

Manitoba Hydro GRA 2017/18 & 2018/19

Consumers Coalition Notice of Legal Issue

January 29, 2018

The Consumers Coalition intends to present legal arguments as part of its Closing Submissions in the Manitoba Hydro General Rate Application 2017/18 & 2018/19.

As per Public Utilities Board direction on January 24, 2018 (transcript pages 6195-6197), the purpose of this document is to provide notice of such intention and a short summary of the intended legal arguments.

Overarching Statutory Intent

In coming to a decision regarding a rate application, the Public Utilities Board has two concerns, as articulated by the Manitoba Court of Appeal: “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.”¹ This consideration of the public interest must be informed by the themes of economy and efficiency, as articulated in the purposes and objects of *The Manitoba Hydro Act*.²

The statutory scheme in place in Manitoba regarding the regulation of rates for Manitoba Hydro is primarily governed by the interaction of *The Public Utilities Board Act*,³ *The Manitoba Hydro Act*⁴ and *The Crown Corporations Governance and Accountability Act*.⁵ While the regulation of electricity rates in Manitoba and the principles of public utility rates articulated by Dr. Bonbright pre-date the passage of the *Constitution Act of 1982*⁶, the current statutory framework in Manitoba was enacted after its passage⁷ and is necessarily informed by the commitments to equal benefit of the law under s. 15 of *the Charter*⁸ and to essential public

1 *Consumers' Association of Canada (Manitoba) Inc v Manitoba Hydro Electric Board*, 2005 MBCA 55, at para 65.

2 *The Manitoba Hydro Act*, CCSM c H190, s 2.

3 *The Public Utilities Board Act*, CCSM c P280.

4 *The Manitoba Hydro Act*, CCSM c H190.

5 *The Crown Corporations Governance and Accountability Act*, CCSM c C336.

6 *The Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

7 *The Public Utilities Board Act* was enacted in 1987 and came into force in 1988; *The Manitoba Hydro Act* was enacted in 1987 and came into force in 1988; *The Crown Corporations Governance and Accountability Act* was enacted in 2017 and its predecessor, *The Crown Corporations Public Review and Accountability Act*, was enacted in 1988.

8 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

services of a reasonable quality under s. 36(1)(c) of the *Constitution Act of 1982*.⁹

In addition to other factors regarding the Crown Corporation's revenue requirement, *The Crown Corporations Governance and Accountability Act* states that the Public Utilities Board may, in reaching a decision, take into consideration:

(viii) any compelling policy considerations that the board considers relevant to the matter, and

(ix) any other factors that the Board considers relevant to the matter.¹⁰

Given the statutory framework, and the discretion explicitly contemplated to consider policy considerations and any other relevant factors, the Consumers Coalition intends to address whether the Public Utilities Board has an obligation to consider Charter and Constitutional protections, including Charter values, in its deliberations as they relate to the determination of just and reasonable rates¹¹ and the promotion of economy and efficiency.¹² This analysis will extend to the consideration of any bill assistance program that is considered.

Jurisdiction of the Public Utilities Board on bill assistance

The Consumers Coalition intends to make legal arguments relating to the jurisdiction of the Public Utilities Board in implementing differential rates based on income.

In Order No. 73/15, the Public Utilities Board concluded that it has jurisdiction to require Manitoba Hydro to implement a bill affordability program. Its conclusion that it has jurisdiction to make such an order was based on its interpretation of *The Manitoba Hydro Act*, *The Public Utilities Board Act* and *The Crown Corporations Public Review and Accountability Act*.

In particular, the PUB noted that although Manitoba Hydro is regulated on a cost of service basis, the PUB is required to set just and reasonable rates. In addition, s. 26(4) of *The Crown Corporations Public Review and Accountability Act* (now 25(4) of *The Crown Corporation Governance and Accountability Act*) expressly authorizes the PUB to consider “any

9 For example, see s 36(1)(c) of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11: 36. (1) **Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to**
(a) promoting equal opportunities for the well-being of Canadians;
(b) furthering economic development to reduce disparity in opportunities; and
(c) **providing essential public services of reasonable quality to all Canadians.** (emphasis added)
See also *Manitoba Keewatinowi Okimakanak Inc v Manitoba Hydro-Electric Board*, 1992 CanLII 8479 (MB CA) where s 36(1)(c) was raised.

10 *The Crown Corporations Governance and Accountability Act*, CCSM c C336, s 25(4)(a).

11 *The Public Utilities Board Act*, CCSM c P280, s 77(a).

12 *The Manitoba Hydro Act*, CCSM c H190, s 2.

compelling policy considerations that the board considers relevant to the matter.” The PUB also noted that the “postage stamp” rate requirement does not prohibit creating a low income customer class provided it does not impose geographical limitations.

In other jurisdictions, decisions regarding a regulator's jurisdiction to implement a bill assistance program has been mixed:

- The Nova Scotia Utility Review Board does not have jurisdiction to order or adopt a rate assistance program for low income consumers and requiring all customers in similar circumstances to be charged the same rate is not discriminatory under the *Charter*;¹³
- The Ontario Energy Board does have jurisdiction to take income level into account when setting rates in order to achieve its objective of protecting the interests of consumers;¹⁴
- The BC Utilities Commission has jurisdiction to approve low income rates if there is an economic or cost of service justification.¹⁵

The Consumers Coalition intends to explore whether the Public Utilities Board's conclusion in Order 73/15 would be considered reasonable if a judicial review of a decision to order a bill assistance program was initiated.¹⁶ In that argument, the Consumers Coalition intends to explore the implications of Charter protections and Constitutional values in providing insight into the Board's jurisdiction to implement differential rates based on income.¹⁷

Charter protections and Constitutional values are always in play

Constitutional values are always in play in the exercise of administrative discretion or in the consideration of statutory ambiguity. The Supreme Court of Canada has found that:

[24] It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including Charter values (see *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 (CanLII),

13 *Dalhousie Legal Aid Service v. Nova Scotia Power Incorporated*, 2006 NSCA 74 and *Boulter v Nova Scotia Power Incorporated*, 2009 NSCA 17

14 *Advocacy Centre for Toronto Ontario v Ontario Energy Board*, 2008 CanLII 23487, Ontario Superior Court of Justice.

15 British Columbia Utilities Commission Decision and Order G-5-17, in the Matter of British Columbia Hydro and Power Authority 2015 Rate Design Application, January 20, 2017.

16 Especially in the context of *Dunsmuir v New Brunswick*, 2008 SCC 9, where the Supreme Court found that there are only two standards of review on judicial review: correctness which allows for no deference, and reasonableness, which allows considerable deference. The PUB is interpreting its own statute, including “other policy considerations” under *The Crown Corporations Governance and Accountability Act*, s 25(4)(a).

17 See *Stadler v Director, St Boniface*, 2017 MBCA 108 for a recent Manitoba example of an administrative tribunal, the Social Services Appeal Board, having been found to be Charter competent.

[2002] 4 S.C.R. 710, at para. 71; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21 (CanLII), [2004] 1 S.C.R. 528, at paras. 19-23; and *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815, at paras. 62-75). The question then is what framework should be used to scrutinize how those values were applied?¹⁸ (emphasis added)

The preferred framework of the Supreme Court to examine how Charter values are applied is:

[35] The alternative is for the Court to embrace a richer conception of administrative law, under which discretion is exercised “in light of constitutional guarantees and the values they reflect” (Multani, at para. 152, per LeBel J.). **Under this approach, it is unnecessary to retreat to a s. 1 Oakes analysis in order to protect Charter values. Rather, administrative decisions are always required to consider fundamental values.** The Charter simply acts as “a reminder that some values are clearly fundamental and . . . cannot be violated lightly” (Cartier, at p. 86). The administrative law approach also recognizes the legitimacy that this Court has given to administrative decision-making in cases such as *Dunsmuir and Conway*. **These cases emphasize that administrative bodies are empowered, and indeed required, to consider Charter values within their scope of expertise.** Integrating Charter values into the administrative approach, and recognizing the expertise of these decision-makers, opens “an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship” (Liston, at p. 100).¹⁹ (emphasis added)

Within the broader context of the consumer interest in affordable access to reliable electricity, the Consumers Coalition will consider the implications of our constitutional commitment to equal benefit of the law and to essential public services of a reasonable quality in all aspect of the rate application including but not limited to:

- The overall rate increase granted to Manitoba Hydro;
- The Public Utilities Board's jurisdiction to implement differential rates based on income;
- Whether to order a bill assistance program; and
- The elements of any bill assistance program implemented.²⁰

No determination of the constitutional validity of an Act of the Legislature is sought or required. Therefore, no notice under s. 3 of *The Constitutional Questions Act*, C.C.S.M. c. C180, is necessary.

¹⁸ *Doré v Barreau du Québec*, 2012 SCC 12, at para 24.

¹⁹ *Ibid*, at para 35.

²⁰ We note that at this time, we have no instructions from our clients, the Manitoba Branch of the Consumers' Association of Canada and Winnipeg Harvest, on their position regarding a bill assistance program.

Implications of *The Efficiency Manitoba Act*

The Consumers Coalition intends to make legal arguments relating to the implications of *The Efficiency Manitoba Act*²¹ on Manitoba Hydro's Integrated Resource Planning. Specifically, the Consumers Coalition will explore whether *The Efficiency Manitoba Act* is intended to operate within an Integrated Resource Planning framework and whether the target of 1.5%/year of savings for electric energy can be adjusted in an efficiency plan in the context of Integrated Resource Planning.

In this argument, the Consumers Coalition intends to rely on the following sections of *The Efficiency Manitoba Act*: Section 7(1): Initial savings targets, Section 9: Efficiency plans, Section 10: Plans to be submitted to PUB, Section 11(1): Review and recommendation by PUB, Section 11(2): Manitoba Hydro entitled to be heard, Section 11(4): Mandatory considerations, Section 11(5): Optional recommendations, Section 16(1): Independent assessment, Section 16(5): PUB recommendations, Section 39(1): Regulations — general, Section 40(1): Regulations — demand-side management of other resources, Section 40(2): Regulations — savings targets for other resources.

21 *The Efficiency Manitoba Act*, SM 2017, c 18.