
2017/18 & 2018/19 ELECTRIC GENERAL RATE APPLICATION**Manitoba Hydro Undertaking #4 (Under Advisement)**

Manitoba Hydro to obtain government permission to place on the public record the amount of the equity request made by Manitoba Hydro of the Province of Manitoba, as well as the analysis information to support the request.

Response:

Manitoba Hydro respectfully declines to provide the requested information on the following grounds:

Relevance

Manitoba Hydro has testified in response to questions posed on cross-examination that a request for an equity injection was made by the Chairman of the Manitoba Hydro Electric Board and that the request was refused [transcript pages 1734-1735]. Questions regarding the details of the request, amount and supporting analysis are not relevant to the Public Utilities Board review in light of the refusal of the Province to consider the request.

The only fact which is relevant to the Board's deliberation is that the request was refused and that no equity injection is forthcoming from the Province. Details regarding how much equity may have been requested; who was involved in the request and so forth can be of no assistance in determining today whether Manitoba Hydro's rate application should be approved.

Canadian National Railway Company v. Clarke Transport, 2013 SKQB 394 discussed the meaning of "relevant to any matter in issue" and found that "Only if the matter is in issue in the action is the matter material, in a jurisprudential sense. If the matter qualifies as being material to the action, the next question is whether the evidence being proffered tends to prove or disprove the matter in issue. If the question does not relate to a matter in issue as particularized by the pleadings, then the matter is not relevant to any matter in issue." (paragraph 22)

The question before the PUB is whether the information requested tends to prove or disprove any of the underlying facts raised in the General Rate Application such that the requested information is relevant (i.e. necessary) for its determination of rates. Given that the request for an equity injection was refused by the Province, any of the details of the request or documentation which informed the request are not relevant. The requested

information is not probative and will not assist the PUB in making a determination as to the appropriate rates to be approved.

It is acknowledged that the PUB has made recommendations regarding matters which are not within its mandate in the past. It must be recognized that these types of recommendations arose out of evidence that was produced in the context of its normal review of rates. This is quite different from embarking down a path of inquiry for the sole purpose of making recommendations on matters beyond its jurisdiction.

Public Interest Immunity (Crown Privilege)

In addition, the requested information is subject to Public Interest Immunity. Communications between Manitoba Hydro and the Minister or Premier on this request are not discloseable as it constitutes a communication and advice to cabinet. It is not in the public interest to compel production of the requested information as to compel disclosure would undermine the need for candour amongst those advising the government and the importance of maintaining the confidential business interests and the security of the Province.

The Supreme Court of Canada considered public interest immunity in *Carey v. Ontario*, [1986] 2 SCR 637, 1986 CanLII 7 (SCC) (“Carey”). The Manitoba Court of Appeal considered its application in Manitoba (and specifically to Manitoba Hydro) in *Manitoba Hydro-Electric Board v. Consumers Assn. of Canada (Manitoba) Inc.* 2012 MBCA 1 (“Manitoba Hydro”). These cases indicate that:

- Public interest immunity is a rule of evidence and was previously known as Crown privilege. It only arises when evidence that is relevant is not admitted into evidence because that would be contrary to the broader public interest. (*Manitoba Hydro* paras. 129 – 130);
- It is obviously necessary for the proper administration of justice that litigants have access to the fair disposition of the issues arising in litigation. It is equally clear, however, that certain information regarding governmental activities should not be disclosed in the public interest. (*Carey*, p. 647)
- There is no hard and fast rule as the kind of injury to the public interest that will support a claim of Crown privilege. It is for the court to which the claim is made to assess the gravity of the risk to the public interest that would be caused by disclosure, and to balance that risk against the risk to the administration of justice that would be caused by denial of the evidence to the litigants. Such a balancing process is inherently discretionary. (*Manitoba Hydro*, para 129);
- On one side of the equation, the need for disclosure may be more or less compelling having regard to the nature of the litigation (eg. between a criminal and civil

- proceeding) and the extent to which the facts may be proved without resort to information sought to be protected from disclosure. (*Carey* p. 648)
- There is merit to the candour argument (that disclosure would lead to a decrease in completeness, in candour and in frankness of such documents if it were known that they could be produced in litigation and this in turn would detrimentally affect government policy and the public interest), but its importance should not be exaggerated (*Carey* p. 656 - 657);
 - The court in *Carey* acknowledged that the business of government is sufficiently difficult that those charged with the responsibility for running the country should not be put in a position where they might be subject to harassment making Cabinet government unmanageable. Their concern was the absolute character of the protection accorded their deliberations or policy formulation without regard to subject matter, to whether they are contemporary or no longer of public interest, or to the importance of their revelation for the purpose of litigation. (*Carey* p. 659)
 - The time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet Government, but this can scarcely be the case when low level policy that has long become of little public interest is involved. (*Carey* p.671)
 - The court highlighted the significance in earlier decisions of whether any relevant information that might be gleaned from a document had already been publicly revealed (*Carey* p. 676 – 677)

The information sought to be disclosed is clearly contemporary and there remains a keen public interest in its topic matter. This information cannot be described as a low level policy decision relevant to specific civil litigation matter nor can it be described as critical to or even required for the disposition of the matter at issue. The only information related to the request that is arguably relevant to the GRA is that is that the request was refused and that no equity injection is forthcoming from the Province.

While not expressly binding on the Public Utilities Board, the deference afforded communications between a public body such as Manitoba Hydro and government under the *Freedom of Information and Protection of Privacy Act* (“*FIPPA*”) is instructive. For example s. 4 (e) of *FIPPA* provides that the Act’s production requirements do not apply to records made by or for an Officer of the Legislative Assembly.

Section 19 of *FIPPA* provides that a public body (which by definition includes Manitoba Hydro) shall refuse to disclose information which would reveal the substance of deliberations of cabinet including:

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- (b) discussion papers, policy analyses, proposals, advice or similar briefing material submitted or prepared for submission to Cabinet;*
(c) a proposal or recommendation prepared for, or reviewed and approved by, a minister for submission to Cabinet

Section 23(1) of FIPPA allows MH to refuse to disclose

- a) advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;...*

These are strong indicators of the type of information, the release of which is not considered to be in the public interest. These provisions recognize the need for candour amongst those advising or doing business with government and the importance of maintaining the confidential business interests and the security of the Province.

The primary consideration for the PUB is whether the information sought to be disclosed is relevant and necessary for the determination of rates. Clearly it is not. Crown Privilege is the secondary consideration – in other words, if the information were to be deemed relevant (and Manitoba Hydro submits it is not), then the Board would be in a position of weighing whether the benefit of receiving such information outweighed the risks associated with violating the principles of Public Interest Immunity. Given that the requested information has no probative value in determining the revenue requirement and resulting rates under consideration by the PUB, the balance of convenience must clearly favour not compelling disclosure.