of discussing this matter with us. At this point we ask that [the defendant] pay the owners of the property an amount of $2000.00 per month with back payments owed from July 2017 to present with ongoing payments of $2000.00 made monthly until such time that TELUS has removed their works from the property of interest.
>
> [Emphasis added]

[127] Ms. Hiebert agreed with the suggestion that the negotiations with the defendant were "over" at that point, and that it was apparent that it did not want to enter into discussions about the proposal contained in the May 2017 Fortis quote that it take over the defendant's line.

[128] Ms. Kahlon did not recall receiving this email, and did not have a copy of it when she testified. She said that had she received it she would have referred the matter to the other members of her team and the defendant's legal counsel, to act on the demand contained in it.

[129] On October 17, 2018, Ms. Kahlon sent the following email to members of her team:

> I just had a chat with my colleague over at Fortis.
>
> They are interested in buying the line off of us as is, upgrading to the [landlord] spec, and then connecting power to TELUS.
>
> The [landlord] has gone to the MLA and put pressure on FORTIS to provide them with power.
>
> The costs involved for TELUS under this scenario are:
>
> 1) Cost of moving TELUS equipment with respect to the interchange near the three closely placed poles.
>
> 2) TELUS to get an agreement for the minimal encroachment on the property line.
>
> TELUS would continue to have dedicated power to the tower.
>
> Please let me know your thoughts and have a review of the attached design.

[130] On October 26 she emailed Mr. Mirsky to say that her team was reviewing the drawing (presumably of the proposed design) and that it "looks good".

[131] Ms. Kahlon was not sure if she had shared this information with the Hieberts and did not know if she had a record of doing so, including whether it was recorded in an email. She did not tell them that she was working on the issue behind closed doors because they had gone to their MLA and were working with Fortis. The defendant's "scope" in the matter was smaller, and although Fortis was communicating about providing electricity to the Hieberts, they were Fortis's customer, and the issue was between them and Fortis.

[132] In November 2018 the Hieberts received a letter from Ms. Kahlon in which she wrote

> As you know, we are currently working to find a viable solution to connect your property with a powerline. Unfortunately, we faced several complex issues that prevent us to move forward as fast as we would have wanted. However, we are still hoping to come up with a resolution to this matter.

[133] Once again Ms. Kahlon proposed the defendant paying $208.33 per month for a temporary right of way until the issue was resolved, and enclosed a cheque for

the period since the one that was covered by the initial $5000 payment. This time the Hieberts did not deposit the cheque.

[134] She was later advised that there had been a “scope change” by the Hieberts with Fortis and so the defendant did not receive a final plan for the line to address.

[135] The Hieberts replied on February 2, 2019, expressing their frustration at the defendant’s refusal to engage with their proposed solution and expressing doubt that there had been any “complex issues” for the defendant to resolve. Most importantly, they formally requested that the defendant remove its “works” from the property by the end of that month. They retained their current litigation counsel shortly after sending that message.

[136] Ms. Hiebert could not recall having taken any steps to follow up with the defendant between their email the previous June demanding that it remove the line, and this email.

[137] She was shown a second quote from Advanced Powerlines, which was issued to the defendant, to the attention of Mr. Kwasnycia, on February 25, 2019. It appeared to be identical to the one that the Hieberts had obtained but not initially forwarded to the defendant in 2017, and was based on a Fortis drawing that bore the same identifying number. This quote suggests that the defendant was continuing to explore options with respect to the line until shortly before it was removed.

[138] As I indicated at the outset, the defendant removed its line in March 2019.

[139] Despite the Hieberts’ overall position on the effect of the defendant’s trespass, Ms. Hiebert agreed in cross-examination that the presence of its poles on the property did not interfere with their use of the property, since they had not intended to build on the right of way.

[140] In response to the suggestion that the defendant did not force them to make any of the choices that they made, she said that the responses that they received

"felt threatening" and that they had made choices based on the feelings that had been evoked by their conversations.

[141] While Ms. Kahlon agreed that the Hieberts conveyed the overall message that the defendant should work with them or get off their property, they also conveyed that they preferred to work with the defendant, a preference that the defendant shared. She said that she was not aware of any of the Hieberts' other plans to obtain electricity without the defendant's involvement.

[142] She was not prepared to admit that the emails between her and the Hieberts in themselves provided an overall accurate representation of the nature of her communications with them. She said that there were also quite a few phone calls, which were necessary in light of the tone of some of the emails. She was also not prepared to agree that there was a "communications problem" between them. She explained that there are channels that have to be gone through with an asset of this nature, and "things can be complicated" when two large organizations are involved. She also rejected the suggestion that there had been a breakdown between what the Hieberts wanted and what she thought they were after. What they did not understand, in her view, was that the defendant "needed to see if we were keeping the asset".

Further Efforts to Obtain Electricity

[143] In June 2018 the Hieberts pursued an alternative route to bring electricity to their property - from the Fortis line on Highway 97 and across a neighbouring property that is located to their east. This was based on an estimate that Fortis had provided the preceding month. They went as far as to pay $50,000 for the installation, only for Fortis to find that an encumbrance on the neighbour's property meant that its required right of way for the line would not have priority. Such priority is an essential requirement for Fortis to build on private property, so, the route was no longer viable.

[144] That plan would have involved the new line going underground, below the defendant's existing line, so the defendant's line would not have interfered with it.

Ms. Hiebert agreed, based on the usual amount of time that elapsed between their initial discussions with Fortis about a route and receiving a quote from them, that by "the beginning of 2018" she and her husband were going to proceed with that plan, and that it did not matter in that regard what the defendant ultimately did about the right of way. Mr. Hiebert agreed that the defendant's line did not prevent that particular design from moving forward, and that "all would have been well" but for the issue with Fortis's right of way across the neighbour's property.

[145] Despite this concession, and although Mr. Hiebert also agreed that Mr. Barbour provided him with a sketch in October 2017 that eventually became this route over the neighbour's property, he did not agree as of that month they were no longer waiting for the defendant to make a decision about the provision of electricity over its existing route. He explained that they were looking at another option because the one with the defendant "was not moving forward", and that the defendant would not communicate with them so that they "could take its poles down". When the plan involving the neighbour failed they were "back to waiting for [the defendant] to let us use that area." He could not recall making any actual request to the defendant to leave the property before October 2017 however.

[146] His perspective was that by refusing to either "come to the table" with them or agree to leave the property, the defendant had compelled them to pursue a less desirable route. The underpinning of this position was that the best route was the one along the defendant's line, which provided "the only good access" to the property. His position was that they "never gave up" on the defendant in pursuing the use of its route. Ms. Hiebert similarly maintained that it was the refusal of the defendant to enter into discussions with them that had forced them to seek such other routes.

[147] In response to a question about why the plaintiff was claiming the costs of generating its own electricity from the time that she and her husband moved on to the property, even though at that point they had not presented any proposal to the

defendant yet, she expressed the view that the presence of the defendant's line prevented them from "running [their] own power".

[148] They were finally able to achieve their goal when a road developed by another neighbour received government approval in October 2019, which allowed Fortis to use the road as part of the route of a power line. This enabled electricity to be connected to their property in March 2020 (Mr. Hiebert thought it was in approximately January of that year).

[149] Although the former route of the defendant's line was vacant by then, Ms. Hiebert said that Fortis's preference was to access their property by means of a public road. She agreed that even when the defendant's line was still in place it appeared from the diagrams that it would not have interfered with this route for their line, which essentially followed the new road. More generally, she agreed that this plan "had nothing to do with [the defendant] one way or another".

[150] However, Mr. Hiebert, as he had with the previous plan, maintained that they had been "pushed toward" this one by the defendant, "for lack of being able to do anything else". In addition to the alternatives that they had considered and ruled out at the early stages, access to electricity from other directions was ruled out by such factors as even steeper terrain, distance from any Fortis lines or the need to cross properties that would not permit it.

[151] Nevertheless, he agreed that the delay in implementing their final successful plan was the result of the time that it took for the road to be approved, and that the existence of the defendant's line did not affect putting that plan into effect.

[152] Even though the defendant's line had been removed by the time this design was finalized, they did not change the part of their route that travelled underground in that area, because they did not want to have any more delays.

Damages

[153] For the first few months after they moved on onto the property, the Hieberts lived in a travel trailer and paid their neighbour to plug it in to the neighbour's electricity. In May 2017 they installed a manufactured home in an area of the property in which they were planning to build a house.

[154] To provide electricity for the manufactured home they had to run a generator, and they eventually bought two generators for that purpose. Ms. Hiebert said that they expected this form of power to be a temporary measure until the defendant had reviewed the quote and a new line was finalized – by the fall of 2017 at the latest.

[155] Using a generator imposed significant restrictions on their living arrangements, and the cost and time of running and maintaining it were also significant.

[156] In July 2018 they installed a solar power system to supplement the generator. They obtained the solar power system after they found out that the route involving crossing their neighbour's property was not going to work. The purpose was to reduce fuel costs and noise, and to obtain a more consistent form of power.

[157] Ms. Hiebert identified a series of invoices, spreadsheets and corporate journal entries that she said captured the expenses that the plaintiff company incurred to provide electricity to the property as a result of the defendant's actions. Distilling them down to what the plaintiff ultimately claimed, they were:

- Equipment and labour relating to the generators, but deducting the cost of the one that is still used by them: $13,790.65;

- Fuel for the generators: $32,005.56 (calculated as the cost of fuel per hour x the number of hours running);

- Equipment and labour relating to the solar power system: $34,697.39. (Mr. Hiebert said that once they had electricity connected to their property it was not economical to use this system to sell the power that it generated to

Fortis or to sell the system itself, which has become outdated, so it had no continuing value.)

[158] This total of their out of pocket expenses to provide themselves with electricity is $80,493.60.

[159] The receipts that were provided show the purchases being made by the Hieberts' construction company. As I initially described, the corporate structure arranged by the Hieberts is that the plaintiff, as the owner of the property, serves as the landlord to their contracting business. The business also performs work for the plaintiff on the property, such as clearing land, for which it is paid by the plaintiff. The rent and other property-related expenses that the business owes to the plaintiff, and the payments to the business by the plaintiff for carrying out work on the property, are dealt with by an adjustment between the companies that is carried out by their accountant. That is also how the electricity-generating expenses that were incurred by the contracting company were "paid" by the plaintiff.

[160] Ms. Hiebert characterized their contracting business as the agent of the plaintiff, although she conceded that no formal agency agreement existed.

[161] She explained that the only specific benefit to the plaintiff of having electricity available to the property is that a portion of the office that they have erected on the property (a separate structure from the modular home) is used for the plaintiff's business. More generally however, she said that the plaintiff benefits from the contracting company that utilizes that property and pays it rent and other expenses having power.

Principles

[162] There is no dispute that, subject to any defence that may apply, the elements of the tort of trespass were satisfied by the presence of the defendant's line on the plaintiff's property, from the date on which the plaintiffs took possession of the property to the date that the defendant removed the line. Those elements are: a direct and physical intrusion onto land that is in the possession of the plaintiff which,

if not intentional, must at least be voluntary: Linden et al, *Canadian Tort Law*, 12th ed. at 11.01.

[163] Instead, the issues are (1) whether the plaintiff consented to the continuing presence of the line, either because they were being paid for it or were engaged in negotiations with the defendant to replace it, and (2) to the extent that the defence of consent does not apply, what damages they are entitled to for the trespass.

[164] The nature of consent in this context was helpfully summarized in *Manak v. Hanelt*, 2022 BCSC 1446:

> 40 Consent or "leave and licence" is a defence to a trespass claim. The burden of proving consent rests on the defendant. Consent may be: (1) express as a result of an agreement; or (2) implied from conduct, or the plaintiff's acquiescence after the entry onto the land, in which case the consent is deemed to have been given retroactively; or (3) a combination of all of these. All relevant circumstances must be examined. Mere silence of the plaintiff will not necessarily be construed as consent. Consent may be limited in scope and may be revoked. The plaintiff alleged to have acquiesced must have had full knowledge of his or her legal rights…[Internal citations omitted].

[165] As part of its through canvass of the authorities on this issue, *Montreal Trust Co. v. Williston Wildcatters Corp.*, 2004 SKCA 116 at para. 36, leave to the S.C.C. refused [2004] S.C.C.A. No. 474, notes that “the anticipation of an agreement” is another of the bases on which leave and licence could be established.

[166] If a trespass is nonetheless proven, the defendant is liable for damages. *Volovsek v. Boisvenu Estate*, 2021 BCCA 179 explains that:

> 62 In the absence of extenuating circumstances giving rise to claims of exemplary and aggravated damages, the types of damages available for a trespass are the following:
>
> (a) nominal damages if the owner has not proven any actual loss;
>
> (b) actual damages suffered by the owner; or
>
> (c) damages equal to a sum that should reasonably be paid by the trespasser for the use of the land…

[167] With respect to (b), compensatory damages are intended to place the owner in the same position as if the wrong had not occurred. They will include

compensation for loss of use of land and for loss of amenities, as well as for remedial work, provided that the latter is fair and reasonable: *Dragica Radic Trust (Trustee of) v. 1128 Enterprises Ltd.*, 2019 BCSC 117 at para. 79.

[168] The plaintiff has put its claim for the costs of providing alternative electricity under the heading of "special damages". Those are not specifically referred to in this excerpt from *Volovsek*, but I think that according to its theory, compensation for those out of pocket costs would help place it in the same position as if this trespass had not occurred, so I will consider them as being compensatory in nature.

[169] The damages for the use of the land referred to in paragraph (c) above are also known as mesne profits. Their nature was explained in *Initiate School of the Canadian Rocky Mountains Ltd. v. Wolfenden Ventures Ltd.*, 2013 BCSC 257:

> [41] …Mesne profits are damages suffered by the land owner for having been wrongfully put out of his property. A non-exhaustive list of the factors relevant to the assessment of mesne profits includes:
>
> 1. The terms on which the owner could have let the property to another during the trespass period;
> 2. The rent the occupier paid before the trespass began;
> 3. Actual profits obtained by the occupier during the trespass; and
> 4. Rents paid by occupiers of similar properties.
>
> [42] It is important to note that no one factor is essential to the award. That is to say, an owner may be entitled to mesne profits even though it cannot show that it would have let the land to someone else.

[170] This list was referred to with approval by the Court of Appeal in *Volovsek*.

[171] The reasoning underlying punitive, or exemplary damages was discussed in *Gibson v. F.K. Developments Ltd.*, 2017 BCSC 2153:

> 59 Punitive damages arise in tort where there is an actionable wrong, that wrong has injured the plaintiff and the conduct of the defendant demands condemnation... They are intended to address the need for retribution, deterrence and denunciation... They are a form of punishment. They are intended to both deter the defendant from such conduct in the future and to denounce that conduct. They arise where the defendant's conduct is particularly egregious and a marked departure from ordinary standards of conduct ... They are sometimes referred to as arising where the conduct in

> issue is malicious, oppressive or high-handed such that the court's sense of decency is offended…[internal citations omitted.

[172] In addition, "[s]ince the primary vehicle of punishment is criminal law, punitive damages should be resorted to only in exceptional cases and with restraint". Further, a court should ask itself "in particular" how an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose: *Bowen Contracting Ltd. v. B.C. Log Spill Recovery Co-operative Assn.*, 2009 BCCA 457 at para. 23, citing *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 67-76.

[173] The other type of damages referred to in *Volovsek* are aggravated damages. They seek to "compensate for the manner in which the defendant's conduct affected the plaintiff" (e.g. pain and suffering, mental distress and emotional shock) and "arise where the conduct of the defendant is particularly poor": *Gibson* at para. 54. I did not understand the plaintiff to be seeking this type of damages.

Positions

Plaintiff

[174] It says that the defendant's actions in this case represent an ongoing refusal, despite being the trespassing party, to engage in any meaningful communications with the Hieberts about resolving the trespass in a way that would benefit both parties.

[175] It submits that far from seeking to gain any advantage from the defendant, the Hieberts initially tried to avoid the defendant's line entirely by pursuing the northern route, turning to the option of replacing the defendant's line only when their original plan turned out to be too expensive.

[176] The defendant's actions then thwarted that alternative. Ms. Kahlon was not provided with the extensive communications that had taken place with Mr. Reitenbach and, despite learning from Mr. Kwasnycia how the Hieberts wanted to proceed, she provided them with suggestions that they had already considered and rejected. She also persisted in investigating Fortis's willingness to take the line

over when the Hieberts had already submitted the quote for the cost of doing so that Fortis itself had prepared.

[177] To make matters worse, she is said to have mischaracterized their proposal in her dealings with Fortis as Fortis purchasing the line from the defendant. Then, when Fortis indicated that it was not willing to do so, she mistakenly focused on the unfairness of the defendant paying for it so that Fortis could own it. In fact, what the Hieberts needed to know was whether the defendant would give its permission for its line to be removed, and was willing to pay its own specific costs for hooking up to the new line.

[178] Other misconceptions on Ms. Kahlon's part that are said to have impeded any productive discussions with the Hieberts were that they wanted the defendant to pay for their line, and that they were withholding another quote that related to the defendant (as we now know, it related to the northern route that they had abandoned by then). Ms. Kahlon is also said to have inaccurately impugned the Hieberts' motives and honesty in her communications with her team, which was a further impediment to productive negotiations.

[179] Then, after failing to respond to the Hieberts for a considerable period, Ms. Kahlon, now knowing that Fortis was willing to move forward with a new line under political pressure, made a further rental payment offer, which was rejected, leading to the demand for removal that the defendant finally complied with.

[180] The bottom line, according to the plaintiff, is that it spent three years trying to mitigate the effects of the defendant's trespass, which was analogous to a wall in the way that it impeded their full use of the property.

[181] The damages it seeks are intended to address the defendant's use and enjoyment of the property during the period and the costs the plaintiff incurred while dealing with the trespass, and to send a message to the defendant that its conduct fell below an acceptable standard.

[182] The plaintiff rejects the suggestion that there was ever any consent to the trespass. What occurred between the parties were only unsuccessful negotiations for the defendant to secure a new right of way, initially on its own and then as part of a Fortis-owned power line on the property. No agreement that would have authorized the trespass ever resulted from those negotiations.

[183] The defendant was repeatedly advised, both by the Hieberts and counsel on their behalf, that failing an agreement by a specified date its line had to be removed so that the Hieberts could obtain their own electricity. The defendant repeatedly refused to comply.

[184] The plaintiff emphasizes the requirement described in the *Manak* decision that the party who is alleged to have consented must have had full knowledge of their legal rights. In this case, when the defendant was protected by federal legislation and Fortis was not permitted to disconnect it, the plaintiff did not have any meaningful ability to exercise its rights. Thus, its acquiescence, when it could not do anything about the defendant's presence, is not meaningful.

[185] Similarly, it cannot be said that the acceptance of the $5000 cheque by the Hieberts represented a consent to the trespass. It was issued by the trespassing party with no conditions attached to it, and represented only what the defendant thought was reasonable. Accepting it was based on the Hieberts' expectation that the defendant was acting in the manner that it had represented, instead of pursuing only its own interests.

[186] A further relevant point is that these were not negotiations between parties who were in an equal position. To the extent that the plaintiff "put up" with the trespass, it was in the belief that negotiations to achieve its objective of obtaining electricity as part of the agreement would be carried out in good faith. Except for the short period between the Hieberts raising that possibility and the Fortis quote for replacing the defendant's line being issued, good faith was not present in the defendant's actions, the plaintiff argues.

[187] With respect to damages, the plaintiff suggests that the appropriate reference points for mesne profits can be found in the annual rent offered by the defendant ($2500/year), and the various amounts requested by the Hieberts over the duration of the trespass, which ranged from $2000 to $5000.The plaintiff frames the essential question as being what the Hieberts would have charged if the effect of occupying the right of way had been to prevent them from obtaining electricity. In that way, the plaintiff's actions were analogous to an expropriation (albeit not of the same permanence). At the end of the day, these damages should be "a holistic all-encompassing solution" that is fair to both parties.

[188] It submits that such a figure in this case would be $1000 per month for the two years and nine months from its purchase of the property with the trespass ongoing in June 2016 to the removal of the line in March 2019. This total would be $33,000.

[189] As to compensatory damages (or special damages as it describes them), as a threshold issue, the plaintiff submits that the book entries by which expenses incurred by the Hieberts' contracting company were attributed as debts to the plaintiff provide a valid basis for the plaintiff to recover those costs as out of pocket expenses. It characterizes the contracting company's efforts as the plaintiff's way of interacting with the world, and of course the directing minds of both companies were the Hieberts.

[190] An example of book entries being found to be the functional equivalent of cash payments is found in *Balic v. Balic*, 2006 BCCA 335. In that family law case the husband had purchased a property using the proceeds of a loan he had received from a subsidiary of a company whose shares were family assets. The company issued a T4 to the husband for $12,000 each year for services performed by him and the amount of the loan was reduced accordingly. Justice Newbury, for the Court, reasoned that:

> 17…The arrangement under which Mr. Balic (effectively) paid the amount due each year was hardly novel or nefarious in my respectful view. The effect was the same as if the company had paid out a salary or other fee to

> Mr. Balic, and he had then paid down the loan using the cash thus received. Instead, the necessary book entries were made without the cash actually being paid out and repaid - a common arrangement not usually objected to by the tax authorities…
>
> [Emphasis added]

[191] Proceeding on the basis that such a means of the plaintiff absorbing the Hieberts' electricity-related expenses is valid, it seeks the following, as reflected in Ms. Hiebert's testimony and the accompanying documents:

- Generator expenses, excluding fuel and GST and subtracting the purchased generator that is still used on the property: $13,790.65;
- Fuel for the generator: $32,005.56;
- Solar power expenses: $34,697.39

[192] The total of these figures is $80,493.60, which the plaintiff rounds down to $80,000 as the amount claimed.

[193] The need for exemplary or punitive damages in this case is said to arise from the defendant's high-handed conduct, as a commercial enterprise making profits using private land under an expired right of way. Despite occupying that role, it was not diligent in resolving the situation, instead seeking only the best solution for itself, and invoking all of the protections available to it when the Hieberts questioned its actions. It operated with what is described as "a level of impunity" – requiring the Hieberts to wait for electricity, until it was prepared to inform them of its decision. Its overall attitude is described as being "If we get caught we will deal with it". The plaintiff submits that this is not how trespassing parties should behave, and damages are therefore required to send a message to the defendant that it needs to be more cooperative and considerate in those circumstances.

[194] The plaintiff cites the example of *Austin v. Rescon Construction (1984) Ltd.* (1989), 36 B.C.L.R. (2d) 21 (C.A.), in which the defendant installed steel rods under the plaintiff's property to shore up the excavation on the adjacent property, after only

perfunctory efforts to obtain the plaintiff's consent. The rods did not immediately interfere with the use of the plaintiff's property but he would have to pay to remove them if he ever wanted to redevelop it. The Court of Appeal increased the award of exemplary damages to $30,000, from the $7,500 that had been awarded at trial. In doing so the Court took into account the profit that the defendant had obtained through its actions, and referred to the principle articulated in *Rookes v. Barnard*, [1964] A.C. 1129, at p. 1227 that "[e]xemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay."

[195] The plaintiff therefore seeks an award of $26,000 under this heading.

Defendant

[196] Dealing first with its consent defence, the defendant submits that during the initial period in which the parties were negotiating the terms of a new right of way, and produced an agreement that the defendant was largely prepared to accept pending any further concerns being raised by the plaintiffs (June to December 2016), there was never any suggestion by the Hieberts that the defendant did not have their consent to remain.

[197] The same is true for the period of May 2017 to May 2018, once the Hieberts had made their request to consider the option of a Fortis powerline along the defendant's route. More importantly though, in August 2017, in response to the letter from their counsel seeking an annual fee for its use of the right of way to that point and a monthly fee from then on, Ms. Kahlon issued a cheque that, by covering the year before the plaintiff had purchased the property, effectively paid for its use until June 2018 at the requested rates, which the Hieberts cashed.

[198] Also importantly from the defendant's perspective, although Ms. Hiebert's October 2017 email asked whether the defendant would be accepting the May 2017 Fortis quote or removing its line, she did not request that it remove the line.

[199] For the final period from May 2018 until the line was removed, the defendant points out that Ms. Kahlon did not recall receiving the Hieberts' demand to vacate in

July 2018, and that if she had received it she would have immediately put the process in motion, as she did in response to the demand in February 2019 that she did receive. The defendant remained for only a matter of weeks before carrying out the removal. Even if the demand that the Hieberts made the previous July is accepted as the date of notice, it remained for less than six months.

[200] To the extent that any damages must be paid, the defendant submits that the "at large" portion of them should be nominal. The trespass was the result on an oversight on the defendant's part, after having had the line in place for an extended period. There was no damage caused by its presence and, as the defendant addressed further when responding to the claim for the costs of temporarily generating electricity, it did not interfere with any activities on the property.

[201] In *Howes v. FortisBC*, 2021 BCSC 2271, Justice Tucker found that power lines and poles that crossed the plaintiff's property, and in relation to which an attempt to negotiate a right of way had failed, constituted a "relatively inconsequential trespass", given the lack of impairment of her use and enjoyment of the property. Aside from the line itself, the part of the property was unserviced and undeveloped, and as a result the only damages that Tucker J. found appropriate were for the defendant's reasonable use of the property during the trespass, which she fixed at $4000 for a four-year period.

[202] The defendant says that it is more appropriate to focus on the sum that should reasonably have been paid, which was the amount that was demanded by the Hieberts' counsel, paid by Ms. Kahlon in response, and offered by her again in November 2018. The Hieberts considered this to be an appropriate amount of compensation at the time, as Ms. Hiebert agreed in her testimony.

[203] A key aspect of the plaintiff's claim that a higher amount of damages is required is the allegation that the defendant did not negotiate in good faith about the potential replacement of its line.

[204] First of all, the defendant notes that no obligation to negotiate in good faith exists "where there is no contract in place between the parties and where the essential terms that remain outstanding are not tied to any objective standard": *Concord Pacific Acquisitions v. Oei.*, 2019 BCSC 1190, aff'd 2022 BCCA 15. Regardless, it says that its dealings with the Hieberts did indeed meet that standard.

[205] The communications on its behalf by Mr. Reitenbach and Ms. Kahlon are said to have been professional and straightforward, and an examination of Ms. Kahlon's actions shows that throughout the process she was attempting, within the proper channels that were required within her own organization and in its dealings with Fortis, to determine the feasibility of the Hieberts' proposal. Despite their possession of a quote from Fortis, she still could not proceed unless the Fortis department that could authorize acquiring the defendant's line provided its approval, and her belief that the Hieberts had another quote for the line that they were refusing to share was the result of information that Fortis had provided to her.

[206] The defendant also argues that the belief on Ms. Kahlon's part that the Hieberts wanted it to contribute to the replacement of the line, which is reflected in her communications within her department and with Fortis, and had also been noted by Mr. Reitenbach, could only have originated with the Hieberts.

[207] More fundamentally, the defendant argues that it has not been shown that the defendant's trespass, to the extent that the plaintiff did not consent to it, caused or contributed to the plaintiff's inability to obtain electricity. The essential points supporting this argument are:

- The property had no electricity when the Hieberts bought it;
- They commissioned a plan to obtain electricity through the northern route, going as far as to pay the required deposit, and claimed to have abandoned it due to their ultimate discomfort with the cost, although there was no technical obstacle to complete it;

- They then raised the prospect of replacing the defendant's line, even though it would involve negotiation with, and coordination between two large organizations, - a process that would be further complicated by their expectation that the defendant pay for it;

- As Mr. Nelson explained, there was no obstacle to the Hieberts constructing their own line parallel to the defendant's, but there was only a minimal consideration by them of that option;

- Despite their position that the defendant stood in the way of implementing the route over its existing line, the Hieberts did not, until long after they had switched to pursuing other options, actually demand that the defendant remove its line;

- They began to pursue those options, which did not depend in any way on the defendant's actions, by as early as October 2017, and the delays in carrying them out similarly had no connection to the defendant.

[208] Finally, addressing the claim for exemplary and punitive damages, the defendant submits that nothing in its conduct begins to approach the sort of malicious, oppressive or high-handed conduct that is required to support such an award. To the contrary, it attempted to negotiate an acceptable new right of way promptly and, after the Hieberts indicated that they wished to take a different approach, Ms. Kahlon provided all possible assistance, despite the defendant being under no obligation to do so.

Discussion

[209] Dealing first with the defence that the plaintiff consented to the trespass, I think it is clear that from their first communications with Mr. Reitenbach to their introduction of the possibility of Fortis taking over the defendant's line, the Hieberts were engaged in negotiations with him to reach a new agreement on a right of way. Their conduct during this period, and Ms. Hiebert's admission that they wanted to enter into a new agreement, could give rise to no other inference but that the

successful conclusion of it was anticipated, and that the defendant's line could stay in place for that period.

[210] I do not think anything turns on how close to completion Mr. Reitenbach's final draft of December 2016 actually was. The point is that concluding it was still the objective and expectation of both parties.

[211] It was the Hieberts who, after a gap of several months, raised the new option of linking the defendant's continued presence on the property to having its line replaced. While the Hieberts grew increasingly frustrated with the pace at which the defendant dealt with their request, none of their communications about their expectations, including the letter from their lawyer in July 2017 and Ms. Hiebert's emails that month raised the possibility of the defendant removing its line other than as an alternative to the successful conclusion of negotiations, which they still obviously wished to pursue. Ms. Hiebert's emails in September and October, which explicitly referred to the goal of moving the negotiations forward, were even clearer on this point.

[212] I do not accept the plaintiff's submission that the Hieberts were at any disadvantage in dealing with the defendant during this period, whether because of Ms. Kahlon's reference to the defendant's regulatory protections or the Hiebert's knowledge that Fortis was not allowed to disconnect it. Their communications throughout this period reflect a robust understanding of their rights, including the right to eject the defendant, and of the protections available to them, including through legal representation. I am satisfied that they were tenacious in pursuing the option reflected in the May 2017 Fortis quote because they believed it to be to their advantage, and were not shy about demanding that the defendant pursue it.

[213] Overlaid on what I am satisfied was the Hieberts' consent for the defendant's line to remain while the negotiations were carried out was their acceptance in August 2017 of a cheque that was labelled as payment for the period of July 2015 (a year before the plaintiff took possession of the property) to July 2017. Ms. Hiebert agreed that by cashing the cheque they had accepted the defendant's valuation of the

appropriate amount. Her email ultimatum in June 2018 demanding $2000 per month until the line was removed, was to take effect from July 2017 onwards, the date that the payment had purported to cover. (As the defendant pointed out, when it is applied to the period in which the plaintiff was actually the owner, that amount would have covered reasonable rent until May 2018, although that is of course a different question than what the plaintiff's acceptance of it signified). Regardless of the fact that they did not sign the accompanying letter, acceptance of this payment must be seen as an acquiescence in the presence of the line from the point at which the plaintiff actually had a property interest to protect, until the conclusion of the period that it purported to cover.

[214] Although Ms. Kahlon stopped replying in October 2017, the plaintiff's sporadic attempts to restart the conversation between then and the following June were all for the same purpose as their earlier communications – to have the defendant accept the May 2017 quote. Mr. Hiebert's evidence was that their pursuit of alternative routes was only to address the defendant's unwillingness to negotiate with them, and that the quote involving it had been their preferred option, so until their unequivocal email in June 2018, it cannot be said that they were seeking to have the defendant's line removed during this period, other than considering the possibility as an undesirable alternative to the outcome they sought.

[215] I accept Ms. Kahlon's evidence that she did not recall receiving that email, but it seems to have been addressed and sent in the usual way, and there is no reason to believe that it was not received by her office, even if she did not access it for some reason. It is clear that the Hieberts no longer consented to the line remaining at that point, and the defendant did not argue that it was honestly mistaken about such consent until it received the February 2019 email to the same effect.

[216] Thus, I conclude that in one form or another the plaintiff, through its directing minds, consented to the defendant's trespass until June 2018.

[217] On the question of other damages, I am not persuaded that the defendant's trespass, to the extent that it was not consented to, carried with it any additional

duties towards the plaintiff in relation to the Hieberts' proposed new line. As a trespasser, it had the duty to arrive at an agreement for rent or remove its line. It was the Hieberts who chose to bring a new dimension to the negotiations, by adding the use of the existing line in their search for electricity.

[218] On that issue, I am satisfied that their approach to the defendant and Fortis included a request that the defendant bear some of the cost of a new line. It is inconceivable that Mr. Reitenbach, Mr. Kwasnycia, Ms. Kahlon and the Fortis officials could all have come to the same understanding, without the idea having originated with the Hieberts, and Mr. Hiebert conceded at least the possibility that it had. I acknowledge that the Hieberts delivered an estimate that broke out the defendant's costs for simply connecting to the new line, separate from the cost of building it and that their lawyer's letter demanding a resolution omits any reference to payment when describing their proposal. But it is inconceivable that if the proposal was that the defendant could have electricity to its cell tower in perpetuity for free, for doing no more than relinquishing its line to Fortis, not a single email from the Hieberts would have said that.

[219] To be clear, there was nothing wrong with the Hieberts seeking to turn the defendant's trespass and the need for a new right of way into a mutually beneficial funding arrangement that would provide them with electricity. The point is that, as Mr. Kwasnycia's internal memo of June 13, 2017 (which I am satisfied accurately captured the Hieberts' negotiating position at that time) sets out, the analysis that the defendant would have to engage in in order to reach an agreement was not particularly simple.

[220] This leads to a more general characterization of the negotiations, which is that the Hieberts seem to have misunderstood the complexity of their proposal as between the defendant and Fortis. In their minds, they had a Fortis quote about the cost of the proposed line which the defendant had a simple choice (keeping in mind my finding that they wanted some form of contribution from it) to accept or not. They did not grasp that the fact that Fortis had given them a quote for building that new

line was not the equivalent of Fortis's overall agreement to assume the line from the defendant, as an aspect of its property operations. I do not fault them for lacking knowledge of such technical details, but they have accused Ms. Kahlon of inaction and stonewalling, without putting forward any actual basis on which to doubt her description of the process that she was faced with. No doubt they perceived the process as being unsatisfactory, but Ms. Kahlon's evidence satisfies me that it was the one that the defendant was required to pursue.

[221] While I accept the defendant's submission that good faith was not required in these negotiations, given the context in which they arose, I am satisfied that good faith was in fact shown to the Hieberts here. Mr. Reitenbach's efforts to secure a new agreement were responsive and fair. Further, bearing in mind that she was responding to an option initiated by the Hieberts that did not conform to her usual property negotiations, Ms. Kahlon did a reasonable job of responding to them and seeking to advance their proposal. Her frustration with them by the fall of 2017, which seems to have been shared by Fortis officials, could perhaps have been better expressed by an email to them summarizing why their proposal could not proceed, rather than by not responding to them for several months, but that is an example of human imperfection, rather than of negotiating in bad faith.

[222] In addition, although I have concluded that nothing about the way that the defendant handled the negotiations caused or contributed to damages suffered by the plaintiff, it is also necessary to determine whether the presence of the line itself, from June 2018 to its removal (or, if I am mistaken in my analysis of consent, from the Hieberts beginning to incur electricity costs on the property in March 2017) did so.

[223] The significance of the northern route, which was effectively abandoned by the time they began to use the generators, is that there was a viable option that the Hieberts chose to abandon solely due to costs concerns, even though it would have brought them electricity despite the presence of the defendant's line. Mr. Hiebert contended that they pursued that route to avoid the defendant's trespass, but that

position is contradicted by the fact that there was no technical reason that a line could not have been built parallel to the defendant's. That option was pursued by him and his wife in only the most perfunctory way, if at all. In other words, the trespass was never a barrier to building their own line along the same route. The proposal that ended up being made by them, I am satisfied, was in order to involve the defendant in bearing a portion of the cost (Ms. Kahlon's testimony and internal communications that they wanted this option because it was the one that would have allowed them to subdivide was not pursued during cross-examination of them or in submissions, and I would not place any weight on it.)

[224] The subsequent efforts to obtain electricity through the route involving the neighbour and the one along the newly-commissioned road are capable of showing, in themselves, that the Hieberts were not being impeded in their attempts to obtain electricity by the presence of the defendant's line. The reality, augmented by the viability of a parallel line, is that they had not been impeded by it at any earlier point, other than by their own attempts to leverage it into having the new line at least partly funded.

[225] As a result, I am unable to find that any of the costs claimed by the plaintiff are legitimate damages for the trespass.

[226] Had I concluded that any such damages had been proven, I would not have found the fact that the costs being claimed were paid by the plaintiff by means of accounting entries with the Hieberts' contracting company to be an impediment to awarding them. Notwithstanding the lack of a formal agency relationship, and the somewhat imprecise manner in which the financial relationship between the companies was documented, there is no real doubt that at the end of the day, as a practical matter, the plaintiff bore the financial brunt of funding alternative sources of electricity.

[227] It almost goes without saying that my finding that there was no requirement for, much less any lack of good faith in in the negotiations that exemplary or punitive damages are not called for in this situation.

[228] Some form of reasonable rent for the use of the right of way during the period that was not covered by consent must of course be paid. I think that the parties' own mutual acceptance of $2500 per year or $208.33 through the cashing of Mr. Reitenbach's cheque fairly reflects such an amount, as does the same yearly amount having been demanded by their lawyer (although with a higher ongoing monthly amount). As I have pointed out, the $5000 he paid them for that purpose purported to extend back to the year before the plaintiff owned the property, and if it were to be applied from the plaintiff's actual ownership date onwards it would actually have extended until July 2018. Given that the Hieberts seem to have taken the purported coverage period at face value in their subsequent email, I would not hold that apparent error by Mr. Reitenbach against them. Damages for mesne profits should therefore be awarded from July 2017 to March 2019 at $208.33 per month, a period of 20 months, which totals $4166.60.

[229] Although it has obviously received much more limited damages than it sought, the plaintiff has established liability and would in the ordinary course receive its damages at the usual scale of difficulty: see *Loft v. Nat,* 2014 BCCA 108*,* at para. 47. However, if there are matters that would affect that tentative conclusion, such as offers to settle, counsel may make written submissions on costs, according to whatever schedule for filing and exchanging their submissions they find convenient.

"Schultes J."