

### Introduction

As always, Manitoba Public Insurance acknowledges the importance and the many benefits derived from the public rate setting process. Basic rates are more fair and equitable and ratemaking at MPI has improved as a result of the PUB process. In making its decision to decline to respond to numerous Information Requests, MPI considered carefully the importance and benefits of the rate setting process along the legal framework (both in legislation and in case law) creating the powers of the PUB and the other government entities to which it is accountable.

In this motion, CAC seeks to expand the jurisdiction of the PUB to require MPI to provide information irrelevant for rate-setting and thereby undertake operational and other reviews of MPI that are the responsibility of other Government entities.

The PUB's sole function is to review and approve proposed changes to rates for Basic, which are proposed annually by MPI. The reality is that the requested information not responded to is *not* required by the PUB. By ordering its production, the PUB would be extending its jurisdiction in a manner not intended by the Legislature.

The case law at the Supreme Court of Canada and provincial courts of appeal regarding disputed tribunal orders ultimately boils down to one simple question: what is the mandate/jurisdiction of the tribunal? Determining the jurisdiction of a statutory body such as the PUB is based upon reviewing and interpreting the statutes which will follow.

This brief addresses the following points:

- 1 - What legislation determines the jurisdiction of the PUB in respect to MPI?
- 2 - What is the scope of the jurisdiction of the PUB in relation to MPI?
- 3 - What is the law of relevancy for a PUB rates hearing?
- 4 - Application of law to the 2015 GRA and Information Requests Not Answered

### **1 - What legislation determines the jurisdiction of the Public Utilities Board in respect to Manitoba Public Insurance?**

Both the PUB and MPI are created by statute. Their respective jurisdictions are established by statute. The Manitoba Court of Appeal in *PUB v. MPI* [2011] M.J. No. 377 determined that the jurisdiction of the PUB in relation to MPI is set out in three Acts:

1. *The Crown Corporations Public Review and Accountability Act*;
2. *The Public Utilities Board Act*;
3. *The Manitoba Public Insurance Corporation Act*.

The Court of Appeal made the following comments about the jurisdiction of the PUB:

*31 The mandate of the PUB, in the context of this case, is set out in s. 26 of The CCAA, that being to review and approve the MPI's rate bases and premiums charged with respect to compulsory driver and vehicle insurance. As can be seen from its annual orders, the PUB has expressed dissatisfaction with three aspects of its mandate:*

- from the beginning of its oversight of the MPI, the PUB has expressed dissatisfaction with its limited jurisdiction and has been looking both to obtain information related to the non-basic lines of business and to expand its jurisdiction to include the review of rates for non-basic lines of business;*
- the PUB has taken the position that driver and vehicle licensing should have been included with the basic line of business, rather than the non-basic, and for many years has been recommending that it be moved so that it will be subject to review by the PUB; and*
- the PUB has expressed dissatisfaction with the fact that it has not been involved in the planning for significant changes to the MPI's operations affecting both the basic and non-basic lines of business, but rather has only received disclosure at the subsequent general rate application.*

*32 Notwithstanding the fact that the PUB has made its concerns known to the government on an annual basis since 1989, the government has not made any changes to the PUB's legislated mandate to expand its jurisdiction. Clearly, the government must be aware of the PUB's concerns and, notwithstanding, is either satisfied with the PUB's existing limited mandate or, at least to date, has chosen not to act on those concerns.*

*33 While all parties agree that its mandate, as set out in s. 26, must be interpreted in accordance with the scheme of the legislation, the PUB has looked at only two statutes, being The PUB Act and The CCAA. In fact, that scheme also includes The MPI Act, which legislates additional significant controls by the government over the activities of the MPI.*

*34 Under the legislative scheme, the Crown Corporations Council has the mandate to review all long-term plans and to receive and review the annual financial statements for the MPI's entire business, which would include both basic insurance and the non-basic lines of business. The government receives financial disclosure of the MPI's entire operation, including both basic and non-basic lines of business, which includes an annual report of its operations and the annual audited financial statements, all of which are subject to public review by a committee of the Legislature. The government has the ultimate authority to approve and enact all rates for both basic insurance and the non-basic lines of business, subject to the proviso that it cannot approve rates for basic insurance that have not been approved by the PUB. It, therefore, has the ultimate responsibility for the financial health of the MPI. It is within this legislative scheme that the PUB's mandate to review the rates for only basic insurance must be interpreted.*

## **2 - What is the scope of the jurisdiction of the PUB in relation to MPI?**

The starting point of the analysis is *The Crown Corporations Public Review and Accountability Act (CCAA)*. Section 26 of the CCAA gives specific authority to the PUB; however, the analysis of the PUB authority does not begin with this section. The analysis must begin with the purpose and intention of the CCAA as a whole. The interpretation of a particular section in an Act must be done in the context of the entire

legislative scheme. As the Court of Appeal stated in *PUB v. MPI* [2011] M.J. No. 377, "It is within this legislative scheme that the PUB's mandate to review the rates for only basic insurance must be interpreted." This legislative scheme includes the CCAA, the *MPI Act* and the *PUB Act*.

*2A - The Legislated Role of Crown Corporation Council vis-a-vis MPI*

The CCAA essentially applies to the three crown corporations: 1) MPI, 2) Manitoba Hydro and 3) Manitoba Liquor and Lotteries Corporation. Part II of the CCAA establishes the Crown Corporations Council. The Council's duties and powers are set out in 6 of the CCAA.

***Duties of council***

*6(1) The council shall*

- (a) facilitate, in co-operation with each corporation, the development of a clearly defined mandate and a clear statement of purpose for the corporation;*
- (b) facilitate, in co-operation with each corporation, the development of consistent and effective criteria for measuring the corporation's performance;*
- (c) review long term corporate plans and capital expenditure proposals of corporations, ensure consistent practices among two or more corporations where appropriate and provide any advice to the Lieutenant Governor in Council on those plans, proposals and practices or any other matter of policy affecting corporations that may be requested by the Lieutenant Governor in Council;*
- (d) receive and hear submissions from any person who, in the opinion of the council, has knowledge respecting any aspect of a corporation's activities regarding alleged failures by the corporation to comply with any Act or any policy of the council.*

***Powers of council***

*6(2) The council may, through the minister responsible for the particular corporation*

- (a) request the chief executive officer of any corporation to provide reports to the council at any time on matters considered by the council likely to have a material effect on the performance of the corporation in terms of its objectives;*
- (b) request the auditor of any corporation at any reasonable time to provide reports to the council on any matter related to the finances of the corporation and have access to any other report issued by that auditor with respect to the corporation;*
- (c) request the auditor of any corporation to undertake additional audits or other work in relation to that corporation and to report on that audit or other work to the council or request any other person to investigate and report to the council on any matter with respect to a corporation.*

These duties and powers belong to the Crown Corporations Council – therefore, understanding that the CCC has these duties and powers helps define the duties and powers of the PUB. **Any interpretation of the PUB powers in section 26 cannot reasonably include these powers because the legislature has specifically provided them in other parts of the CCAA to the Crown Corporations Council.**

*2B - The Legislated Role of the Board of Directors of MPI*

The Board of Directors is created by the MPI Act. Part III of the CCAA establishes general provisions governing MPI. Specific relevant duties and powers of the Board of Directors of MPI are set out in sections 13 and 18. Similarly to understanding the duties and powers of the Council helps understand the jurisdiction of the PUB, so does understanding the duties and powers of the Board of Directors.

***Duties of boards***

*13(1) Subject to specific requirements or restrictions contained in the Act by or under which a corporation is established and to this Act, a board shall*

- (a) exercise the powers of the corporation directly or indirectly through the employees and agents of the corporation;*
- (b) direct the management of the business and affairs of the corporation;*
- (c) ensure that the corporation complies with the laws of the Province of Manitoba;*
- (d) cause the corporation to conduct a review of strategic plans and its performance in relation to those plans at intervals not exceeding five years commencing on the day on which this section comes into force; ....*

***Audit Committee***

*18(1) Every board shall establish an audit committee, a majority of whom shall be directors.*

***Duties of audit committee***

*18(2) The audit committee shall*

- (a) review and advise the board with respect to the financial statements that are to be included in the annual report of the corporation;*
- (b) review and advise the board with respect to the annual auditor's report of the corporation;*
- (c) review and approve the mandate of the internal auditor of the corporation;*
- (d) review the corporation's annual internal audit plans;*

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- (e) periodically arrange and participate in meetings with the internal auditor and the Auditor General to review the results of internal audit practices of the corporation; and
- (f) perform any other functions that are assigned to it by the board and the by-laws of the corporation.

The jurisdiction of the PUB does not include the duties and responsibilities given to other bodies referred to in the CCAA. Simply stated, the Board of Directors is responsible for the operation of MPI and the Crown Corporations Council for oversight of MPI, hence, these responsibilities are not the mandate of the PUB.

### 2C - The Legislated Role of the Government

The CCAA provides that the Board of Directors is responsible to the Minister responsible for MPI.

#### ***Boards responsible to minister***

*14(1) Subject to subsection (2), every board is responsible to the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of the Act by or under which the corporation is established.*

#### ***Boards responsible to minister.***

*14(2) Where a corporation is incorporated under The Corporations Act, the board is responsible to the member of the Executive Council designated by the Lieutenant Governor in Council.*

The MPI Act also contains detailed provisions with respect to the oversight and control of MPI by the Manitoba government. In particular:

- The Chairman of MPI's Board of Directors reports to the Minister responsible for MPI
- The Lieutenant Governor in Council appoints the chairman and the directors;
- A member of the Legislative Assembly may be, and historically always has been, a member of MPI's board of directors;
- The LGC designates the head office of MPI;
- Borrowing or raising money may only be undertaken with approval of the LGC;
- The Manitoba Department of Finance (which is overseen by the Minister of Finance) manages MPI's investment portfolio;
- MPI tables its annual report in the Legislative Assembly;
- MPI's annual report is reviewed and passed by the all-party Standing Committee on Crown Corporations at a public hearing, the transcripts of which are public on the government's website. (MPI Act, s. 2, 3, 4, 10, 12, and 43)

*2D - The Legislated Role of the Auditor General vis-a-vis MPI*

In addition to the powers and responsibilities of government mentioned by the Court of Appeal it should be noted that the Auditor General of Manitoba has a significant role in the oversight of MPI. Section 14 of *The Auditor General Act* provides authorization to the Auditor General to have many of the roles that the PUB seeks to have in relation to MPI.

*14(1) In carrying out his or her responsibilities under this Act, the Auditor General may examine and audit the operations of a government organization with regard to any of the following matters:*

- (a) whether financial and administrative provisions of Acts, regulations, policies and directives have been complied with;*
- (b) whether public money has been expended with proper regard for economy and efficiency;*
- (c) whether the Assembly has been provided with appropriate accountability information;*
- (d) whether the form and content of financial information documents is adequate and suitable.*

**Report to Assembly**

*14(4) The Auditor General must report to the Assembly annually on the work carried out under this section, and may bring to the Assembly's attention anything he or she considers necessary, including recommendations.*

The Auditor General has recently undertaken a detailed audit of the system and practices of MPI in administering the PIPP (Annual Report to the Legislature by the Office of the Auditor General, Manitoba, 2012). This type of operational review of MPI is within the purview of the Auditor General, as per its legislation. Furthermore, the Auditor General attends the meetings of the Audit Committee of the Board of Directors.

*2E - The Legislated Role of the PUB – vis-a-vis MPI*

Section 26 of the CCAA:

**Hydro and MPI rates review**

*26(1) Notwithstanding any other Act or law, rates for services provided by Manitoba Hydro and the Manitoba Public Insurance Corporation shall be reviewed by The Public Utilities Board under The Public Utilities Board Act and no change in rates for services shall be made and no new rates for services shall be introduced without the approval of The Public Utilities Board.*

**Definition, "rates for services"**

26(2) For the purposes of this Part, "**rates for services**" means

*(c) in the case of the Manitoba Public Insurance Corporation, rate bases and premiums charged with respect to compulsory driver and vehicle insurance provided by that corporation.*

There are no other legislative provisions granting the PUB any authority over any other aspects of MPI.

2F - Analysis of the Legislated Roles

As the Court of Appeal stated in the *PUB v. MPI* stated case *PUB v. MPI* [2011] M.J. No. 377:

*The mandate of the PUB, in the context of this case, is set out in s. 26 of The CCAA, that being to review and approve the MPI's rate bases and premiums charged with respect to compulsory driver and vehicle insurance.*

Two fundamental questions arise from this statement:

1. What is meant by "to review and approve the MPI's rate bases and premiums charged with respect to compulsory driver and vehicle insurance"?
2. How does the PUB "review and approve the MPI's rate bases and premiums charged with respect to compulsory driver and vehicle insurance"?

The answer to the first question is straightforward - the PUB approves rates for service that the government may pass in regulation for MPI. (MPI Act, s. 33 (1.1))

In 1995, the Coalition of Manitoba Motorcycle Groups appealed a PUB order which increased motorcycle rates by more than what MPI was requesting. The Court of Appeal, *CMMG v. PUB* [1995] M.J. No. 301, dismissed the appeal and said the PUB could approve a rate different from that proposed by MPI. In rendering its decision the Court of Appeal considered section 26 of the CCAA and section 33(1.1) of the *MPI Act* and stated:

*18 The result is that neither the Board nor the Lieutenant Governor in Council can fix new rates for automobile insurance without the concurrence of the other. The Lieutenant Governor in Council can, of course, leave rates as they are if he does not agree with the rates approved by the Board, but that is his only alternative to establishing those rates which the Board has approved.*

*19 The role of the Lieutenant Governor in Council as the body responsible for fixing rates is not without significance to the first issue before us. It explains why, under s. 26(1) of The Accountability Act, the function of the Board is review and approval. The Board is not given*

*actual power to determine what the new rates shall be as that power, limited as it is to fixing rates approved by the Board, is conferred on the Lieutenant Governor in Council.*

**20** *Given that explanation for the power of "approval", I do not construe s. 26(1) as limiting the Board to the approval of rates proposed by the Corporation. This would inevitably lead to the "rubber stamping" of proposed rates or, if the proposed rates were rejected, to one or possible several re-applications for rate approval. These subsequent applications would be extremely time-consuming and costly and could end up in a Mexican stand-off between the Corporation and the Board, the former refusing to accept rates indicated by the Board and the latter refusing to rubber-stamp a Corporation proposal. That is not, in my view, what the legislature intended.*

**21** *Support for my view that the Board is free to approve a rate different from that proposed by the Corporation is to be found in s. 44(1) of The Public Utilities Board Act, R.S.M. 1987, c. P280, which is made applicable, as above noted, by s. 26(3) of The Accountability Act. Subsection 44(1) of The Public Utilities Board Act provides:*

*44(1) Upon any application to it, the board may make an order granting the whole or part only of the application or may grant such further or other relief in addition to or in substitution for that applied for, as fully and in all respects as if the application had been for such partial, further or other relief.*

**22** *That subsection extends the Board's power of review and approval to the granting of other relief. The term "relief" is troublesome. That, however, is because lawyers identify the word with its usual legal meaning of aid sought by a party to a dispute. Clearly, approval of a higher rate than that sought by the Corporation is not aid sought by that party. But the word also means "alleviation of some burden" and "deliverance from some hardship, burden or grievance; remedy, redress" (The Oxford Universal Dictionary, 3rd ed., revised with addenda, 1964) and "anything that offers a pleasing change" (Webster's New World Dictionary, 3rd College ed. 1988). In my view, the legislature, in using the word "relief" intended to confer on the Board a power to approve a rate which would alleviate the burden on the Corporation of taking too little in premiums to justify taking the risks inherent in a particular class of insurance.*

**23** *A power of "review" would make little sense if the Board could only approve or reject an application or fix a rate below that sought. The Board's function is not only to protect consumers from unreasonable changes, but also to ensure the fiscal health of the Corporation and fairness between different classes of consumer. Although the Corporation is not a public utility, as that term is defined in The Public Utilities Board Act, it is a Crown Corporation that is made accountable to the Board by The Accountability Act. It is the Corporation's accountability which gives the Board its broad power to approve a different rate than that sought by the Corporation.*

As is noted in the *CMMG* case, the Lieutenant Governor in Council fixes the rate bases and premiums charged with respect to compulsory driver and vehicle insurance. The Lieutenant Governor in Council is limited in fixing those rates to what has been approved by the PUB. Thus if MPI wishes to ask the Lieutenant Governor in Council to change rate bases and premiums charged it must first obtain approval of those changes from the PUB. MPI must submit its proposed rates to the PUB and the PUB reviews and approves rates for the Lieutenant Governor in Council to consider fixing.

The second question of how does the PUB review and approve the rate bases and premiums deals with how the PUB goes about approving the rates for services.



The PUB is to conduct a public hearing to review the rates for services. At this hearing the PUB is guided by subsections 26(4) and (5) of the CCAA:

***Factors to be considered, hearings***

*26(4) In reaching a decision pursuant to this Part, The Public Utilities Board may*

*(a) take into consideration*

- (i) the amount required to provide sufficient moneys to cover operating, maintenance and administration expenses of the corporation,*
- (ii) interest and expenses on debt incurred for the purposes of the corporation by the government,*
- (iii) interest on debt incurred by the corporation,*
- (iv) reserves for replacement, renewal and obsolescence of works of the corporation,*
- (v) any other reserves that are necessary for the maintenance, operation, and replacement of works of the corporation,*
- (vi) liabilities of the corporation for pension benefits and other employee benefit programs;*
- (vii) any other payments that are required to be made out of the revenue of the corporation,*
- (viii) any compelling policy considerations that the board considers relevant to the matter,*
- (ix) any other factors that the board considers relevant to the matter; and*

*(b) hear submissions from any persons or groups or classes of persons or groups who, in the opinion of the board, have an interest in the matter.*

***MPI***

*26(5) In the case of a review pursuant to this Part of rates for services of the Manitoba Public Insurance Corporation, The Public Utilities Board may take into consideration, in addition to factors described in subsection (4), all elements of insurance coverage affecting insurance rates.*

In 2005, The Consumers' Association of Canada (Manitoba) Inc. and The Manitoba Society of Seniors Inc. applied for leave to appeal a PUB decision on Manitoba Hydro rates. The leave for appeal was denied. The Court of Appeal stated, in *Consumers Assn of Canada (Manitoba) In v. MB Hydro* [2005] M.J. No 142:

**63** *The intent of the legislation is to approve fair rates, taking into account such considerations as cost and policy or otherwise as the PUB deems appropriate. Rate approval involves balancing the interests of multiple consumer groups with those of the utility. The PUB's decision*

*to build retained earnings more rapidly than proposed in order to better protect the utility and consumers from the financial impact of future drought, clearly meets the intent of the legislation and is within the jurisdiction afforded the PUB in s. 26 of the Accountability Act.*

**64** *The role of the PUB under the Accountability Act is not only to protect consumers from unreasonable charges, but also to ensure the fiscal health of Hydro. It is clear the PUB understood its role in this regard.*

**65** *The PUB has two concerns when dealing with a rate application; the interests of the utility's ratepayers, and the financial health of the utility. Together, and in the broadest interpretation, these interests represent the general public interest. These issues were addressed in the PUB's decision.*

**66** *All in all, the PUB addressed the right question, the reasonableness of approved rates. It did not rely on irrelevant evidence or fail to consider relevant evidence. The PUB was alive to the issues and alive to the implications of its decision. It did not apply inappropriate tests or apply appropriate tests or factors incorrectly. It did not make its decision in an arbitrary manner.*

**67** *The setting of rates, and the elements that are to be considered in doing so, require a specialized knowledge and understanding that ought not to be interfered with by courts unless there is clear error in that decision or the manner in which it was arrived at. This is not such a case.*

**68** *When all of the arguments of the applicants are considered in light of the evidence the PUB heard and the decision it eventually made, I have not been convinced that what the applicants are complaining about is anything but the methodology the PUB utilized to arrive at that decision.* *The PUB then went on to justify that decision in the light of the interests of both the public and Hydro. (underlining added)*

Subsections 26 (4) and (5) of the CCAA and the above quote from the Court of Appeal provide direction on what the PUB is to consider in reviewing the rates for services. An earlier case from the Court of Appeal gives direction into what is not to be considered when reviewing the rates for services.

In 1989, the Manitoba Society of Seniors and the Consumers Association of Canada (Manitoba) brought a stated case in *PUB v. MB (Attorney General)* [1989] M.J. No 491 to the Court of Appeal on the following question:

*Does the Public Utilities Board have jurisdiction to approve, reject or vary Manitoba Hydro capital project plans such as plans to construct new generating stations, incidental to or as a condition of granting approval for changes in the prices charged for power?*

The Court of Appeal stated:

*[C]ounsel for the Manitoba Society of Seniors, contends that in fixing or reviewing rates the Board has jurisdiction to review the decisions of Manitoba Hydro with respect to its major capital projects such as the construction of new generating stations or new transmission lines.*

*It is agreed by all counsel that the Act in question grants no such specific power to the Board. In other words, the legislation is silent on that issue. However, Mr. Peltz alleges that the practical reality is that capital plans and expenditures cannot be ignored in any workable system of rate*

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review and if specific legislation is not available, then the court should, of necessity, imply such power in the Board.

I am unable to imply such an intention in the legislation as it stands. To imply it would be to legislate which is not the function of this court. Since the legislation is defective in that the power is not specifically stated, the Board and/or the parties will have to knock at the Legislature's door in order to obtain that specific power if desirable. [underlining added]

On the basis of the legislation as it stands, the Board has no jurisdiction to approve, reject or vary Manitoba Hydro's major capital projects such as construction of new generating power stations or transmission lines.

In accordance with this case, when the PUB undertook the "Needs For and Alternatives To" (NFAT) review of Manitoba Hydro's proposed preferred development plan, the authority to conduct the review was Order In Council No. 128/2013 made pursuant to section 107 (b) of *The Public Utilities Board Act*, which states:

"107. The board may perform duties assigned to it ... (b) by order of the Lieutenant Governor in Council .... and Part I, in so far as it is applicable, applies to the carrying out of duties so assigned."

The NFAT review of Hydro's major capital project was not done in accordance with the authority given to PUB in section 26 of the CCAA but rather as a specific task assigned to it by the Government pursuant to *The Public Utilities Board Act*. The Government has made no such order for MPI in regards to any type of strategic planning, capital or operating review to be undertaken by the PUB.

To examine the interplay of the legislated roles of the different entities, an example can be provided. If the Crown Corporations Council or the Auditor General were to instruct MPI to set certain Basic rates, then MPI would advise them, that approving Basic rates is the domain of the PUB. Conversely, when the PUB is examining the operational efficiency or reviewing capital projects of the Corporation, then MPI is advising the PUB that different entities are charged with this.

### *Ensuring Necessary and Prudent Costs – Not the Role of the PUB*

Finally, CAC has cited PUB Order 5/12 from the Manitoba Hydro GRA on the Board's role:

- Ensuring that MH's forecasts are reasonably reliable;
- Ensuring that actual and projected costs incurred are necessary and prudent;
- Assessing the reasonable revenue needs of the Corporation in the context of the overall general health of MH;
- Determining an appropriate allocation of costs between classes; and
- Setting just and reasonable rates in accordance with statutory objectives.

MPI agrees with all points but one (other than the change in the third bullet to the needs of Basic and the financial health of Basic).

MPI respectfully considers the PUB erred in indicating its role is to ensure actual and projected costs incurred are necessary and prudent. As set out in great length above, this is the role of other government entities who have responsibility over MPI and MPI itself – whether through management, the Board of Directors, of the Minister. Absolutely no where in any legislation is this power granted or even implied to the PUB.

If the PUB considers its role is to ensure costs are necessary and prudent, then MPI respectfully views the PUB as having rewritten the boundaries of the legislative framework governing MPI – and in doing so the PUB trenches upon the statutory authority of the other legislated entities and “second-guesses” their decisions and exercise of powers. This is neither the intention nor the effect of the legislation.

### **3 - What is the law of relevancy for a PUB rates hearing?**

The mandate to be performed by the PUB is to review and approve the rates for services. This involves conducting a hearing that considers the items listed in subsection 26(4) of the CCAA. Most of the items listed are specific, while two items are not [(viii) *any compelling policy considerations that the board considers relevant to the matter*, (ix) *any other factors that the board considers relevant to the matter*].

A proper interpretation of relevancy does not provide the PUB with broad powers that go beyond the scope of the specified provisions that exist in the legislation or that belong to another body. And, of course, these items must be “relevant to the matter”. The evidence sought to be reviewed in the Information Requests must be relevant to the mandate of the PUB – namely, setting rates.

The issue of relevancy of evidence in the administrative context is addressed in Macaulay and Sprague – *Practice and Procedure Before Administrative Tribunals*. The authors state at paragraph 17.1(d):

*One has to be concerned with two things in deciding whether a particular piece of evidence is capable of establishing a good factual base for a decision: its relevance and its weight.*

- a. *Relevance. The information which is offered must be capable, assuming that it were true, of logically establishing some fact which an agency needs in order to accomplish its mandate.*

*When evidence is admitted in a proceeding the agency is saying that it is capable of logically proving the existence of some fact or matter which has to be established in order for the agency to perform its statutory mandate. (underlining added)*

The principles of relevancy of evidence in administrative tribunals and public inquiries are explained in *Ontario (Provincial Police) v. Cornwall (Public Inquiry)* [2008] O.J. No. 153 by Moldaver JA, as he then was, who finds that relevance must be reasonable.

**21** [A]n error of jurisdiction occurs when the Commission admits evidence that is not reasonably relevant to the subject matter of the inquiry. Howland J.A. addressed the meaning of the phrase "reasonably relevant" at pp. 624-25:

- Having determined that the test of reasonable relevance should be applied, it is necessary to consider the meaning of the words "reasonably relevant".
- The definition of "relevant" which has been commonly cited with approval by the Courts is that in *Stephen's Digest of the Law of Evidence*, 12th ed., art. 1. It states that the word means that "any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other". In concluding what evidence is admissible as being reasonably relevant to a commission of inquiry, I would adopt the statement in *McCormick on Evidence*, 2nd ed., at p. 438: "Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value ...".
- In deciding whether evidence is reasonably relevant it is necessary to scrutinize carefully the subject-matter of the inquiry as set forth in Order in Council 2959/76. This is the governing document ... [underlining added]

**22** Having correctly set out the applicable legal principles... the majority did not go on to perform the review function that they had identified, namely, "to scrutinize carefully the subject matter of the inquiry as set forth in the Order in Council". Instead, the majority took a deferential approach ....

**23** In my respectful view, the majority erred in taking a deferential approach. No deference is owed to the Commissioner on the issue of the definition of the subject matter of the Inquiry. The Commissioner's jurisdiction is limited to that subject matter, which is prescribed by the legislature in the OIC creating the Commission. If the Commissioner defines the subject matter too broadly or too narrowly, he or she will have rewritten the OIC and redefined the terms of reference. That, of course, is impermissible and constitutes jurisdictional error.

**24** In my view, the Commissioner misconstrued the OIC and in so doing he enlarged the subject matter of the Inquiry and conferred a much wider jurisdiction upon himself than the legislature contemplated. [underlining added] In interpreting the OIC as he did, I believe that the Commissioner committed four errors:

- (1) he failed to consider the context and circumstances in which the Commission was established;
- (2) he failed to consider relevant wording in the preamble to the OIC that provided valuable insight into the nature and type of allegations at issue;
- (3) he failed to construe wording used in the OIC harmoniously and with reference to the document as a whole;
- (4) by reason of the first three errors, he misidentified the subject matter of the Inquiry and ascribed to himself a mandate that is beyond anything contemplated by the legislature.

In determining the factors to take into consideration in approving rates, the PUB must ensure it does not commit any of the above four errors in deciding what information is needed to fulfil its mandate.

It is crucially important to note that the PUB cannot expand its jurisdiction by making declarations of relevance – which is in essence what CAC and CMMG are asking for through their motions. Self declarations of relevance do not expand jurisdiction, rather the jurisdiction as prescribed by the legislation provides the box into which the relevance must fit. The Board cannot effectively expand the scope of its jurisdiction by applying an unreasonable approach to the concept of relevancy. A factor that, objectively reviewed, has no relevance to the matter the PUB must decide cannot be swept into the PUB's jurisdictional reach merely because the PUB claims that it considers it to be a relevant factor.

Importantly, although section 26(4)(a)(ix) of the CCAA empowers the PUB to take into consideration “any other factors that the board considers relevant to the matter”, the PUB does not have unlimited authority to determine the scope of its own jurisdiction. The “matter” referred to is the approval of Basic rates.

The PUB's mandate cannot be read as broadly as CAC suggests in its brief, allowing it to rewrite the boundaries of the legislative framework governing MPI. Moreover, the PUB's authority to consider policy considerations and other factors it considers relevant to the matter cannot be construed as authority to reverse a properly enacted legislative scheme of the government.

### **Addressing CAC's Common Law Cases on Relevancy**

CAC has cited two cases (TransCanada Pipelines and ATCO Gas from the Supreme Court of Canada) on the broad scope of inquiry that a regulator can have. Unfortunately, both these cases are under the private sector model of rate base, rate of return or cost of service regulation. This model of regulation is extremely different from that of a crown corporation and is instituted under a prescribed and detailed regulatory scheme that is vastly different. In that legislated model the regulator specifically approves costs that are “used, useful, and prudently acquired” upon which the utility's shareholder earns a rate of return, also set by the regulator. Additionally the regulator has the power to “disallow” expenditures. The legislative scheme is not comparable to that governing MPI and hence what a regulator in Alberta may review for a privately owned utility is vastly different from the legislated scheme for the PUB regarding MPI rates. Accordingly, these cases are not applicable in this instance.

#### **4 - Application of Law to 2015 GRA and the Information Requests Not Answered**

The Court of Appeal in *Consumers Assn of Canada (Manitoba) Inc. v. MB Hydro* said the right question for the PUB to be asking is - are the rates reasonable? Although this question is on its face very broad, it is to be interpreted within the scope of the PUB's legislative mandate.

MPI has developed, with the input of the PUB and the interveners, the ratemaking methodology which has been approved by the PUB and is in current use. The PUB has said that it is "well established, thoroughly tested at the annual rate hearings and actuarially sound and statistically driven." PUB Order 157/08, p. 64.

MPI's ratemaking methodology has two objectives:

- (a) determine the overall costs expected to arise during a given policy period and
- (b) allocate those overall expected costs equitably among insured (with the expected cost to the insured being the rate they are required to pay).

MPI's ratemaking methodology is based on actuarial principles and ties directly to costs, thereby assuring equity. It minimized cross subsidization between customers and provides for rates that are responsive to changes in claims patterns. It ensures complete enumeration of all expected costs, allowing for assurance that the break-even target is achieved.

Responses were provided to every information request on ratemaking and rates for the 2015 rates. Responses were provided for all information requests in respect of financial projections of expenses and revenues and actuarial modelling. All other information is considered by MPI to be for the purposes of an operational review or audit and declined to be answered as it is not consistent with the mandate of the PUB, and is, in fact, under the jurisdiction of a different government entity.

The following sections explain in detail why this information is not required by the PUB, (or the interveners) for rate setting and is operationally reviewed or audited by other government entities as per the legislative framework.

The categorization of Information Requests not answered falls within the following areas:

- A - Road safety**
  - (i) a review of related expenditures, including efforts regarding vulnerable road users**

**(ii) Critically evaluating the optimum size of MPI's road safety budget and whether it is sufficient to enable a significant reduction in the cost to MPI of injuries to cyclists in the short and long term;**

**(iii) Critically evaluating the adequacy of MPI's road safety programs with respect to the fatal and severe injury of cyclists**

**(iv) Critically evaluating the quality and clarity of MPI's data collection, analysis and accessibility, regarding collisions involving cyclists, particularly in comparison to transportation safety programs from local, national and international entities and jurisdictions. PUB Order 81/14**

Respectfully, the Legislature has not granted the PUB jurisdiction to conduct an overall review, audit, or critically evaluate any aspects of MPI's road safety program. Instead, the Legislature via sections 6(1)(c) and 6(2) of the CCAA confer jurisdiction to the Crown Corporation Council to review these matters. Similarly, the Auditor General under its Act is charged with conducting operational reviews and audits and could undertake a review of MPI's road safety program, including its efficiency, effectiveness, and critical evaluation. It is the Board of Directors of MPI and the Government of Manitoba that have the authority to provide the direction and review of MPI's road safety initiatives. Whether MPI decides to proceed with road safety program "a", "b" or "c" or no program at all is a business decision of MPI. The jurisdiction to make that decision belongs to MPI pursuant to sections 13(1) (b) of the CCAA as part of "direct the management of the business and affairs of the corporation" and 6(2) (h) of the *MPI Act*.

The power conferred to approve Basic rates does not provide the PUB with the power to compel MPI to produce the wide-ranging information on road safety sought in the Information Requests not responded to. Merely alleging that ratepayers fund the road safety program through their rates does not give rise to a wholesale review of this expenditure. This information is not relevant to the matter of setting the 2015 rates.

Some areas of road safety programs that may be relevant to the PUB for approving Basic rates are:

- The 2015-16 budgeted amount of the road safety program is relevant because MPI is seeking rates to cover this expenditure. MPI has provided responses to these information requests.
- The expenditures and their nature included in the budgeted amount are relevant – for the purposes of ensuring all the components of the budget are for compulsory driver and vehicle insurance. MPI has provided responses to these information requests.



**B - Benchmarking, including with respect to other provinces**

The CCAA does not grant any specific power to the PUB to assess benchmarking. The CCAA does however specifically state in section 6(1)(b) that the Crown Corporations Council shall “facilitate, in co-operation with each corporation, the development of consistent and effective criteria for measuring the corporation's performance”. Of course, benchmarking is utilized as a major tool to measure corporate performance.

The power conferred to approve Basic rates does not provide the PUB with the power to compel MPI to produce the wide-ranging information on bench-marking sought in the Information Requests not responded to.

Generally speaking, Information Requests about benchmarking will be beyond the mandate of the PUB and therefore not reasonably relevant to the issue to be resolved. However, specific questions on benchmarking of rates may be reasonably relevant.

**C - New or enhanced services being developed or examined by MPI**

This issue is not relevant to the GRA. The Court of Appeal has said in *PUB v. MPI*:

*43 As regards the failure to advise the PUB of any plans, plans do not affect the rates that are subject to review in a particular year. While plans, if implemented, may well affect the rates for basic insurance in future years, those rates will be subject to review by the PUB if and when the plans are realized and put into effect. Until then, the mandate to review and comment on long-term plans has been left to the Crown Corporations Council and the government, and the PUB has not demonstrated how they are relevant to, or affect, its ability to carry out its mandate in any particular year. The fact is that the government has the right to change legislation and to require that the MPI make changes to its business, and neither the government nor the MPI are required to give the PUB any advance notice. This is an issue for the government and not the PUB.*

Accordingly, MPI has declined to respond to those IRs posed that are with respect to exploring the nature and scope of plans for new or enhanced services.

**D - IT Projects including the Physical Damage Re-engineering Project, and additionally critically evaluating MPI's new Physical Damage Re-engineering Program, reviewing MPI's cost containment initiatives relative to recycled parts and suggesting improvements in reducing physical damage repair costs**

The PUB has not been granted the jurisdiction to review decisions related to IT Projects or the PD Re-Engineering Project. IT projects are capital intensive. The PD Re-Engineering is both a capital project and seeks to revise the service delivery of the physical damage line of insurance operations. Section 6(1)(c) and subsection 6(2) of

the CCAA give jurisdiction to the Crown Corporations Council to review these matters. Whether MPI decides to precede with IT Project “a”, “b” or “c” or no project at all is a business decision of MPI. The jurisdiction to make that decision belongs to MPI pursuant to sections 13(1) (b) of the CCAA and 6 of the *MPI Act*. Similarly, the Auditor General under its Act could review these projects.

For reasons similar to what the Court of Appeal said in the *PUB v. MB (Attorney-General)* stated case; IT Projects, which are capital projects, are not relevant to the issue of the reasonableness of the rates:

*It is agreed by all counsel that the Act in question grants no such specific power to the Board. In other words, the legislation is silent on that issue. However, Mr. Peltz alleges that the practical reality is that capital plans and expenditures cannot be ignored in any workable system of rate review and if specific legislation is not available, then the court should, of necessity, imply such power in the Board.*

*I am unable to imply such an intention in the legislation as it stands. To imply it would be to legislate which is not the function of this court. Since the legislation is defective in that the power is not specifically stated, the Board and/or the parties will have to knock at the Legislature's door in order to obtain that specific power if desirable.*

*On the basis of the legislation as it stands, the Board has no jurisdiction to approve, reject or vary Manitoba Hydro's major capital projects such as construction of new generating power stations or transmission lines.*

Again, merely alleging that ratepayers will fund the IT and PDR projects does not give rise to a wholesale review of these projects through the ratesetting hearing process. This information is not relevant to the setting of the 2015 rates.

Some areas of the IT Projects that may be relevant are:

- The budgeted amount of the IT Projects is relevant because MPI is seeking rates to cover this expenditure. MPI has provided responses to these Information Requests.
- The expenditures and their nature included in the budgeted amount are relevant – to ensure all the components of the budget actually are part of compulsory driver and vehicle insurance. MPI has provided responses to these information requests.

In addition, it should be noted that the PUB is a tribunal with specialized knowledge in rate setting. By seeking assistance in critically evaluating the PD re-engineering program, reviewing cost containment initiatives relative to recycled parts and suggesting improvements in reducing physical damage repair costs is an admission by the PUB that they do not have a specialized knowledge in these areas. The assistance sought is into a subject matter that is beyond the scope of the PUB specialized knowledge and is further evidence that the PUB is exceeding its jurisdiction.

***E – Details of the Operations of the Corporation***

The same argument for road safety above is used for the justification of for refusing to provide responses to Information Requests that seek details of the operations of MPI.

***F - The performance of investment portfolio and the content of the portfolio***

Information Requests related to the forecasted performance of the investment portfolio are relevant because the rate application assumes income will be generated from the investment portfolio. Information Requests are responded to for the purpose of enabling the PUB to determine whether the projected income forecasts are reasonable. MPI has responded to those Information Requests.

Information Requests on any decisions to invest (whether when, what, why, or how) are beyond the mandate of the PUB, recognizing the management of the investment portfolio is the responsibility of the Minister of Finance. Information Requests regarding historical information not used to forecast future investment income are irrelevant to the 2015 rates. MPI has not responded to those Information Requests.

***Rule 16 of the PUB Rules of Process and Procedure***

In addition to the standard response provided which the Corporation considers adequate, MPI has further provided the above reasons by subject matter setting out why it is unwilling to provide a full and adequate response to the Information Requests. Also attached are individual reasons to the Information Requests not responded to.

***CONCLUSION***

If the PUB issues an Order compelling MPI to produce full and adequate responses to all first round Information Requests of CAC and PUB, then it is respectfully submitted, the PUB will err in making an order which is beyond its statutory mandate. The PUB's jurisdiction is limited to reviewing and approving proposed changes to rates for compulsory driver and automobile insurance. The PUB's mandate is to ensure that MPI's rates are sufficient to satisfy the costs of Basic, including any reserve (or, in other words, that the rates are actuarially sound and statistically driven).

This mandate cannot be read as broadly as CAC suggests in its brief, allowing it to rewrite the boundaries of the legislative framework governing MPI. Moreover, the PUB's authority to consider policy considerations and other factors it considers relevant to the matter cannot be construed as authority to reverse a properly enacted legislative scheme of the government.

The effect of responding to all of the Information Requests posed, presuming the PUB considered them relevant for rate setting, would be to trench upon the statutory authority of the other legislated entities – the Crown Corporations Council, Board of Directors, Government of Manitoba, and Auditor General – and “second-guessing” their decisions and exercise of powers.

If the PUB were to compel MPI to respond to the Information Requests, then it would appear the PUB’s perception of its jurisdiction suggests the Legislature has displaced the role of the Manitoba government in overseeing MPI and providing the PUB with an unchecked and unlimited scope of review. Such a broad scope of review is inconsistent with the MPI Act and the CCAA. This legislative scheme provides for a complex system of checks and balances, which provided that the Manitoba governments is ultimately responsible for MPI’s financial well-being and for the insurance plans, programs, and services MPI administers for the government.

Although section 26(4)(a)(ix) of the CCAA empowers the PUB to take into consideration “any other factors that the board considers relevant to the matter”, the PUB does not have unlimited authority to determine the scope of its own jurisdiction. The “matter” referred to is the approval of Basic rates.

### **Order Sought**

In response to the CAC motion (and those of CMMG and ARM), MPI respectfully submits that the PUB dismiss the motion as follows:

- (a) MPI need not respond to those Information Requests to which it has already declined to respond
- (b) MPI has provided specific reasons for declining to respond to the Information Requests
- (c) No amendments be made to the timetable established in Order 81/14
- (d) Costs will be decided at the end of the 2015 GRA proceedings in the cost awards

ALL OF WHICH IS RESPECTFULLY SUBMITTED



 Kathy Kalinowsky  
General Counsel & Corporate Secretary  
Manitoba Public Insurance