



PUBLIC INTEREST LAW CENTRE – CENTRE JURIDIQUE DE L'INTÉRÊT PUBLIC

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Writer's email: bywil@legalaid.mb.ca

Dr. Darren Christle
Board Secretary
400-330 Portage Avenue
Winnipeg, MB R3C 0C4

Sent via email: Darren.christle@gov.mb.ca

Dear Dr. Christle,

**Re: Motion for Leave to Submit New Evidence in the Consumers Coalition
Application for an Order requiring a Manitoba Hydro Status Update Hearing**

Overview

Pursuant to rules 17, 18, 22 and 26 of the *Public Utilities Board Rules of Practice and Procedure* (the PUB Rules), the Consumers Coalition¹ files this Motion for leave to submit new evidence in support of its Application for an Order requiring a Manitoba Hydro Status Update Hearing.²

On 29 June 2021, Ms. Jay Grewal, the Chief Executive Officer (CEO) of Manitoba Hydro appeared before the Legislative Assembly of Manitoba Standing Committee on Crown Corporations to present Manitoba Hydro's Annual Report for the fiscal year ending 31 March 2021. In doing so, Ms. Grewal alleged, first, that Manitoba Hydro requires a 3.5% rate increase in 2021, and second, that financial projections identifying this need were available as early as August of 2020.³

¹ The Consumers Coalition consists of Harvest Manitoba, the Aboriginal Council of Winnipeg, and the Consumers Association of Canada (Manitoba Branch).

² This Application was filed with the Public Utilities Board on 26 March 2021.

³ Manitoba, Legislative Assembly Standing Committee on Crown Corporations, *Hansard*, 42nd Leg, 3rd Sess, Vol LXXV No. 3 (29 June 2021) at 73 and 74 (Jay Grewal).

The Consumers Coalition seeks leave to submit the Hansard record of the 29 June 2021 sitting of the Standing Committee on Crown Corporations as its contents are relevant and material to the issues raised in the Consumers Coalition Application.

The Legal Test

Rule 26(1) of the PUB Rules provides that:

The information contained in an application and the information submitted by an applicant to the Board, pursuant to Rules 17, 19, 21 and 23, shall be deemed to constitute the written evidence of the applicant and the applicant shall not, except with leave of the Board, be at liberty to submit additional written evidence.

In considering whether to grant leave to the Consumers Coalition to adduce additional written evidence, the Consumers Coalition suggests the analysis to be undertaken by the Public Utilities Board (PUB) should be informed by the practice of the Manitoba Court of Queen's Bench in considering motions to adduce new evidence on appeals from orders, decisions, or certificates of a Master pursuant to Court of Queen's Bench rule 62.01(13).⁴

A request to submit new evidence pursuant to Queen's Bench Rule 62.01(13) requires leave of the Court. In the same fashion, Rule 26(1) of the PUB permits the submission of new evidence in support of an Application only with leave of the Board.⁵

To this end, following the legal test first developed by the Supreme Court of Canada in *Palmer et al v The Queen*⁶ and applied regularly by the Manitoba Court of Queen's Bench in these circumstances, the Consumers Coalition submits that the Hansard record of the 29 June 2021 sitting of the Standing Committee on Crown Corporations should be admitted if the following four criteria are met:

- a) that the applicant show due diligence;
- b) that the evidence must be relevant and bears upon the decision or is potentially determinative of the issue at trial;
- c) that the evidence must be credible; and
- d) that the evidence could reasonably, when taken with the other evidence, be expected to have affected the result.⁷

In the view of the Consumers Coalition, it would be appropriate to apply these criteria in tandem with a consideration of the PUB Rules, including rules 17, 18, 22 and 26.⁸

⁴ *Court of Queen's Bench Rules*, Man Reg 553/88.

⁵ *The Public Utilities Board Rules of Practice and Procedure*, r 26(1).

⁶ [1980] 1 SCR 759.

⁷ *Green v Tram et al*, 2016 MBCA 99 at para 25.

⁸ It should also be noted that the PUB is not bound by the technical rules of evidence. See *The Public Utilities Board Act*, CCSM c P280, s 24(2).

The Consumers Coalition will address each of these criteria in turn.

a) The Consumers Coalition has shown due diligence in bringing these materials before the PUB

The Consumers Coalition has brought this motion as soon as was possible after the CEO's comments were made on 29 June 2021.

Neither the statements in question nor evidence of comparable relevance was available or known to the Consumers Coalition at the time of the filing of the Consumers Coalition Application on 26 March 2021. Similarly, this information was not available to the Consumers Coalition on 24 June 2021 when it filed its comments on Manitoba Hydro's response to PUB Order 53/21.

The Consumers Coalition has brought this application for leave to file this material with all due diligence and within three calendar days of the testimony of Ms. Grewal being given.

b) The Statements of the CEO are Relevant and Potentially Determinative of the Issues Raised by the Consumers Coalition

The comments made by the CEO of Manitoba Hydro on 29 June 2021 before the Standing Committee on Crown Corporations are relevant to the issues raised in the Consumers Coalition Application in two ways.

First, in its Application, the Consumers Coalition called for a Status Update process to, among other things, "determine whether current rates are just and reasonable and costs are fairly allocated."⁹

The comments of the CEO before the Standing Committee imply that the rates currently being charged for Manitoba Hydro's electricity services are not just and reasonable as they may not be sufficient for the Corporation to meet its financial targets.

The CEO explained that Manitoba Hydro is operating on the assumption that a 3.5% rate increase will be made effective 1 October 2021. The CEO of Manitoba Hydro alleged that this rate change was "prudent",¹⁰ "important",¹¹ and "required to set the trajectory to achieve the current 75-25 debt-equity target that [Manitoba Hydro is] to reach."¹²

⁹ Application of the Consumers Coalition for an Order requiring a Manitoba Hydro Status Update Hearing (26 March 2021) at 3.

¹⁰ Manitoba, Legislative Assembly Standing Committee on Crown Corporations, *Hansard*, 42nd Leg, 3rd Sess, Vol LXXV No. 3 (29 June 2021) at 73 (Jay Grewal).

¹¹ *Ibid* at 74.

¹² *Ibid*.

The Consumers Coalition views these comments as undermining the submission of Manitoba Hydro that its circumstances have not changed substantially. The alleged need for an estimated \$60 Million rate increase is an admission against interest.¹³ It directly contradicts Hydro's allegation that its circumstances have not changed substantially since Orders 69/19 and 59/18 and that its current rates are just and reasonable.

Second, in response to the Consumers Coalition Application, the PUB ordered Manitoba Hydro to produce prospective financial information in the form of documents long relied upon by Manitoba Hydro and the PUB to determine just and reasonable rates.¹⁴ As described in the Consumers Coalition comments provided to the PUB on 24 June 2021, Manitoba Hydro's response was substantially non-compliant with the PUB Order. Manitoba Hydro did not provide the financial forecasts sought by the PUB because it claimed that they did not exist.¹⁵ It also failed to provide a reasonable proxy for these longstanding forecasts.

Before the Standing Committee, the CEO suggested that the financial forecasting and analysis relied upon by Manitoba Hydro management to identify the need for a 3.5% rate increase in 2021 were prepared and available to be provided to the PUB in response to Order 53/21, having already been developed by August 2020.¹⁶

Manitoba Hydro could have and should have provided to the PUB forecast information in its possession that might substantiate its allegation that the proposed 3.5% rate change was "prudent",¹⁷ "important",¹⁸ and "required to set the trajectory to achieve the current 75-25 debt-equity target that [Manitoba Hydro is] to reach." It could have done so without sharing the actual Treasury Board submission in question.

From the perspective of the Consumers Coalition, this supports a characterization of Manitoba Hydro's 9 June 2021 response to Order 53/21 as non-compliant. These comments are relevant to the Board's determination of next steps in this proceeding following Order 53/21 and are supportive of the Consumers Coalition comments provided to the Board on 24 June 2021.

c) The Evidence can be Received under the PUB Rules and is an Admission against Interest

Ms. Grewal's testimony was given before Legislative Assembly of Manitoba's Standing Committee on Crown Corporations. It contradicts the 9 June 2021 submissions made by Manitoba Hydro in Response to Order 53/21.

¹³ As a rule of thumb, the Consumers Coalition estimates a 1% rate increase to amount to approximately \$17 million.

¹⁴ PUB Order 53/21 at 23.

¹⁵ Manitoba Hydro Letter to the Public Utilities Board (9 June 2021) at 1.

¹⁶ *Ibid.*

¹⁷ Manitoba, Legislative Assembly Standing Committee on Crown Corporations, *Hansard*, 42nd Leg, 3rd Sess, Vol LXXV No. 3 (29 June 2021) at 73 (Jay Grewal).

¹⁸ *Ibid* at 74.

PUB Rule 18 provides that:

Evidence received in another proceeding before the Board or before any other provincial or federal regulatory body or any report, decision, finding or order made in respect thereof, may, by leave of the Board, be received as evidence in a proceeding.

Testimony given before a Standing Committee of the Legislative Assembly of Manitoba meets the criteria for evidence received in another proceeding before another provincial regulatory body.

The comments of the CEO before the Standing Committee on Crown Corporations were neither made under oath nor tested through cross examination. In the context of court proceedings, statements made by a person out of court, are “generally speaking, not admissible to prove the truth of what [they say].”¹⁹

An exception to this rule, however, permits admission of the statement if it constitutes an admission against interest. As noted by the Supreme Court of Canada, this is because “admissions against interest are likely to be true.”²⁰

Whether or not the statements of Ms. Grewal before the Standing Committee are analytically or mathematically correct, it is reasonable to infer that she believed them to be true given the reality that they contradict the assertions made by Manitoba Hydro in its 9 June 2021 response to Order 53/21.

It is open to the PUB to receive this evidence under its own Rules and under the common law rules of evidence.

d) With Other Evidence, the CEO’s Comments Could Reasonably be Determinative

As explained in its comments provided to the Board on 24 June 2021, the Consumers Coalition submits that there is sufficient evidence before the Board to find, first, that Manitoba Hydro’s circumstances have changed substantially, and second, that Manitoba Hydro has not complied with Order 53/21.

The comments made by the CEO before the Standing Committee on Crown Corporations are highly relevant and material to both of these issues.

The comments by the CEO also address the issue of “information asymmetry” raised by the Consumers Coalition and accepted by the Board in Order 53/21.²¹ The comments of the CEO, if admitted, would enable the PUB to rely not only on the submissions of the Consumers Coalition and other participating parties characterizing Manitoba Hydro’s

¹⁹ *R v Rojas*, 2008 SCC 56 at para 29.

²⁰ *Ibid* at para 35.

²¹ Order 53/21 at 20.

circumstances on the basis of publicly available information, but also on the statements of Manitoba Hydro management.

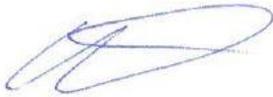
Conclusion

The Consumers Coalition has shown due diligence in seeking leave to introduce statements by the Manitoba Hydro CEO that are relevant and material. The information is admissible under the PUB Rules and the common law and could reasonably be expected to affect the result of the Application for an Order requiring a Manitoba Hydro Status Update Hearing. There can be no prejudice to Manitoba Hydro from the admission of contemporaneous testimony from its own CEO.

Accordingly, the Consumers Coalition asks the PUB to grant this motion for leave to introduce new evidence.

Thank you for your consideration of these submissions.

Yours truly,



Byron Williams
Director, Public Interest Law Centre



Christopher Klassen
Barrister and Solicitor

Enclosures (1)

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