Undertaking #39

MPI to provide a short written submission on any jurisprudence that might exist on the interpretation that the Corporation is taking with respect to reserves regulation, as set out in the capital management plan, which allows a five (5) year build, three (3) year release provision if not exactly at 100 percent MCT.

RESPONSE:

The amount to be held in MPI's reserves is defined in section 2 of the Reserves Regulation, 76/2019 (the "Regulation"), which states as follows:

> ***2*** *For the purpose of section 18 of the Act, the minimum amount the corporation must maintain*
>
> *(a) in its rate stabilization reserve is the amount determined using a MCT ratio of 100%;*

As noted in *Part VI Rate Stabilization Reserve RSR 6.3* of the 2020 General Rate Application (GRA):

> *RSR 6.3 Capital Build or Release Provision*
> *Except by coincidence, the Basic MCT ratio will never be exactly 100% at the beginning of the rating year.*

During the course of the GRA Hearing, Mr. Luke Johnston testified on behalf of MPI concerning compliance with the Regulation through its proposed Capital Management Plan (transcript of October 15, 2019, pages 1111 and 1112):

> *MS. KATHLEEN MCCANDLESS: And so this interpretation -- namely, the second interpretation here -- that would allow for the possibility that the Basic MCT ratio might be below 100 percent, correct?*
>
> *MR. LUKE JOHNSTON: Correct.*

MS. KATHLEEN MCCANDLESS: And that MC -- MPI will consider itself to have complied with the regulation even if the Basic MCT ratio is below 100 percent MCT, yes?

MR. LUKE JOHNSTON: Correct.

MS. KATHLEEN MCCANDLESS: That's provided there's a plan to bring it up to 100 percent within five (5) years or less, yes?

MR. LUKE JOHNSTON: Yes.

MS. KATHLEEN MCCANDLESS: And if we just jump back to the wording of the regulation itself, under two (2), it states: "The minimum amount the Corporation must maintain" Yes?

MR. LUKE JOHNSTON: Correct.

MS. KATHLEEN MCCANDLESS: So could you help us understand how MPI reconciles its interpretation of the regulation with the wording that we see before us here?

MR. STEVEN SCARFONE: I can probably help Mr. Johnston there, Ms. McCandless. So to the extent that the regulation contains that mandatory language that you've indicated, if, for example, the Corporation was to fall below its MCT target, what the Corporation anticipates happening is this Board asking MPIC what the Corporation intends to do about that. And they would want, in our view, MPIC to have a plan to – to bring the MCT ratio back up to 100 percent. So essentially, the Corporation's position is that should the -- the RSR be drawed (sic) down for whatever reason, we would come back before the Board, and they would want to be satisfied that the Corporation had a plan in place to achieve that target once again. And that's what the capital management plan envisions.

MPI also provided a complete answer to question of how MPI expects to comply with the Reserves Regulation, and what it will do when it is not in compliance, in response to PUB (MPI) 1-100, parts (a) and (b).

MPI will either be in compliance with the Reserves Regulation or not depending upon whether the RSR is below 100% MCT. If it is not in compliance, MPI will require a plan to get into compliance. The Capital Management Plan is that plan. It is important to note that MPI was not in compliance the day the Reserves Regulation came into force.

MPI found no jurisprudence specifically on point but believes it is useful to consider certain provisions of *The Public Utilities Board Act*, C.C.S.M. c. P280 (the PUB Act) and of legislation from other jurisdictions.

It is trite to say that the Public Utilities Board (the PUB), like other utility regulator, must ensure that the entities it regulates (including MPI) comply with the relevant Manitoba legislation within its purview (in addition to its decisions, orders and rules). In fact, s. 78(1)(a) of the PUB Act expressly authorizes the PUB to issue orders requiring public utilities to comply with applicable laws:

> ***Orders as to owners***
> *78(1) The board may, by order in writing and notice to, and hearing of, the parties interested, require every owner of a public utility*
>
> *(a) to comply with the laws of the province and any municipal by-law affecting the public utility or its owner, and to conform to the duties imposed thereby, or by the provisions of its own charter, or by any agreement with any municipality or other owner;*

Therefore, the PUB may issue an Order directing MPI to comply with its requirement to maintain an amount equal to at least 100% MCT in its RSR.

Where a law with which the PUB directs a regulated entity to comply is silent with respect to remediating non-compliance, MPI submits that the PUB may provide direction to the regulated entity on how to achieve compliance. MPI would caution the PUB not to interpret s. 2(a) of the Regulation as requiring immediate remediation of non-compliance as such an interpretation would result in an absurdity (see *PUB (MPI) 1-100*).

As per *The Interpretation Act*, C.C.S.M. c. I80:

> **Rule of liberal interpretation**
>
> *6 Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.*

Further, Professor Ruth Sullivan, at page 25 of Statutory Interpretation (Toronto, Ontario: Irwin Law Inc., 1997), writes as follows:

> *The consequential analysis or absurdity rule tells interpreters to take into account the consequences of adopting an interpretation. Interpretations that lead to beneficial consequences are presumed to be intended, while those that lead to irrational, unjust, or unacceptable consequences are rejected as absurd.*

Additionally, Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) states at pages 85-86:

> *Summary of the absurdity rule. The modern view of the "golden" rule may be summarized by the following propositions:*
>
> *(1) It is presumed that legislation is not intended to produce absurd consequences.*
>
> *(2) Absurdity is not limited to logical contradictions and internal incoherence; it includes violations of justice, reasonableness, common sense and other public standards. Also, absurdity is not limited to what is shocking or unthinkable; it may include any consequences that are judged to be undesirable because they contradict values or principles that are considered important by the courts.*
>
> *(3) Where the words of a legislative text allow for more than one interpretation, avoiding absurd consequences is a good reason to prefer*

one interpretation over the other. Even where the words are clear, the ordinary meaning may be rejected if it would lead to an absurdity.

(4) The more compelling the reasons for avoiding an absurdity, the greater the departure from ordinary meaning that may be tolerated. However, the interpretation that is adopted should be plausible.

Here, the evidence is that the RSR, by virtue of fluctuating claims experience, interest rates and other factors including the retention of RSR investment income and capital transfers from Extension, will never be exactly at 100% MCT -- except by chance. Therefore, interpreting s. 2(a) of the Regulation so as to require immediate remediation when the balance of the RSR was below 100% MCT would not only require constant monitoring, but may also leave MPI in a position where it does not have the financial resources to comply. Such an interpretation, MPI would submit, would result in an absurdity. Therefore, MPI respectfully submits that the absence of comment in the Regulation affords the PUB the opportunity to provide reasonable direction consistent with its mandate of approving rates for service that are just and reasonable.

MPI would point out that the PUB did just that respecting its compliance with s. 18 of *The Manitoba Public Insurance Corporation Act*, C.C.S.M. c. P215 (prior to the enactment of the Regulation).

Further, where the PUB issues orders, it has the express authority to extend the time to comply with them:

> ***Extension of time for compliance with order***
> *46 Where any work, act, matter, or thing, by any order, regulation, or decision of the board is required to be done, performed, or completed within a specified time, the board may, if the circumstances appear so to require, upon such notice as it deems reasonable, or, in its discretion, without notice, extend the time so specified.*

As a result, MPI submits that the PUB has the authority to issue an Order to MPI to comply with s. 2(a) of the Regulation and may issue further direction to MPI with respect to the manner in which MPI is to remedy non-compliance.

The mandatory language of section 74(2) of the PUB Act requires the Board to fully investigate the details of the Capital Management Plan (as it did during the course of the hearing):

> ***Inquiries by board***
> *74(2) The board shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of public utilities comply with the law, or as to any other matter or thing within the jurisdiction of the board.*

If satisfied that the mechanics of bringing MPI into compliance with s. 2(a) of the Regulation, as set out in the Capital Management Plan, are reasonable, the PUB may (and should) approve same under the authority provided to it under ss. 74(2) and 78(1) of the PUB Act.

The statutes below are examples of other jurisdictions where the legislature has codified the regulators duty to ensure the utility is in compliance with the relevant provincial legislation and regulations.

Public Utilities Act, RSNS 1989, c 380

Section 52A of the Nova Scotia *Public Utilities Act* requires the Board to establish performance standards for Nova Scotia Power Incorporated (NSPI) in respect of reliability and response to adverse weather conditions, while section 52B requires the Board to establish performance standards in respect of "such areas of NSPI's customer service as it determines appropriate". Sections 52C to 52E provide for reporting in relation to NSPI's performance compared to the standards, **as well as the Board's oversight with respect to NSPI's compliance.**

> **Status reports relating to performance**

52D (1) The Board may require Nova Scotia Power Incorporated to provide it with periodic status reports, at such times and including such information as the Board may require, on Nova Scotia Power Incorporated's performance in respect of the standards established pursuant to Sections 52A and 52B.

(2) Within ninety days following the end of each calendar year, Nova Scotia Power Incorporated shall provide a written report to the Board on its performance in respect of the standards established pursuant to Sections 52A and 52B.

(3) The written report must be in such form and contain such information as the Board determines appropriate.

(4) Where, following receipt of the report referred to in subsection (2), the Board determines that Nova Scotia Power Incorporated has failed to achieve any performance standard established pursuant to Section 52A, ***the Board may order Nova Scotia Power Incorporated to pay an administrative penalty or to develop and file a plan for bringing itself into compliance with a performance standard, or both.***

(5) Where, following receipt of the report referred to in subsection (2), the Board determines that Nova Scotia Power Incorporated has failed to achieve any performance standard established pursuant to Section 52B, ***the Board may order Nova Scotia Power Incorporated to pay an administrative penalty or to develop and file a plan for bringing itself into compliance with a performance standard, or both. 2015, c. 31, s. 31.***

Workers Compensation Act, RSBC 1996, c 492

Compliance report

194 (1) An order may include a requirement for compliance reports in accordance with this section.

(2) The employer or other person directed by an order under subsection (1) must prepare a compliance report that specifies

(a) what has been done to comply with the order, and

(b) if compliance has not been achieved at the time of the report, a plan of what will be done to comply and when compliance will be achieved.

(3) If a compliance report includes a plan under subsection (2) (b), the employer or other person must also prepare a follow-up compliance report when compliance is achieved.

(4) In the case of compliance reports prepared by an employer, the employer must

(a) post a copy of the original report and any follow-up compliance reports at the workplace in the places where the order to which it relates are posted,

(b) provide a copy of the reports to the joint committee or worker health and safety representative, as applicable,

(c) if the reports relate to a workplace where workers of the employer are represented by a union, send a copy to the union, and

(d) if required by the Board, send a copy of the reports to the Board.