Citation: Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board) et al, 2020 MBCA 60

Date: 20200609
Docket: AI18-30-09116

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre

IN THE MATTER OF:	***The Public Utilities Board Act, CCSM c P280***
AND IN THE MATTER OF:	***The Manitoba Hydro Act, CCSM c H190***
AND IN THE MATTER OF:	***The Crown Corporations Governance and Accountability Act, CCSM c C336***
AND IN THE MATTER OF:	***An Appeal from Order No. 59/18 dated May 1, 2018, Order No. 68/18 dated May 29, 2018 and Order No. 90/18 dated July 13, 2018 of the Public Utilities Board of Manitoba***

BETWEEN:

MANITOBA HYDRO-ELECTRIC BOARD	***P. J. Ramage***,
	H. D. Van Iderstine *and*
	D. A. Barchyn
(Applicant) Appellant	*for the Appellant*
	R. F. Peters,
- and -	***D. M. Steinfeld*** *and*
	K. Hart
	for the Respondent
PUBLIC UTILITIES BOARD OF MANITOBA	***J. B. Williams***
	for the Intervener
	Consumers' Association
Respondent	*of Canada*
	C. Fox *and*
- and -	***E. Guglielmin***
	for the Intervener
	Assembly of Manitoba
CONSUMERS' ASSOCIATION OF CANADA	*Chiefs*

(MANITOBA) and ASSEMBLY OF MANITOBA CHIEFS	)	*Appeal heard:*
	)	***January 22, 2020***
	)	
	)	*Judgment delivered:*
Interveners	)	***June 9, 2020***

CAMERON JA

Introduction and Background

[1] This is an appeal by the applicant (Manitoba Hydro) from Directive 6 (the directive) of Order No 59/18 of the respondent (the PUB) (all PUB orders referred to herein were accessed online: *Public Utilities Board*, <www.pubmanitoba.ca/v1/proceedings-decisions/orders/electricity.html> (date accessed: 26 May 2020)). Order No 59/18 was made in response to a General Rate Application filed by Manitoba Hydro seeking, among other things, a 7.9 per cent rate increase to all components of the rates for all customer classes to be effective April 1, 2018.

[2] The PUB unanimously denied the 7.9 per cent increase, ordering instead a 3.6 per cent average revenue increase. However, by way of the directive, a majority of the PUB ordered Manitoba Hydro to create a First Nations On-Reserve Residential customer class (the on-reserve class) that was to receive a zero per cent rate increase.

[3] The sole dissenting member of the PUB was of the opinion that the PUB did not have jurisdiction to create the on-reserve class.

[4] In *Manitoba Hydro-Electric Board v Public Utilities Board (Man) et al*, 2019 MBCA 54, leave to appeal the directive to this Court was granted by Michel Monnin JA pursuant to section 58(2) of *The Public Utilities Board Act*, CCSM c P280 (the *PUB Act*) on the question of "whether the PUB

exceeded its jurisdiction in creating [an on-reserve class] whose rate for service would be different from those customers remaining in the existing 'residential class'" (at para 41).

[5] After the directive had been made, the PUB approved the resulting Residential Rates Schedule reflecting the new rates in Order No 68/16.

[6] Manitoba Hydro applied to the PUB to review and vary Order Nos 59/18 and 68/18 including, among other things, the directive. In Order No 90/18, the PUB denied the application to vary the directive. Thus, to the extent that Order Nos 68/18 and 90/18 reflect the directive contained in Order No 59/18, they are also the subject of this appeal.

[7] Manitoba Hydro maintains that, in creating the on-reserve class, the PUB exceeded its jurisdiction. In support of its argument, it relies on statutory interpretation of *The Manitoba Hydro Act*, CCSM c H190 (the *Hydro Act*); the *PUB Act*; and *The Crown Corporations Governance and Accountability Act*, CCSM c C336 (the *Crown Act*).

[8] Relying on the same statutes, the PUB asserts that, in exercising its function of reviewing and setting rates for the provision of power, it is empowered to consider policy issues such as energy affordability for "low-income families" (Order No 59/18 at p 209). It maintains that it has the jurisdiction to "order a bill affordability program such as a lower-income rate, and to take into account affordability as a factor in setting just and reasonable rates" (at p 27). In its view, it was exercising this jurisdiction when it directed the creation of the on-reserve class.

[9] Consumers' Association of Canada (Manitoba) (CAC Manitoba) generally supports the position of the PUB. Its primary focus is to rebut

Manitoba Hydro's assertion that the PUB erred by determining that it had the authority to classify customer groups.

[10] Assembly of Manitoba Chiefs (AMC) is in total agreement with the position of the PUB. It emphasises that, in reaching its conclusion, the PUB correctly considered *The Path to Reconciliation Act*, CCSM c R30.5 (the *PTRA*).

[11] For the reasons below, I would allow the appeal. While the PUB has the authority to scrutinize and create customer classifications in approving the rates charged by Manitoba Hydro, the directive breached section 39(2.2) of the *Hydro Act*, which requires that customers are not to be classified solely on the basis of the region of the province in which they live or the density of the population.

[12] In addition, and more significantly, the directive constituted the creation and implementation of general social policy, an area outside of the PUB's jurisdiction and encroaching into areas that are better suited to the federal and provincial governments. The directive resulted in the use of Manitoba Hydro's funds and revenue for government purposes contrary to section 43(3) of the *Hydro Act* and in excess of the PUB's jurisdiction.

The Legislative Framework

Manitoba Hydro

Manitoba Hydro is a Crown corporation with a monopoly over the provision of power in Manitoba. Its home statute, the *Hydro Act*, specifies that its objects and purposes are to "provide for the continuance of a supply of power adequate for the needs of the province" and related activities (at section 2).

Section 39(1) of the *Hydro Act* provides that "The prices payable for power supplied by [Manitoba Hydro] shall be such as to return to it in full the cost to the corporation, of supplying the power". Section 39(2) grants Manitoba Hydro the ability to fix prices subject to Part 4 of the *Crown Act*.

The PUB

[13] The home statute of the PUB is the *PUB Act*. The PUB describes itself as "an administrative tribunal created by provincial legislation to act as an independent decision-maker in the regulation of public utilities in Manitoba" (Order 59/18 at p 4). The PUB's authority over Manitoba Hydro is limited by section 2(5) of the *PUB Act*, which provides, "Subject to Part 4 of the [*Crown Act*] . . . this Act . . . does not apply to Manitoba Hydro and the [PUB] has no jurisdiction or authority over Manitoba Hydro."

The Crown Act

[14] The *Crown Act* governs public corporations, including Manitoba Hydro (see section 2(b)). Section 25(1) provides that the PUB shall review the rates for services provided by Manitoba Hydro. Section 25(2) defines rates for services as the prices charged by Manitoba Hydro for the provision of power. Section 25(3) states that the *PUB Act* applies with "any necessary changes" to a review of the rates for services charged by Manitoba Hydro for the provision of power. Finally, section 25(4) provides a number of factors that the PUB may take into consideration in making a decision regarding the rates for services.

[15] The relevant provisions of the *Hydro Act*, the *PUB Act* and the *Crown Act* are reproduced in full in these reasons as required.

The Decision of the PUB

[16] The PUB determined it had broad jurisdiction with respect to its review of the rates charged by Manitoba Hydro. It found that, when fixing just and reasonable rates pursuant to section 77 of the *PUB Act*, it was guided by the factors contained in section 25(4)(a) of the *Crown Act*, including section 25(4)(a)(viii), which allows the PUB to consider any compelling policy considerations, and section 25(4)(a)(ix), which allows it to take into account any other factors it considers to be relevant to the matter. The PUB stated (at p 217):

> As the Manitoba Court of Appeal held in *Consumers' Association of Canada (Manitoba) Inc v Manitoba Hydro Electric Board*, 2005 MBCA 55, this requires the [PUB] to balance two concerns: "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." Each of these two concerns support the ability of the [PUB] to consider the affordability of Manitoba Hydro's rates, whether broadly or within a class or sub-set of its customers.

[17] The PUB further determined that the *PUB Act* did not prohibit the creation of a customer class that pays less than the average cost to serve such customers. According to the PUB, "the only limitation on the [PUB's] broad authority under *The Crown Act* is the requirement [at section 39(2.2)(b) of the *Hydro Act*] that customers not be classified solely based on region or population density" (at p 220). It was the PUB's view that the creation of a lower-income customer class generally was not prohibited by that limitation.

[18] In brief, the PUB concluded that it had "legal jurisdiction under its governing statutory framework to order a bill affordability program such as a

lower-income rate, and to take into account affordability as a factor in setting just and reasonable rates" (at p 27).

[19] Based on the foregoing, the PUB directed Manitoba Hydro to establish the on-reserve class and implement a zero per cent rate increase for that class for the 2018/2019 test year. In its reasons, the PUB stated that the directive was consistent with the principle of reconciliation as defined in the *PTRA*. It said that the creation of the on-reserve class was in response to the degree of poverty on reserves and ordered that the on-reserve class continue until otherwise ordered. According to the PUB, the creation of the on-reserve class was "not defined solely on the basis of the region of the province in which the customers are located or population density" (at p 233).

[20] In reaching its conclusion, the PUB recognised that the directive could create a shortfall in revenue to Manitoba Hydro. However, it determined that Manitoba Hydro would be "kept whole because the cost of the 0% rate increase for [the on-reserve class] has been factored into the level of the average general rate increase granted for the Test Year to all other customer classes" (at p 29).

[21] The dissenting member of the PUB found that the directive constituted a departure from principles of utility regulation in this province. He stated that, if there was to be a "significant deviation or change to the long-standing approach to cost recovery on a cost of service basis, that change should be made by the Government" (at p 236). In his view, the creation of the sub-set of residential payers constituted the impermissible making of social policy. While he agreed with the majority that the PUB had the jurisdiction to create a lower-income customer class, it did not have jurisdiction to create a "discriminatory customer class based on regions of the

province" (at p 237). Finally, he expressed concern that, over time, the gap in residential rates would continue to grow and "would become onerous on other ratepayers that will be responsible for subsidizing through their rates the lost revenues not recovered from the [on-reserve class]" (at p 238).

Grounds of Appeal

[22] Manitoba Hydro raises six grounds of appeal:

1. Did the PUB misinterpret the legislative schemes governing Manitoba Hydro and the PUB?

2. Did the PUB err in its understanding of the uniform rates provision of the *Hydro Act* and the regulatory principle of non-discrimination?

3. Did the PUB err in its definition of reserve?

4. Did the PUB err in its application of the limited class rule?

5. Did the PUB err in law in intruding into social policy?

6. Did the PUB err in causing Manitoba Hydro to expend funds for purposes of poverty reduction (Government purposes)?

Standard of Review

[23] This case involves an appeal of the decision of an administrative tribunal. Before the hearing of this matter, the Supreme Court of Canada released its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, and the companion decision of *Bell Canada v Canada (Attorney General)*, 2019 SCC 66.

[24] In *Vavilov*, the Supreme Court of Canada reinforced that reasonableness is the presumptive standard to be applied by a court reviewing the merits of an administrative law decision (see paras 10, 16, 25). However, relevant to this case, an intent to rebut the presumption of reasonableness can be found where the legislation provides a statutory appeal mechanism from an administrative decision to the courts (see paras 17, 33).

[25] Where a court is hearing an appeal pursuant to a statutory appeal mechanism, the court is to apply appellate standards of review as set out in *Housen v Nikolaisen*, 2002 SCC 33. Thus, where the appeal is from an administrative decision-maker, and a question of law is raised, including questions of statutory interpretation and questions about the scope of the decision-maker's authority, the standard of correctness will apply. If the issue is a question of fact, or a question of mixed law and fact for which there is no extricable question of law, the standard of palpable and overriding error will apply (see para 37).

[26] Section 58(1) of the *PUB Act* states:

> **Grounds of appeal**
> **58(1)** An appeal lies from any final order or decision of the [PUB] to The Court of Appeal upon
>
> (a) any question involving the jurisdiction of the [PUB]; or
>
> (b) any point of law; or
>
> (c) any facts expressly found by the [PUB] relating to a matter before the [PUB].

[27] The parties agree, as do I, that the question of "whether the PUB exceeded its jurisdiction in creating [an on-reserve class] whose rate for service would be different from those customers remaining in the existing

'residential class'" (2019 MBCA 54 at para 41) involves issues of statutory interpretation and is therefore to be reviewed on the standard of correctness (see *Bell Canada* at paras 34-35). In my view, the standard of correctness also applies to each of the grounds of appeal advanced by Manitoba Hydro as they involve questions of jurisdiction, statutory interpretation and law.

Statutory Interpretation

[28] The modern approach to statutory interpretation was set out by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 (at para 21):

> Although much has been written about the interpretation of legislation, . . . Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[29] Further, section 6 of *The Interpretation Act*, CCSM c I80 provides that "[e]very 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."

Ground 1—Did the PUB Misinterpret the Legislative Schemes Governing Manitoba Hydro and the PUB?

Positions of the Parties

[30] Manitoba Hydro underscores that it is generally exempt from the *PUB Act* pursuant to section 2(5) of that *Act*. It argues that the PUB's grant of authority pursuant to section 25 of the *Crown Act* only permits the PUB to review "rates for service", that being the price charged by Manitoba Hydro with respect to the provision of power. It submits that there is no authority permitting the PUB to create customer classes.

[31] The PUB argues that section 25(3) of the *Crown Act* authorises it to apply the *PUB Act* to the review of rates charged by Manitoba Hydro and that its ability to create classes is found in sections 77 and 82(1) of the *PUB Act*.

[32] CAC Manitoba argues that, pursuant to section 44 of the *PUB Act*, the PUB had the "flexibility to grant [Manitoba Hydro's] application in whole or part or to grant further or other relief 'in addition to or in substitution for that applied for'". Relying on *Coalition of Manitoba Motorcycle Groups Inc v Manitoba (Public Utilities Board)*, 1995 CarswellMan 433 at para 25 (CA), it asserts that, when considering and granting relief, "[a]ll 'aspects of a rate (are) in issue'."

[33] AMC agrees with the PUB that the *PUB Act*, the *Crown Act* and the *Hydro Act* give the PUB authority to direct the creation of a new customer class.

Analysis

[34] Section 2(5) of the *PUB Act* provides:

> **Application to Manitoba Hydro**
> **2(5)** Subject to Part 4 of [the *Crown Act*] and except for the purposes of conducting a public hearing in respect of an application made to the [PUB] under subsection 38(2) or 50(4) of [the] *Hydro Act*, this Act, other than subsection 83(4) and the regulations under that subsection, does not apply to Manitoba Hydro and the [PUB] has no jurisdiction or authority over Manitoba Hydro.

[35] Regarding the prices to be fixed by Manitoba Hydro for the provision of power, section 39(2) of the *Hydro Act* states:

> **Fixing of price by corporation**
> **39(2)** Subject to Part 4 of [the *Crown Act*] and to subsection (2.1), [Manitoba Hydro] may fix the prices to be charged for power supplied by [Manitoba Hydro].

[36] Part 4 of the *Crown Act* contains sections 25(1)-25(3), which state:

> **Hydro and MPIC rates review**
> **25(1)** Despite 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 *PUB*] *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"**
> **25(2)** For the purposes of this Part, **"rates for services"** means
>
> (a) in the case of Manitoba Hydro, prices charged by that corporation with respect to the provision of power as defined in [the] *Hydro Act*; . . .
>
> . . .

Application of [PUB] Act
25(3) [The *PUB*] *Act* applies with any necessary changes to a review pursuant to this Part of rates for services.

[37] The sections of the *PUB Act* which are relevant to whether the PUB has authority to create customer classes are sections 44(1), 77(a)-77(b) and 82(1)(a) and 82(1)(c). Those sections state:

Power to order partial or other relief
44(1) Upon any application to it, the [PUB] 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.

Orders as to utilities
77 The [PUB] may, by order in writing after notice to, and hearing of, the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls, charges, or schedules thereof, as well as commutation, mileage, and other special rates that shall be imposed, observed, and followed thereafter, by any owner of a public utility wherever the [PUB] determines that any existing individual rate, joint rate, roll, charge or schedule thereof or commutation, mileage, or other special rate is unjust, unreasonable, insufficient, or unjustly discriminatory or preferential;

(b) fix just and reasonable standards, classifications, regulations, practices, measurements, or service to be furnished, imposed, observed, and followed thereafter by any such owner;

Discriminatory rates
82(1) No owner of a public utility shall

(a) make, impose, or exact any unjust or unreasonable, unjustly discriminatory, or unduly preferential, individual or joint rate, commutation rate, mileage, or other special rate, toll, fare, charge, or schedule, for any product or service supplied or rendered by it within the province;

> (c) adopt or impose any unjust or unreasonable classification in the making, or as the basis, of any individual or joint rate, toll, fare, charge, or schedule for any product or service rendered by it within the province;
>
> [emphasis added]

[38] Contrary to Manitoba Hydro's position, I am of the view that sections 77(b) and 82(1)(c) of the *PUB Act* do apply to a PUB review of its customer classifications. The limitation on the PUB's authority found in section 2(5) of the *PUB Act* specifies that it is subject to Part 4 of the *Crown Act*. Section 25(3) of the *Crown Act* specifically allows for the application of the *PUB Act* "with any necessary changes" to a review of the rates charged by Manitoba Hydro. I disagree with the suggestion made by Manitoba Hydro that section 25(3) of the *Crown Act* is limited to process only. There is nothing in section 25(3) that would limit its application to matters of procedure before the PUB.

[39] The PUB is mandated to review rates on the basis of whether they are just and reasonable. Sections 77(b) and 82(1)(c) of the *PUB Act* clearly contemplate the necessity for just and reasonable rates and classifications.

[40] In my view, the setting of customer classifications is an inherent part of the setting of rates. In *Coalition of Manitoba Motorcycle Groups*, Twaddle JA considered the breadth of section 44(1) of the *PUB Act* and its application to a decision made by the PUB to increase insurance rates in an amount higher than that requested by the Manitoba Public Insurance Corporation. He agreed that "if the [PUB] has discretion to set any rate that is fair and reasonable upon the evidence and in the public interest, then all aspects of the rates are 'in issue'" (at para 25). In my view, that statement is equally applicable in this case.

[41] In summary, a purposive approach to the interpretation of the legislation supports the ability of the PUB pursuant to section 82(1)(c) of the *PUB Act* to review the classifications created by Manitoba Hydro to ensure that they are not unjust or unreasonable. Similarly, it has the authority to fix just and reasonable rates, charges and classifications. Nevertheless, as I next explain, the PUB must act within the statutory limits set out in the *Hydro Act* when exercising its jurisdiction.

Ground 2—Did the PUB Err in Its Understanding of the Uniform Rates Provision of the *Hydro Act* and the Regulatory Principle of Non-Discrimination?

Ground 3—Did the PUB Err in Its Definition of Reserve?

Positions of the Parties

[42] Manitoba Hydro argues that the creation of the on-reserve class breached sections 39(2.1) and 39(2.2) of the *Hydro Act* which require that the price charged for power supplied to a class of grid customers shall be the same throughout the province and that customers are not to be classified solely on the basis of the region in the province in which they are located or on the population density.

[43] The PUB and AMC submit that the PUB did not err when it concluded that section 39 of the *Hydro Act* was not offended by the creation of the on-reserve class. They disagree with Manitoba Hydro's interpretation of the intent of the legislation and maintain that the on-reserve class is not based on a region in the province, as there are 63 different reserves throughout the province. The PUB further argues that the on-reserve class is not solely based on the region of the province, as it is defined on the basis of class

members belonging to Manitoba First Nations, being residential customers and living on reserve.

Analysis

[44] Section 39 of the *Hydro Act* governs the sale of power by Manitoba Hydro. Section 39(1) provides:

> **Price of power sold by corporation**
> **39(1)** The prices payable for power supplied by [Manitoba Hydro] shall be such as to return to it in full the cost to [Manitoba Hydro], of supplying the power, including
>
> . . .

[45] Sections 39(2.1) and 39(2.2) provide:

> **Equalization of rates**
> **39(2.1)** The rates charged for power supplied to a class of grid customers within the province shall be the same throughout the province.
>
> **Interpretation**
> **39(2.2)** For the purpose of subsection (2.1),
>
> (a) grid customers are those who obtain power from [Manitoba Hydro's] main interconnected system for transmitting and distributing power in Manitoba; and
>
> (b) customers shall not be classified based solely on the region of the province in which they are located or on the population density of the area in which they are located.
>
> [emphasis added]

[46] The ability of the PUB to review, approve and fix rates is constrained by the provisions of the *Hydro Act*.

[47] A review of the legislative history of sections 39(2.1) and 39(2.2) evidences that those sections were enacted to equalize rates among residential customers. Prior to their enactment, Manitoba Hydro divided residential customers into three zones dependent on the density of the population and the number of metered services, and it calculated its rates for each zone based on the cost of service principle. As a result, rural or remote customers paid more for the provision of power supplied by Manitoba Hydro.

[48] In 2001, *The Manitoba Hydro Amendment Act (2)*, SM 2001, c 23, which enacted sections 39(2.1) and 39(2.2), came into force. During the second reading of Bill 27, *The Manitoba Hydro Amendment Act (2)*, 2nd reading, Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 37-2, vol 51, No 38 (30 May 2001), online (pdf): *Legislative Assembly of Manitoba* < www.gov.mb.ca/legislature/hansard/37th_2nd/hansardpdf/38.pdf> (date accessed 22 May 2020), the Hon Greg Selinger, then Minister charged with the administration of the *Hydro Act*, stated (at p 2505):

> **Mr. Selinger:** I am pleased to give second reading to this bill. As I mentioned in the first reading, this legislation will require Manitoba Hydro to charge customers connected to the provincial power grid the same rate for electricity service, regardless of where they live in Manitoba.
>
> Mr. Speaker, on December 5, 2000, the Speech from the Throne promised this single rate for residential hydro users.

[49] That the government understood that the equalization of the cost for the provision of hydro was a government policy decision requiring legislative authority is evidenced by the comments of Minister Selinger in the Manitoba, Legislative Assembly, Standing Committee on Public Utilities and Natural Resources, *Committee Debates (Hansard)*, 37-2, vol 51, No 3 (18 June 2001),

online (pdf): *Legislative Assembly of Manitoba* < www.gov.mb.ca/legislature/hansard/37th_2nd/hansardpdf/pu3.pdf> (date accessed 22 May 2020) (at pp 96, 98-99):

> **Mr. Selinger:** As we have discussed in the Legislature, it was the Government's decision to proceed by legislation for uniform rates, and that is because it is a change, not an adjustment to the existing rate structure. It is a change, a policy-driven change to the rates themselves, to go to a uniform or universal rate for all Manitobans.
>
> . . .
>
> **Mr. Selinger:** Once again, the uniform rates we are proposing which lower electricity rates for rural and northern customers are ones that were promised in an election. It is a change in policy. It is not an adjustment to an existing rate structure. A change in policy is the responsibility of the Government, and the Government is taking that responsibility in the Legislature and in this committee, presenting you with that information and proceeding on that basis. That is a completely legitimate role for government.
>
> . . .
> The structural change to go to a uniform rate is one that is driven by the Government who has the majority in the Legislature and has made that election commitment.
>
> [emphasis added]

[50] In the context of this appeal, it is significant that the PUB itself has previously recognised that, while it may consider the creation of classes for the purposes of setting rates, it may only do so "provided that no geographic limitations are imposed on such a class" (Order No 73/15 at p 29).

[51] I agree with Manitoba Hydro that, in enacting sections 39(2.1) and 39(2.2), the legislative intent was to equalize the price of power charged to residential customers in various regions of the province. I also agree with

Manitoba Hydro's assertion that the reserves contemplated by the directive are "tract[s] of land" (as so defined in section 2(1) of the *Indian Act*, RSC 1985, c I-5) and that they are, in fact, specific geographic regions in the province.

[52] At the hearing, this Court questioned whether persons who were not of First Nations descent, but who were living on a reserve, were eligible for the zero per cent increase benefit provided to the on-reserve class. The PUB argued that it intended that the on-reserve class would only apply to those customers that were of First Nations descent. It stated that, based on the record of the hearings before the PUB, it was apparent that its intent was for Manitoba Hydro to identify First Nations customers as those persons having treaty status. This was a troublesome submission for a number of reasons. To begin, there is no reference in the PUB's reasons to eligibility based on treaty status and, in my view, there is nothing in the reasons to support that interpretation. The directive was for Manitoba Hydro to "create a First Nations On-Reserve Residential customer class" (Order No 59/18 at p 266). In the absence of the PUB's oral submission, one would have assumed that Indigenous persons living on reserve without treaty status would also fall within the proposed class.

[53] Although the PUB created the on-reserve class to address poverty concerns, treaty members who do not reside on reserve are not eligible, even if they are living in similar circumstances. Clearly, the defining circumstance for class membership is geographic location, not poverty or treaty status.

[54] In my view, the PUB erred in law when it created an on-reserve class based solely on a geographic region of the province in which certain customers are located. Regardless of the considerations that the PUB factored

into its decision, such as poverty and/or bill affordability, the result of the directive was the creation of a customer class that contravened section 39(2.2)(b) of the *Hydro Act*.

[55] Before leaving this area, I would observe that the creation of a class restricted to persons to be identified by treaty status and the fixing of a rate for power supplied to that class may also contravene sections 82(1)(a) and 82(1)(c) of the *PUB Act*. Here, the PUB has created a class and a price for power supplied to that class that is lower than the price for the same power charged to similar ratepayers in the province. However well-intentioned, it cannot be just and reasonable for disadvantaged individuals on reserve to pay a lower price than other similarly disadvantaged individuals located on reserve or elsewhere in the province. Moreover, there is no indication that the PUB considered whether it would be just and reasonable for the remaining ratepayers in the province to subsidise the on-reserve class. All of the above underscores why initiatives to address broad social issues such as poverty should be left to the government.

Ground 4—Did the PUB Err in Its Application of the Limited Class Rule?

Ground 5—Did the PUB Err in Law in Intruding Into Social Policy?

Ground 6—Did the PUB Err in Causing Manitoba Hydro to Expend Funds for Purposes of Poverty Reduction (Government Purposes)?

Positions of the Parties

[56] Manitoba Hydro argues that its mandate is focussed on the provision of power adequate for the needs of the province in an economical and efficient manner. Relying on the reasons of the dissenting member of the PUB, Manitoba Hydro submits that the PUB exceeded its jurisdiction by making an

order that purports to implement broad social policy, a role reserved to the provincial and federal governments.

[57] It argues that section 43(3) of the *Hydro Act* prohibits the use of its funds for government purposes. In its view, the creation of the on-reserve class amounted to an attempt to alleviate poverty, which is a "Government purpose".

[58] In support of its position that the PUB does not have the jurisdiction to implement broad social policy, Manitoba Hydro relies on the cases of *ENMAX Power Corp, Re*, 2004 CarswellAlta 2078 at paras 979-83 (EUB) (Alberta Energy and Utilities Board found to be an unsuitable forum within which to address social issues or ratemaking on the basis of a customer's ability to pay); *Dalhousie Legal Aid Service v Nova Scotia Power Inc*, 2006 NSCA 74 (*Dalhousie*) at paras 1, 40 (Nova Scotia Utility and Review Board had no jurisdiction to order reduced power rates based on the income level of the customer); and *British Columbia Hydro and Power Authority, Re*, 2017 CarswellBC 193 (Util Comm'n) (British Columbia Utilities Commission finding that low-income rates unsupported by an economic or cost of service justification are unjust, unreasonable and unduly discriminatory).

[59] Manitoba Hydro agrees that sections 25(4)(a)(viii) and 25(4)(a)(ix) of the *Crown Act* provide that the PUB may consider "compelling policy considerations" and "any other factors that the [PUB] considers relevant to the matter". However, it argues that the interpretation of those sections should be limited to the identified financial factors in sections 25(4)(a)(i)-25(4)(a)(vii). It further submits that sections 25(4)(a)(viii) and 25(4)(a)(ix) cannot be considered in isolation from the legislative scheme and the regulatory principle of cost of service on which rates are to be determined.

[60] The PUB argues that it has jurisdiction to consider the issue of bill affordability, including ordering a program such as a "lower-income rate" in fulfilling its mandate to set just and reasonable hydro rates. In its view, while the government is better placed to introduce a bill affordability program, that does not mean that the PUB is prohibited from doing so.

[61] In support of its position, the PUB relies on the decision of *Advocacy Centre For Tenants-Ontario v Ontario Energy Board* (2008), 293 DLR (4th) 684 (Ont Sup Ct J (Div Ct)) (*Advocacy Centre*). In that case, a majority of the Court held that the Ontario Energy Board (OEB) had the jurisdiction to take into account customers' ability to pay in setting rates.

[62] In the PUB's view, its jurisdiction is more closely aligned to the statutory framework in Ontario than that considered by the Nova Scotia Court of Appeal in *Dalhousie*.

[63] The PUB submits that, to read sections 25(4)(a)(viii) and 25(4)(a)(ix) as being limited to the financial factors set out in sections 25(4)(a)(i)-25(4)(a)(vii), is contrary to the legislative intent that the PUB fix just and reasonable rates in the general public interest through balancing the interest of Manitoba Hydro's ratepayers and the financial health of the utility. It argues that the *Crown Act* goes further than the *Hydro Act* in providing for the consideration of factors beyond those listed in sections 25(4)(a)(i)-25(4)(a)(vii).

[64] Finally, the PUB argues that the directive does not direct the use of hydro funds for government purposes as, collectively, ratepayers are paying for the provision of power necessary for Manitoba Hydro's approved revenue requirement.

[65] While agreeing that cost of service must be a critical factor in the setting of rates, CAC Manitoba argues that the PUB can consider compelling social policy, not limited to financial, considerations.

[66] AMC emphasises that the PUB did not err in its consideration of bill affordability as well as public policy in creating the on-reserve class. It argues that the directive is consistent with the *PTRA*.

Analysis

[67] The main issue engaged by these three grounds of appeal concerns the interplay between sections 2 and 43(3) of the *Hydro Act*, as well as factors that the PUB may take into consideration in reaching a decision regarding just and reasonable rates for services provided by Manitoba Hydro pursuant to section 25(4)(a) of the *Crown Act*.

[68] Manitoba Hydro is empowered to carry out the purposes and objects specified in section 2 of the *Hydro Act*:

> **Purposes and objects of Act**
> **2** The purposes and objects of this Act are to provide for the continuance of a supply of power adequate for the needs of the province, and to engage in and to promote economy and efficiency in the development, generation, transmission, distribution, supply and end-use of power and, in addition, are
>
> (a) to provide and market products, services and expertise related to the development, generation, transmission, distribution, supply and end-use of power, within and outside the province; and
>
> (b) to market and supply power to persons outside the province on terms and conditions acceptable to the board.

[69] Regarding the allocation and use of Manitoba Hydro's funds, section 43(3) of the *Hydro Act* provides:

> **Funds of government and corporation not to be mixed**
> **43(3)** Except as specifically provided in this Act, the funds of the corporation shall not be employed for the purposes of the government or any agency of the government as that expression is defined in *The Civil Service Act*, [CCSM c C110] other than the corporation, and the funds of the government shall not be employed for the purposes of the corporation except as advances to the corporation by the government by way of loan or as a result of a guarantee by the government of indebtedness of, or assumed by, the corporation or liability for the repayment of which is an obligation of the corporation.
>
> [emphasis added]

[70] Section 25(4)(a) of the *Crown Act* provides the factors that may be considered by the PUB in determining rates for services. It states:

> **Factors to be considered, hearings**
> **25(4)** In reaching a decision pursuant to this Part, The [PUB] may
>
> (a) take into consideration
>
> (i) the amount required to provide sufficient funds 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, and

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

[emphasis added]

[71] It is interesting to note that the French language version of section 25(4)(a)(viii) states the PUB may consider "des considérations de principe importantes qu'elle estime pertinentes à l'affaire". In my view, the French translation permits consideration of "important policy considerations", which could arguably influence the interpretation of the phrase "compelling policy considerations" found in the English version. However, as the matter was not argued before us, I will not comment further on this observation.

[72] While the PUB has broad authority to make orders approving or setting rates for Manitoba Hydro that are not unjust, unreasonable or discriminatory, the PUB is clearly constrained by the prohibition contained in section 43(3) of the *Hydro Act*.

[73] Historically, the PUB was of the view that it did not have the jurisdiction to consider ability to pay as a factor in approving costs. For example, in Order No 17/04, the PUB considered an application by Manitoba Hydro to increase certain rates for electric service for four remote communities that were served by diesel generation. The application proposed that all First Nations accounts, regardless of the source and level of funding,

be subject to the government rate, including the government surcharge. After hearing evidence regarding inability to pay from Manitoba Keewatinook Ininew Okimowin (MKO), two First Nations Chiefs as well as other Manitoba Hydro customers affected by the application, the PUB declined to exempt First Nations from paying the government surcharge. It stated (at p 31):

> The [PUB] remains extremely sensitive to the rising costs of living in Northern Manitoba, and the ability to pay issue. However, the [PUB] also has a duty and responsibility to [Manitoba] Hydro and to the large population of all of [Manitoba] Hydro's customers to set rates for diesel communities that are just and reasonable, within the mandate of the [PUB] in applying the principles of rate regulation. It is the [PUB]'s view that the ability to pay issue is one that lies outside of the regulatory arena, and lies more appropriately within the Provincial and Federal Social Policy area. [Manitoba] Hydro grid customers presently subsidize electricity rates in remote diesel communities to a significant degree. The [PUB] refers to the Governments of Canada and Manitoba the need for improved social policy to address the ability of people living in remote northern communities to pay for essential services. It is not within the mandate of [the PUB] to use utility rates to effect social policy.

[74] The above statement is consistent with the decision of the majority of the OEB in *Re Enbridge Gas Distribution Inc* (26 April 2007), EB-2006-0034, online (pdf): *Ontario Energy Board* <www.oeb.ca/documents/cases/EB-2006-0034/decision_egd_rate_affordability_20070426.pdf> (date accessed 26 May 2020). In that decision, the OEB held that the *Ontario Energy Board Act, 1998*, SO 1998, c 15, Schedule B (the *OEB Act*) did not provide it with either explicit or implicit jurisdiction to order the implementation of a rate class based on rate affordability for low income customers.

[75] On appeal, the decision of the OEB was overturned by a majority of the Court in *Advocacy Centre*. In that case, the majority determined that, while the traditional "cost of service" approach was the "root principle underlying the determination of rates" (at para 52), the OEB was authorised by the *OEB Act* to take "into account income levels in pricing to achieve the delivery of affordable energy to low income consumers" (at para 55). In reaching this conclusion, the majority considered section 36 of the *OEB Act* (at para 15):

> Section 36 of the [*OEB*] Act confers the [OEB's] jurisdiction:
>
> > **36.**(1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.
> >
> > ....
> >
> > (2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.
> >
> > (3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.
>
> [emphasis added]

[76] In interpreting the term "just and reasonable rates", the majority considered *Hansard*, stating (at paras 19-20):

> The phrase "approving or fixing just and reasonable rates" in the present s. 36(2) was first introduced by s. 17(1) of Bill 38, *An Act to Establish the Ontario Energy Board*, 1st Sess., 26th Leg., Ontario, 1960 by the then Minister of Energy Resources, the Hon. Robert Macaulay. He outlined for the Legislature the philosophy underlying rate setting (*Legislature of Ontario Debates*, 9 (8 February 1960) at 199 (Hon. Macaulay)):

> First, why are there rate controls? There are rate controls because, in effect, the distribution of natural gas is a monopoly, a public utility. Secondly…it is fair that whatever rate is charged should be one designated, not only in the interests of the consumer, but also in the interests of the distributor… [O]ne really should have in mind 3 basic objectives: First, the rate should be low enough to secure to the user a fair and just rate. Second, the rate should be adequate to pay for good service and replacement and retirement of the used portion of the assets. Third, it should be high enough to attract a sufficient return on capital….

He went on to explain the purpose of the Government's policy (at 205):

> [F]irst, to protect the consumer, and to see that he pays a fair and just rate, not more or less, and that is competitive with other fuels. Second, to make sure the rate is sufficient to provide adequate service, replacements and safety for the company providing the service. Third, it is that the company should be able to charge a rate which is sufficient to attract the necessary capital to expand.

[77] The majority observed that section 36 replaced previous legislation, which limited the phrase "just and reasonable rates" to the traditional cost of service analysis (at para 23).

[78] Next, it considered section 36 in conjunction with objective 2 under section 2 of the *OEB Act*. That objective was stated to be "[t]o protect the interests of consumers with respect to prices and the reliability and quality of gas service" (at para 33). It concluded (at para 61):

> [T]he [OEB] has the jurisdiction to take into account the ability to pay in setting rates. We so find having taken into account the expansive wording of s. 36(2) and (3) of the statute and giving that wording its ordinary meaning, having considered the purpose of the legislation within the context of the statutory objectives for the [OEB] seen in s. 2, and being mindful of the history of rate setting

> to date in giving efficacy to the promotion of the legislative purpose.

[79] After the decision in *Advocacy Centre*, the PUB determined in Order No 116/08 that "Manitoba and Ontario rate setting jurisdictions are similarly broad" (at p 230) and that it had jurisdiction to order the implementation of a rate affordability program. Since that time, the PUB has reasserted its jurisdiction to consider bill affordability. See, for example, Order No 73/15.

[80] In its decision in the present case, the PUB reasoned that the jurisdiction to implement a bill affordability program provided it with the authority to make the directive that is the subject of this appeal.

[81] I agree with the PUB that it is entitled to consider social policy and any other factors it considers relevant in fulfilling its mandate. I see no reason to limit the interpretation of sections 25(4)(a)(viii) and 25(4)(a)(ix) to the financial considerations found in sections 25(4)(a)(i) to 25(4)(a)(vii). There is nothing in section 25(4)(a) to suggest such an interpretation.

[82] Further, the interpretation suggested by Manitoba Hydro is not supported by *Hansard*. In the second reading of Bill 37, *The Crown Corporations Public Review and Accountability and Consequential Amendments Act*, 2nd reading, Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 34-1, vol 37, No 72 (4 November 1988), online (pdf): *Legislative Assembly of Manitoba* <www.gov.mb.ca/legislature/hansard/34th_1st/hansardpdf/72.pdf> (as repealed by the *Crown Act* at section 39) the Hon Clayton Manness, then Minister responsible for Crown corporations, stated (at p 2806):

> Factors to be considered, Mr. Speaker, we have given the [PUB] some direction as to what factors are to be considered. Not only are they to look at financial considerations but, if there are compelling social factors that can be presented in an argument, we have mandated the [PUB] to look at those, to take those into account before they reach their decision.

[83] Bill affordability is an issue of social policy. It forms part of the PUB's concerns when dealing with a rate application, described by Michel Monnin JA in *Consumers' Association of Canada (Man) Inc et al v Manitoba Hydro, Electric Board*, 2005 MBCA 55, as "the interests of the utility's ratepayers, and the financial health of the utility" (at para 65).

[84] In addition, although not determinative to the PUB's decision, I am not persuaded that the PUB erred in considering the *PTRA* and the social policy underlying that legislation in reaching its conclusion.

[85] Nevertheless, the ability to consider factors such as social policy and bill affordability in approving and fixing rates for service does not equate to the authority to direct the creation of customer classifications implementing broader social policy aimed at poverty reduction and which have the effect of redistributing Manitoba Hydro's funds and revenues to alleviate such conditions.

[86] A plain and purposive reading of section 43(3) of the *Hydro Act* evidences that funds and revenue of Manitoba Hydro are not to be used by the government to serve any purpose other than that of Manitoba Hydro.

[87] I agree with the dissenting member of the PUB that the directive constitutes "a realm that is reserved for the federal and provincial governments" (Order No 59/18 at p 235; see also, for example, section 91(24) of the *Constitution Act, 1982*) as well as the impermissible creation and

implementation of social policy. This is also consistent with the remarks made by Minister Selinger preceding the enactment of sections 39(2.1) and 39(2.2) of the *Hydro Act* referred to earlier in these reasons.

[88] Without explicitly stating that the PUB has no jurisdiction to implement broad social policy, this Court has previously expressed reservations about the jurisdiction of the PUB to make orders that would normally fall within the purview of government. For example, in *Re The Cash Store Financial Services Inc,* 2009 MBCA 1, MacInnes JA granted the applicant, a payday loan business, leave to appeal a decision from a PUB order which set maximum charges with respect to payday loans (see para 1). He found that it was at least arguable that the PUB overstepped its jurisdiction in expressing its "philosophical views" (at para 49) against the morality of payday loans (see also paras 46-47). Of note, the appeal in that case was discontinued prior to being heard by this Court.

[89] In my view, the PUB erred in applying *Advocacy Centre* in determining that it had the authority to order the directive. That case is distinguishable. In *Advocacy Centre*, the majority of the Court did not consider legislation similar to section 43(3) of the *Hydro Act* prohibiting the use of the utility's funds or revenue for government purposes. Furthermore, the powers conferred on the PUB are not as broad or as expansive as those conveyed by sections 36(2) and 36(3) of the *OEB Act*.

[90] I am in agreement with the dissenting reasons of Swinton J in *Advocacy Center*. She recognised that, historically, principles governing public utilities mandated equal treatment of all customers respecting rates. She stated (at paras 92, 94-96):

> The ability to order a rate affordability program would significantly change the role that the Board has played – indeed, the majority of the Board stated a number of times that the proposal to base rates on income level would be a "fundamental" departure from its current practice. In the past, the Board has acted as an economic regulator, balancing the interests of the utility and its shareholders against the interests of consumers as a group. Were it to assume jurisdiction over rate affordability programs, it would carry out an entirely different function. It would enter into the realm of social policy, weighing the interests of low income consumers against those of other consumers. This is not a role that the Board has traditionally played. This is not where its expertise lies, nor is it well-suited to taking on such a role.
>
> In addition, the Board would have to consider eligibility criteria for a rate affordability assistance program that reasonably would take into account existing programs for assistance to low income consumers. Obviously, this would include social assistance programs. As well, Enbridge, in its factum, has identified other programs which provide assistance for low income consumers. For example, the Ontario government has implemented a program to assist low income customers with rising electricity costs through amendments to income tax legislation (*Income Tax Act*, R.S.O. 1990, c. I.2, s. 8.6.1, as amended S.O. 2006, c.18, s.1). At the federal level, there was one-time relief for low income families and senior citizens provided by the *Energy Costs Assistance Measures Act*, S.C. 2005, c. 49.
>
> Moreover, in order to cover the lower costs, the Board would have to increase the rates of other customers in a manner that would inevitably be regressive in nature, as it is difficult to conceive how the Board would be able to determine, in a systematic way, the ability of these other customers to pay.
>
> Clearly, the determination of the need for a subsidy for low income consumers is better made by the Legislature. That body has the ability to consider the full range of existing programs, as well as a wide range of funding options, while the Board is necessarily limited to allocating the cost to other consumers. . . .

[91] In this case, similar problems arise. The on-reserve class creates anomalies between those who are similarly situated. Persons who are not of

Indigenous descent or who do not have treaty status, but who live on a "First Nations" reserve, may or may not be eligible for the benefit, while those living in similar circumstances, but not on reserve, are not eligible.

[92] As earlier stated, the PUB assumed that Manitoba Hydro would remain whole on the basis that "collectively ratepayers are paying for the provision of power at the level necessary for [Manitoba Hydro's] approved revenue requirement." This means that all other customer classes must pay more for the provision of power to account for the shortfall resulting from the zero per cent increase to prices charged to customers in the on-reserve class.

[93] Furthermore, the evidence in this case demonstrates that the federal government pays for the hydro costs of persons living on reserve who are in receipt of employment income assistance. Thus, the directive may actually, in some cases, amount to a subsidy to the federal government and not provide relief to ratepayers in the on-reserve class.

[94] In Order No 59/18, the PUB acknowledged that the directive created anomalies, but felt that these were better left to an elected government (at p 29):

> The anomalies that result from this measure are best addressed by a more wide-reaching government bill affordability program. The [PUB] envisions that, with the introduction of a comprehensive government bill affordability program, the [on-reserve] class and lower rate built into the 2018/19 Test Year may no longer be required.

[95] It also noted that the Government of Manitoba already had a social program infrastructure in place to address broader social policy issues and programs (at p 229):

> There is an important role for governments in advancing bill affordability for all Manitobans. The [PUB] unanimously recommends that the provincial government introduce a comprehensive bill affordability program run by a government department to address energy poverty issues faced by Manitobans throughout the province. The [PUB] heard evidence that there is a long-standing need to address this issue and the government is best situated to do so in a comprehensive fashion. The provincial government has social program infrastructure already in place.

[96] Finally, accounting for the fact that the legislation in each of the following provinces contains distinct wording, I would note that Swinton J's position is fundamentally consistent with the decisions of the Nova Scotia Court of Appeal in *Dalhousie* at para 33; the Alberta Energy and Utilities Board's decision in *ENMAX* at paras 979-83; and *British Columbia Old Age Pensioners' v British Columbia Utilities Commission*, 2017 BCCA 400 at para 38, leave to appeal to BC CA refused.

[97] Therefore, based on the above, it is my view that the PUB exceeded its jurisdiction and that the directive is in contravention of section 43(3) of the *Hydro Act*.

Decision

[98] In accordance with section 58(5) of the *PUB Act*, which requires this Court to certify its opinion to the PUB, I am of the opinion that the PUB exceeded its jurisdiction by making a directive that breached sections 39(2.2) and 43(3) of the *Hydro Act*.

[99] For all of the above reasons, I would grant the appeal and set aside the directive.

[100] Section 58(8) of the *PUB Act* exempts the PUB from an award of costs. In the circumstances, I would make no order of costs against the interveners.

JA

I agree: JA

I agree: JA