THE PUBLIC UTILITIES BOARD OF MANITOBA

IN THE MATTER OF:	**In the matter of the Manitoba Public Insurance Corporation 2020/21 General Rate Application: *Notice of Constitutional Question* relating to s. 2(a), 3 and 4 of the Reserves Regulation, Regulation 76/2019 under *The Manitoba Public Insurance Corporation Act*.**
AND IN THE MATTER OF:	***The Constitutional Questions Act*, s. 7**

Submission by the Attorney General of Manitoba

in response to the Notice of Constitutional Question presented by the Consumers' Association of Canada (Manitoba) Inc.

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I. Introduction

A. Standing of the Attorney General of Manitoba

1. A Notice of Constitutional Question has been served on the Attorney General of Manitoba (the "Attorney General"), under section 7(3) of *The Constitutional Questions Act* (the "*CQ Act*") **[Tab 4]**. The Consumers' Association of Canada (Manitoba) ("CACM") is calling for a regulation to be treated as though it is invalid.

2. The issue is not, strictly speaking, a question of constitutional validity. Nevertheless, section 7(3) requires a notice to be served. Section 7(6) of the *CQ Act* grants the Attorney General standing at the hearing.

B. The Reserves Regulation (Man. Reg. 76/2019) is delegated legislation

3. Regulation 76/2019 (the "Reserves Regulation") **[Tab 6]** has been made by the Lieutenant Governor in Council ("LGIC" or "Cabinet") pursuant to statutory authority expressly delegated to it. The statutory authority is found within the preamble of section 33(1) of *The Manitoba Public Insurance Corporation Act* (the "*MPIC Act*"), as well as in clauses 33(1)(a) and 33(1)(o) **[Tab 1]**:

> **Regulations**
> **33(1)** Subject to subsection (1.1), for the purpose of carrying out the provisions of this Act according to their intent, the Lieutenant Governor in

> Council may make such regulations as are ancillary thereto and not inconsistent therewith; and every regulation shall be deemed to be part of this Act and has the force of law; and, without restricting the generality of the foregoing, the Lieutenant Governor in Council may make regulations
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> (a) establishing, amending and revoking such plans of automobile insurance and plans of universal compulsory automobile insurance for the insurance within Manitoba of such losses, damages, injuries or deaths arising out of the perils and risks attendant upon or related to the use, operation, or ownership of motor vehicles and trailers as the Lieutenant Governor in Council may designate;
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> …
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> (o) respecting any matter considered necessary or deemed advisable by the Lieutenant Governor in Council for the effective carrying out of the intent and purpose of this Act and the regulations and any insurance plan established under this Act.

4. Order in Council 126/2019 confirms this as the statutory authority under which Cabinet has made the Reserves Regulation **[Tab 5]**.

C. Purpose of the Reserves Regulation

5. The purpose of the Reserves Regulation is related directly to section 18 of the *MPIC Act* **[Tab 1]**, which provides:

> **Reserves**
> **18** The corporation shall establish and maintain reserves in such amounts that, at all times, it has sufficient funds to meet all the payments as may become payable under this Act and regulations.

6. Section 18 of the *MPIC Act* directs the Manitoba Pubic Insurance Corporation ("MPI") in three fundamental respects. First, it compels MPI to maintain reserves. Second, it compels MPI to maintain those reserves at certain minimum levels. Third, the sufficiency of the reserves must be achieved "*at all times*".

7. Regarding the magnitude of the minimum levels, section 18 of the *MPIC Act* establishes the minimums with a concept: the minimums must be "*in such amounts that, at all times, [MPI] has sufficient funds to meet all of the payments*" under the Act and its regulations. This wording does not set the minimum levels with absolute

precision, so its meaning is likely to be viewed differently depending on one's interests and perspectives. It is a test that is inherently flexible, for which applying it in practice can engage some debate and deliberation, and even has potential to evolve with time and be refined through experience.

8. Section 2 of the Reserves Regulation is rooted in section 18.[1] By making this regulation, Cabinet has brought numerical precision to what constitutes the sufficient minimums for MPI's reserves, as follows:

   a. The reserve for rate stabilization is a minimum 100% of the Minimum Capital Test ("MCT") ratio.

   b. The reserve for extension is a minimum 200% of MCT ratio.

   c. The reserve for special extension is a minimum 300% of MCT ratio.

9. Section 3 of the Regulation addresses a further point not specifically covered in section 18 of the *MPIC Act*. It directs MPI to use any excess from the 100% rate stabilization reserve for only the purpose of reducing the "*rate indication*" (i.e. premiums) for basic insurance in a subsequent year. The Reserves Regulation is silent on MPI's use of any excesses in the 200% extension and the 300% special extension reserves.

10. More generally, section 1 of the Reserves Regulation opens with an introduction of its overall purpose **[Tab 6]**:

> **Purpose**
> **1** This regulation sets out the manner of determining the amount to be maintained by the corporation in its reserves for the purposes of the Act and restricts the use of any surplus reserve funds.

11. Section 1 accurately captures what is being done in the Reserves Regulation.

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[1] Section 2 of the Regulation indicates expressly that the minimum levels for reserves are set "*[f]or the purpose of section 18 of the Act*"

II. The Challenge

A. CACM's Notice of Constitutional Question

12. CACM questions whether the LGIC's grant of regulation-making authority under the *MPIC Act* is sufficient for it to have made certain aspects of the Reserves Regulation – notably clause 2(a), section 3, and section 4.

13. CACM's decision to focus its challenge to the validity of clause 2(a) (100% rate stabilization reserve), and not to clauses 2(b) (200% extension reserve) or 2(c) (300% special extension reserve), reflects that the jurisdiction of the Public Utilities Board ("PUB") is limited to approving changes to premiums charged by MPI for basic insurance, with no PUB role to approve changes to extension-related premiums.

14. It is perhaps understandable that CACM also proposes to challenge the validity of section 3 – which specifies how a surplus in the 100% rate stabilization reserve is to be used. What is unclear, however, is what purpose CACM seeks to achieve with its proposed challenge to section 4 – the definitions section.[2]

15. CACM's Notice explains, from paras. 2 to 49, some of the history behind and evolution of the PUB's role regarding Manitoba's régime of public automobile insurance. It also gives some of the policy and legislative background that preceded Cabinet's recent making of the Reserves Regulation. This history is also explained in CACM's Brief.

16. With respect to the essence of the legal argument for its challenge, that is found specifically at paragraphs 50 to 55 of CACM's Notice. The essence of the challenge must centre around the meaning and interpretation of the provisions in the *MPIC Act* that empower Cabinet to make delegated legislation. The argument is, in effect, that neither the preamble of section 33(1), nor clause 33(1)(a), nor clause 33(1)(o), give Cabinet authority to make the challenged aspects of the Reserves Regulation

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[2] In any event, section 33(1)(f) of the *MPIC Act* expressly authorizes the LGIC to include provisions "*defining for the purposes of the regulations words not defined in the Act*". **[Tab 1]**

– that these regulation-making powers are somehow insufficient to allow Cabinet to make a regulation that, as section 1 describes, "*sets the manner of determining the amount to be maintained […] in reserves […] and restricts the use of any surplus.*"

B. Principles of Delegated Legislating

17. All legislation is evolutionary and inherently non-static. Statutes are routinely enacted by the democratically elected Legislature, and once enacted those statutes are very often modified or amended. Enacting and amending legislation is the essential and most fundamental function of the Legislative Branch of government.

18. It stands to reason that one of the key reasons why a statute will be amended, is practical experience. Something arises that was probably unforeseen at the time of original enactment, and the Legislature determines revision is warranted. In fact, CACM illustrates the point at paras. 9 to 15 of its Notice. Manitoba's régime of public automobile insurance was first established in 1970. At that time, the PUB had no role, but by 1988 experience led the Legislature to assign a new role to the PUB. This was accomplished by statutory amendment.[3]

19. The process of enacting and amending a statute can be cumbersome and time consuming. Because of this, the Legislature has developed an important legislative technique that allows for supplemental legislation to be made by someone other than the Legislature: delegated legislation.

20. Subject only to constitutional constraints, the Legislature is at liberty to enact whatever legislation it considers appropriate – including the ability to delegate a power to make regulations.[4] Delegated legislation is equally as binding as statutory

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[3] In 1988, it was not a forgone conclusion that the Legislature would necessarily assign a role to the PUB. The Kopstein Report deliberated over whether to instead recommend the same role, but to a different or new agency. Ultimately, the Kopstein report recommend the role for the PUB, and the Legislature obviously agreed. For this discussion, see Kopstein Report Volume 2, Position Paper #1 pages 30 to 40 under the heading "Rate Increases".

[4] 52 C.E.D. West, Title 149 (Statutes), para. 396 **[Tab 7]**

legislation. In Manitoba, delegated legislation is generally called a "regulation" under *The Statutes and Regulations Act*.

21. Delegated legislation has several advantages, including that it is less cumbersome to make procedurally. When enacting a delegation provision in a statute, the Legislature will identify to whom the authority is being delegated, and what the scope of the delegation is.

22. Manitoba's Legislature has enacted a wide array of statutes that include numerous provisions delegating authority to make regulations. There is not just one way for a delegation to be accomplished.

23. One common approach is for specific authority to be granted on a fairly targeted scope of subject-matter. Examples of this are at clauses 33(1)(a) to (n) of the *MPIC Act* **[Tab 1]**.

24. Another common – and equally viable – approach used by the Legislature is to grant a general and unspecified authority to make regulations under a statute. Here, the limitation on the delegate is not restricted to a targeted scope of subject-matter, but rather that the regulation must fall within the larger and more general purpose of the statute. Examples of this approach include the preamble of section 33(1) of the *MPIC Act*, and clause 33(1)(o). There is no shortage of examples of other Manitoba statutes in which the Legislature has taken the same or equivalent general approach as in these two general provisions.

25. Most often, when the Legislature grants a general and unrestricted regulation-making power, the delegate is the LGIC. But not always. There are some examples where the general unrestricted grant is given to a different delegate.[5] Nevertheless, the LGIC is by far the most usual delegate for a general grant, and for good reason.

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[5] See, for example, *The Liquor, Gaming and Cannabis Authority Act*, where at section 157 certain regulation-making powers are granted to the LGIC, and others are granted to the Liquor, Gaming and Cannabis Authority. Under this particular Act, the general power is granted to the LGCA, and not the LGIC. **[Tab 8]**

The ability to make regulations amounts to an ability to make binding public legislation of general application. It is therefore entirely appropriate that the Legislature's most frequent choice of general delegate in practice is Cabinet – a body that is inherently composed of elected representatives who sit in the Legislature and have been appointed as ministers of the Crown.[6]

26. Very often, the Legislature uses a combination of both delegation techniques in the same statute: targeted and general delegations. When this is done, a statute will typically first delegate a series of specific regulation-making powers. Then the specific list is closed by, or perhaps preceded with, a general unrestricted authority. This is precisely what the Legislature has chosen to do under the *MPIC Act*, at section 33(1): a series of targeted authorities, supplemented by general and unrestricted grants.

27. The purpose of this double-pronged approach to delegating regulation-making powers is self-evident. The Legislature anticipates that regulations might or will need to be made in relation to certain specified subject-matters. At the same time, the Act is drafted to recognize that unanticipated needs might arise in future that will call for delegated legislation to be made on other topics arising under the statute, but not known at the time of original enactment. Rather than leaving statutory amendment as the only possible remedial recourse, a general unrestricted grant of

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[6] A point should be made here about CACM's argument about "public suspicions of political interference" leading to the 1988 amendments that gave the PUB its role (para. 47 of CACM's Brief, and paras. 49 and 91).

In law, such characterizations are of no relevance to the question of a regulation's validity. The reality is that what happened in 1988 was done under the law as written at the time. That was part of the experience that led the Legislature to make those statutory amendments.

Identifying this point is particularly germane under the *MPIC Act*, where the LGIC has an extensive list of delegated powers to consider and potentially apply. The LGIC being composed as it is, and given that the very exercise of a delegated power is inherently intended to have consequential effects, the CACM could potentially argue that every regulation, decision or other form of action undertaken by the LGIC under the *MPIC Act* could be characterized as "political interference".

But CACM's presenting of that as an argument, or even as a perspective in explaining an action taken at some point, does not support the implication that any of those actions are somehow illegitimate, illegal, invalid or even just inappropriate. In law, the issue is whether the Legislature's chosen delegate has acted pursuant to authority rooted in the words of the statute.

authority to make regulations provides an opportunity for binding legislative solutions to be made more expediently.

C. CACM's Onus

28. CACM's Notice provides an extensive overview of certain aspects of an evolution in legislative history that includes: (i) MPI's establishment in 1970, including its original mandate, (ii) the granting of a new statutory mandate to the PUB in 1988 and its subsequent implementation of that mandate in relation to MPI, notably through specific directives or instructions through the annual application process for approval of premium changes, and (iii) Cabinet's decision in April 2019 to bring a legislative solution to one of the discrete points that has regularly arisen at the annual application process (i.e. MPI's reserves). To that end, much of CACM's Notice is dedicated to reciting a legislative and regulatory history, with particular focus on the issue of the magnitude of MPI's reserves and how it has been a recurring point of discussion at annual hearings.

29. That legislative and regulatory history, however, is only the background that leads to the specific legal question that appears at paragraphs 50 to 55 of CACM's Notice: a legal argument about the validity of certain aspects of the Reserves Regulation.

30. The Reserves Regulation is presumed to be valid law, unless and until a competent decision-maker determines it to be invalid.[7] Until a ruling of invalidity has been made, MPI is and will remain bound to comply with the binding public law as it appears in the Regulation. The presumption of validity also appears within the preamble of section 33(1), which specifies that "*every regulation shall be deemed to be part of this Act and has the force of law*".

31. The initial onus of establishing the allegation of invalidity of the specific provisions of the Regulation must therefore be placed on CACM – the party who challenges the provisions. The Attorney General cannot be expected to meet a broad and

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[7] 52 C.E.D. West, Title 149 (Statutes), para. 397 **[Tab 7]**

general burden of proving a regulation to be valid, upon mere receipt of a notice under section 7(3) of the *CQ Act*. The Attorney General can only respond to the bases of challenge actually presented.

D. The Grants of Authority to Make the Reserves Regulations

32. A processing of the CACM's argument will require two streams of analysis. One is more specific: whether the Reserves Regulation falls within the specific grant of regulation-making authority at clause 33(1)(a). The issue here will be whether the concept of a reserve for insurance fits within the meaning of "*plans of automobile insurance*" and "*plans of universal compulsory automobile insurance*".

33. The other is more general: whether the Reserves Regulation falls within the general and unspecified authority to make regulations as follows:

    a. "*for the purpose of carrying the provisions of [the MPIC] Act according to their intent*", to the extent such regulations "*are ancillary [to the Act] and not inconsistent therewith*"
    [under the preamble]

    - or -

    b. "*respecting any matter considered necessary or deemed advisable by the Lieutenant Governor in Council for the effective carrying out of the intent and purpose of this Act and the regulations and any insurance plan established under this Act*"
    [under clause (o)]

34. The Attorney General acknowledges the LGIC's authority to make the substantive aspects of the Reserves Regulation does not derive from any of the other particular clauses within the remainder of the list of specific provisions at clauses 33(1)(b) to (n). Nor does the authority arise from any of the other specific regulation-making powers that appear intermittently throughout the *MPIC Act*.[8]

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[8] For example, sections 30(2), 30(2.1), 30(4), 30(6), 31(1), 33(3) and 68. **[Tab 1]**

III. Preliminary Issue: PUB's Jurisdiction to Decide this Issue

35. Respectfully, the Attorney General raises a preliminary question: whether the PUB has the statutory authority to decide on the validity of the Reserves Regulation.

A. Principles of Administrative Law

36. The Attorney General agrees with CACM's position that the validity of a regulation is a question of law. It is also recognized that constitutional questions are questions of law as well, and that the Supreme Court of Canada has held that if an administrative tribunal has the authority to decide questions of law, and if there is no indication in the statute otherwise, then the tribunal can hear and decide constitutional questions.[9]

37. On the basis of that kind of reasoning, John M. Keyes writes as follows in *Executive Legislation* (LexisNexis: Toronto, 2010), at pages 538-539 **[Tab 9]**:

> The Supreme Court of Canada has clearly marked out the analytical approach to determining whether administrative tribunals can consider the constitutionality of legislation, including executive legislation, and its compatibility with other legislation. There has been little consideration in Canada of their jurisdiction to consider the validity of executive legislation in terms of its enabling authority or the process requirements for making it. However, the approach articulated in *Martin*[10] and *Tranchemontagne*[11] seems equally suited to these questions. Thus, if a tribunal has authority to decide questions of law generally, this would presumably include those relating to the validity of executive legislation generally, unless such questions had been withdrawn from its consideration.

38. That reasoning, however, fails to recognize that there is a unique dynamic to the question of the validity of delegated legislation which is not in play for constitutional questions.

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9 *R. v. Conway,* 2010 SCC 22. **[CACM's Book of Authorities]**

10 *Nova Scotia v. Martin,* [2003] S.C.J. No. 54. **[CACM's Book of Authorities]**

11 *Tranchemontagne v. Ontario,* [2006] S.C.J. No. 14. **[Tab 10]**

39. When the question of law before an administrative tribunal is a constitutional question, the dynamic is that of a single public authority interpreting and applying a tapestry of legislative provisions – some of which are constitutional – prior to that public authority coming to an answer that is within its own jurisdiction to decide. Jurisdictionally, the only administrative actor in that scenario is the one public authority or administrative tribunal.

40. By contrast, in the present circumstance, CACM is asking the PUB as one statutory delegate, to use its jurisdiction to explore and potentially negate the exercise by a different statutory delegate (here, the LGIC) of its own statutory powers. Thus, one administrative actor would be using its jurisdiction to rule on the scope and exercise of another administrative actor's jurisdiction. Keyes fails to recognize this crucial distinguishing point before he extends the *Martin* and *Tranchemontagne* (and *Conway*) reasoning as he does.

41. The Attorney General has located no case law that is directly on point as to whether one statutory delegate can negate, rule or otherwise opine on the actions undertaken by another statutory delegate. There is, to some extent, some tangential commentary that can be found in "standard of review" jurisprudence, but it never directly addresses this specific point.

42. For example, in the seminal case on standards of review, *Dunsmuir* (2009 SCC 9) **[Tab]**, there is some commentary which acknowledges the reality that dividing lines will sometimes need to be drawn between the jurisdictional spheres of different statutory delegates.[12] *Dunsmuir* stands for the principle that when it comes to conclusively delineating where one public authority's jurisdiction begins, and the other's ends, judicial review courts will be the ones to make the final decisions in law. *Dunsmuir* establishes this, from the fact it says a tribunal's decision on its own

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[12] See, for example, *Dunsmuir* paras. 51 to 64, and particularly paras. 59, 60 and 61 **[Tab 11]**. At para. 61, it makes a comment that briefly recognizes there can be some situations where there might be "*two or more competing specialized tribunals*" which might become engaged on the same set of facts or issues. This point is also touched upon in para. 30 of *Alberta Teachers* (2011 SCC 654) **[Tab 12]**.

jurisdiction will be reviewed on a correctness basis. Which makes sense. The courts are best positioned to be the final independent arbiters in such circumstances, because rulings by tribunals about the scope of their own jurisdiction, and the extent to which their jurisdiction can impact another tribunal's jurisdiction, risks being skewed. The courts will be better positioned to set the jurisdictional dividing lines.

43. But the entire discussion on this point in *Dunsmuir* comes from a particular viewpoint: where an administrative tribunal is deciding over its own jurisdiction, in a way that has potential to impact on another's jurisdiction. The *Dunsmuir* decision does not speak about the alternative viewpoint, where one statutory delegate is expressly asked to rule conclusively on the validity of an action undertaken by another external statutory delegate. This is no longer a question of a tribunal ruling on its own jurisdiction.

44. At that point, the perspective has been fundamentally altered. The issue becomes one administrative delegate (here, LGIC) having exercised its own delegated functions, seeing a parallel delegate (here, PUB) being asked to step outside its own jurisdiction to rule on whether what the LGIC has done within its own scope of delegated authority was compliant with the law. It becomes the equivalent to a judicial review by one statutory delegate (PUB) over the actions of another (LGIC). *Dunsmuir* does not speak to the question of whether engaging on such a question can truly fall within an external administrative tribunal's decision-making jurisdiction, even if that jurisdiction includes deciding questions of law.

45. There is nevertheless one comment in the concurring reasons of Binnie J. in *Dunsmuir* **[Tab 11]** which suggests that an administrative decision-maker already can't go too far beyond its own direct statutory mandate, even if it is not to examine another's jurisdiction:

> [128] Secondly, administrative action must be founded on statutory or prerogative (i.e. common law) powers. This too is a simple idea. No one can exercise a power they do not possess. Whether or

> not the power (or jurisdiction) exists is a question of law for the courts to determine, just as it is for the courts (not the administrators) to have the final word on questions of general law that may be relevant to the resolution of an administrative issue. The instances where this Court has deferred to an administrator's conclusion of law outside his or her home statute, or a statute "intimately" connected thereto, are exceptional. We should say so. Instead, my colleagues say the court's view of the law will prevail
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> > where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". [para. 60]
>
> It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges.

46. This is not to suggest that an administrative tribunal can never interpret or apply legislation that falls outside of its home statute – only that there are limited circumstances where it can occur. But the Attorney General submits that a review by one administrative delegate of another's actions is quite a novel idea, and exhibits strong indicia of being an excess of one's statutory authority.

47. It is submitted that case law at least implies as much. By way of example, in *Conway* **[CACM's Book of Authorities]** the Supreme Court of Canada broadened the remedial powers of administrative tribunals to include the ability to make remedial orders under section 24(1) of the Charter. But this was to deal with matters as they arose for a tribunal "*in the course of carrying out its statutory mandate*" (at para. 22). Here, the PUB has not actually been assigned a statutory mandate of reviewing the validity of the LGIC's regulations under the *MPIC Act*.

48. In a different context, the Supreme Court of Canada has held that an administrative tribunal can have jurisdiction to interpret human rights legislation, to the extent it

relates to a subject-matter that comes under its home statute.[13] Essentially, *Tranchemontagne* has established that in Ontario other administrative tribunals have been assigned concurrent jurisdiction to apply human rights legislation. That is, they have the statutory authority to apply human rights law and order human rights remedies, because those powers are not restricted to only human rights adjudicators.

49. But the *Tranchemontagne* reasoning does not expand to a point where a human rights law can be used by one administrative tribunal to invalidate the findings and application by another of its jurisdiction. For instance, it is not suggesting that a non-human rights adjudicator could somehow be asked to sit in review of a decision made by a human rights adjudicator. Nor is it suggesting the reverse, that a human rights adjudicator could be asked to sit in review of a non-human rights administrative tribunal which has applied human rights principles.

50. In fact, the *Tranchmontagne* decision has some helpful passages – although never fully directly on point for present purposes:

> [26] The presumption that a tribunal can go beyond its enabling statute – unlike the presumption that a tribunal can pronounce on constitutional validity – exists because it is undesirable for a tribunal to limit itself to some of the law while shutting its eyes to the rest of the law. […] Accordingly, to limit the tribunal's ability to consider the whole law is to increase the probability that a tribunal will come to a misinformed conclusion.
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> [27] Yet the power to decide questions of law will not always imply the power to apply legal principles beyond the tribunal's enabling legislation. As noted above, statutory creatures are necessarily limited by the boundaries placed upon them by the legislature. Subject to its own constitutional constraints, a legislature may restrict the jurisdiction of its tribunals however it sees fit.
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> [31] The Code emanates from the Ontario legislature. As I will elaborate below, it is one thing to preclude a statutory tribunal from *invalidating* legislation enacted by the legislature that created it. It is

[13] *Tranchemontagne v. Ontario (Director, Disability Support Program),* 2006 SCC 14 **[Tab 10]**. It is to be noted that human rights statues are routinely characterized by courts as "quasi-constitutional" legislation.

> completely different to preclude that body from *applying* legislation enacted by that legislature in order to resolve apparent conflicts between statutes. The former power – an act of defying legislative intent – is one that is clearly more offensive to the legislature; it should not be surprising, therefore, when the legislature eliminates it. Yet the latter power represents nothing more than an instantiation of legislative intent – a legislative intent, I should note, that includes the primacy of the Code and the concurrent jurisdiction of administrative bodies to apply it.
>
> [36] Thus whether a provision is constitutionally permissible, and whether it is consistent with the Code, are two separate questions involving two different kinds of scrutiny. When a tribunal or court applies s. 47 of the Code to render another law inapplicable, it is not "going behind" that law to consider its validity, as it would be if it engaged in the two activities denied the SBT by s. 67(2) of the OWA. It is not declaring that the legislature was wrong to enact it in the first place. Rather, it is simply applying the tie-breaker supplied by, and amended according to the desires of, the legislature itself. The difference between s. 47 of the Code and s. 52 of the *Constitution Act*, 1982 is therefore the difference between following legislative intent and overturning legislative intent.
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> Rather, it is most consistent with the legislative scheme surrounding the Code to differentiate the Code from the Constitution and allow the SBT to consider the former.
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> [39] …While s. 14b(6) of *The Ontario Human Rights Code*, R.S.O. 1970, c. 318, as amended by S.O. 1971, c. 50 (Supp.), s. 63, previously gave a board of inquiry exclusive jurisdiction to determine contraventions of the Code, the legislature has since altered its regime. In its present form, the Code can be interpreted and applied by a myriad of administrative actors. Nothing in the current legislative scheme suggests that the OHRC is the guardian or the gatekeeper for human rights law in Ontario.

51. It is acknowledged that ultimately, none of the above reproductions are truly dispositive of the specific question at issue here, because ultimately *Tranchemontagne* was not about one administrative actor purporting to invalidate something already done by another. Still, these passages help to bring some further thought to point made above – that the above-reproduced passage from Keyes (which implies that all questions of law are no different from one another) overlooks the crucial aspect of some statutory delegates using their own jurisdiction to negate actions of others.

52. And so, it is one thing for a statutory delegate to interpret and apply its "*own statute or statutes closely connected to its function*", and to make reference to other laws in doing that. It is quite another for one delegate to reach directly into the jurisdictional sphere of another, and to rule directly on the validity of that other's exercise of distinct delegated powers. That, it is submitted, is an extension beyond one's own legislative jurisdiction, by inserting itself into an active review of the affairs and jurisdiction of the other.

53. The Attorney General submits that from the standpoint of administrative law principles in general, the PUB does not have the jurisdiction to extend beyond its own jurisdiction, by opining or ruling on the exercise by the LGIC of its authority to make delegated legislation.

54. In the alternative, the Attorney General submits that if the PUB disagrees, and concludes that it can rule on the validity of the LGIC's exercise of authority, then a further as-yet-unexplored question still needs to be considered at that point: the extent to which there might be a principle of administrative comity (or deference) as between statutory delegates and their exercise of their own jurisdiction.

55. It is submitted that a party such as the CACM cannot unilaterally compel the PUB to make a ruling on the issue. While the CACM can raise the issue for the PUB to consider, the PUB ultimately controls its own process. The PUB must be allowed to retain an inherent ability to decline from ruling on a question such as this one, in preference to the party being redirected to put its challenge in the courts.

56. By analogy, judicial review in the courts is inherently discretionary.[14] That means a judicial review court retains an ability to decline from engaging in judicial review, if it feels it has reasons for so declining. It is submitted that similarly, to the extent the PUB is being asked to step outside its jurisdiction to engage into a question about the LGIC's exercise of jurisdiction, it should have a comparable ability to decline.

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[14] *Alberta Teachers* (2011 SCC 654), para. 22 **[Tab 12]**.

57. It is submitted that one of the key reasons the PUB might choose to decline, is that it might consciously determine that it is not prepared to insert itself into the jurisdictional decision-making of another statutory delegate. The fact alone that an administrative tribunal such as the PUB might have the jurisdiction to do so, does not mean a party can unilaterally force that administrative tribunal down that road. There is no reason why redirecting the challenging party to the courts on the issue could not be an option.

58. Another key reason why the PUB might choose to decline, is that it might not see how the requested ruling would even impact the specific decisional outcome that is directly before it.[15]

B. Analysis of Specific Jurisdiction

59. The above is an argument based on general principles of administrative law. It is submitted that a closer review of the specific statutory régimes in question also leads to the same conclusion: that the PUB legislatively does not have jurisdiction to rule on the validity of the Reserves Regulation.

60. CACM argues in para. 52 of its Notice that Cabinet is somehow "usurping" the PUB's jurisdiction, and CACM repeats that language in its Brief. But the very reverse could be argued with equal force, if not more: that CACM is trying to persuade the PUB to "usurp" Cabinet's exclusive delegated ability to decide when it will make subordinate legislation under the *MPIC Act* in relation to a subject matter that already is specifically legislated within that Act.

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[15] This point is particularly apt in the present case, where CACM is not disagreeing with MPI's proposed changes to premiums. CACM is recommending the PUB approve MPI's proposed average 0.6% reduction in premiums.

In effect, CACM is asking the PUB to make a discrete ruling on the validity of the LGIC's regulation, without establishing how that discrete ruling might have any bearing on the present application. MPI's proposed changes, after all, are based on compliance with the Reserves Regulation.

61. But it is submitted that the actual legal issue that is in play, is not to be decided on the basis of which legislative delegate might feel it is better positioned to use heightened language to characterize the actions of the other. The concept of "usurping" is not a concept that is in any way dispositive of the legal issue that has been brought to the PUB by the CACM. The true question for the PUB is: Has the LGIC made a valid regulation? And before getting to that question, the preliminary question is: Does the PUB's statutory mandate authorize it to engage on that question?

62. CACM argues with very broad strokes that because of the 1988 amendments that assigned a specific role to the PUB, three statutes should simply be reviewed as a collective whole – the *MPIC Act*, the *CCGA Act*, and the *PUB Act*. The CACM argues about what it suggests is the new combined purpose and intent of that collective whole (since 1988), and essentially argues about the PUB's jurisdiction and its position within those three statutes based on that purpose and intent.

63. But purpose and intent arguments do not set jurisdictional parameters. Jurisdictional parameters are set by the specific words use by the Legislature in the statutes. Purpose and intent arguments assist in interpreting those words, but purpose and intent arguments and analysis still need to be rooted in the actual words of the statute.

64. Jurisdictionally, Cabinet has made its regulation under section 33(1) of the *MIPC Act*. The subject-matter of that regulation – MPI's reserves – is an issue that is already expressly legislated within that Act, at section 18. Further mentions of reserves are also made at sections 12(1) and 14(2) of the *MPIC Act* **[Tab 1]**.

65. The PUB, for its part, derives its jurisdiction to approve MPI's premium changes under a different statue – section 25 of the *CCGA Act* **[Tab 2]**. The jurisdiction in that statute is generally supplemented by the *PUB Act* **[Tab 3]**.

66. Within the *MPIC Act*, there is very little mention of the PUB directly. In fact, the following is a complete reproduction of every provision in the *MPIC Act* that makes an actual mention of the PUB **[Tab 1]**:

> **6.4(2)** The corporation must apply to The Public Utilities Board for approval before changing an existing plan premium, or establishing a new plan premium, for its plans of universal compulsory automobile insurance.
>
> **6.4(3)** The Public Utilities Board may either approve or vary the plan premiums applied for by the corporation, and must make its decision in accordance with Part 4 of *The Crown Corporations Governance and Accountability Act*.
>
> […]
>
> **33(1.1)** No regulation changing the amount of an additional driver premium, a base driver premium or a discounted driver premium — together being the premiums charged by the corporation for compulsory driver insurance — may be made under subsection (1) unless the Lieutenant Governor in Council is satisfied that the proposed change has been approved by The Public Utilities Board in accordance with Part 4 of *The Crown Corporations Governance and Accountability Act*.

67. The principal administrative actor under the *MPIC Act* is really MPI. That Act addresses a wide array of matters that are specific to MPI. Aside from the above provisions within the *MPIC Act* about changes to compulsory automobile insurance premiums, nowhere else does the PUB derive any direct jurisdiction over MPI and its assigned mandate(s) under its *MPIC Act*.

68. Where the *MPI Act* makes reference the PUB, it is through mentions to recognize the PUB's role since 1988, as established under the *CCGA Act* – to approve proposed changes to compulsory automobile insurance premiums. As such, the PUB's jurisdictional connection to any aspect of MPI's activity is through that legislative portal – section 25 of the *CCGA Act* for approval of changes to compulsory automobile insurance premiums.

69. Within the *MPIC Act* there are several other administrative actors who are given roles – but none moreso than the LGIC. It does far more than make regulations.[16]

70. And so, to the extent the PUB undertakes wider-ranging reviews of MPI's affairs at annual applications for approval of changes to premiums, it cannot be disregarded that the legislative link for doing so is the PUB's authority to approve changes to compulsory automobile insurance premiums. From this specific role, it cannot realistically be concluded that the *MPIC Act* is a home statute for the PUB. It most certainly is a home statute for MPI. It also is a home statute for the LGIC in several respects. But the *MPIC Act* has not become so inextricably intermingled with the *CCGC Act* and the *PUB Act* that the three statutes can be intermingled into a single whole, with the PUB positioned atop all of it.

71. The thrust of CACM's argument, as it relates to the PUB's jurisdiction over reserves, is rooted in the PUB's historic track record of inquiring into the sufficiency of MPI's reserves since 1988. The argument as presented is not rooted in any specific legislative provision. But there is no way to explain the role other than through section 25 of the *CCGA Act*.

72. The implication of the CACM's argument is effectively that PUB has been occupying since 1988 what would otherwise have been an administratively vacant field (from a supervisory perspective), to a point where the PUB can now declare that because it has been regulating in the area of reserves for all these years, that subject-matter is now off limits to the LGIC in terms of making regulations. Yet the very existence of MPI's reserves are set by the *MPIC Act*, and it has been explained above that the wording of section 18 already requires MPI to maintain minimums. The language in the statute ("sufficiency") is inherently flexible, which has led to different people and

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[16] Under Part 1 of the *MPIC Act*, the LGIC is assigned responsibilities under no less than the following provisions: 2(1), 2(3), 3, 4, 6(1)(a) (b) and (c), 7, 8, 9(1), 9(2), 10(1), 10(3), 11(1), 11(2), 11(3), 13(1), 15, 17(4), 30(2), 30(2.1) , 30(3.1), 30(4), 30(6), 31(1), 33(1), 33(1.1), 33(3), 43(1), 44(1), 67(1) and 68.

In addition, the LGIC has some responsibilities assigned to it under Part 2 – a régime that also includes its own distinct roster of legislative delegates, such as the Automobile Injury Compensation Appeal Commission.

entities viewing that concept differently, depending on their interests and perspectives. The year-to-year experience has also demonstrated how there has been both individual and collective evolutions and refinements to the thinking about sufficiency, but with the issue never being completely resolved.

73. The fact that this evolution has occurred before the PUB has not created a jurisdictional enclave for the PUB over all aspects of MPI's reserves, to the exclusion of the LGIC's authority to make regulations. In reality, the field of regulating MPI's reserves has never been truly vacant, and the PUB's annual work on reserves has to be understood, from a legal perspective, in the proper context of the guiding legislation. Section 18 of the *MPIC Act* says what is says about reserves, and sections 12(1) and 14(2) complement that.

74. Jurisdictionally, if the PUB has been inquiring into the sufficiency of MPI's reserves all this time, it has been through its general mandate under section 25 of the *CCGA Act* to approve premium changes. The reality is that many variables can be seen as having an impact on premiums, but this does not eclipse the express *MPIC Act* rules that govern those variables, including reserves.

75. Whether knowingly or not, what the PUB has been doing all this time, has been exercising vigilance about MPI's compliance with the conceptual requirement at section 18 of the *MPIC Act* to maintain sufficient reserves. In fact, a cursory overview of the PUB's orders over time demonstrates that the PUB has been inquiring into exactly that question. In that regard, it is to be noted that section 78(1)(a) of *The Public Utilities Board Act* actually gives the PUB a broad ability to issue an order to a regulated entity, compelling that entity to "*comply with the laws of the province*".[17]

[17] Conversely, there is no provision in either the *CCGA Act* or the *PUB Act* which would give the PUB authority to direct a regulated entity (or itself) to disregard any provincial law. With the greatest of respect for Mr. Todd and his expertise within his field, he is in no position to be encouraging this Board to somehow position itself as being superordinate to valid legislation. The PUB should encourage compliance with all laws by all regulated entities. The starting point

76. Section 25 is not a power of no constraints, which somehow grants the PUB illimited direct control over all variables that can impact changes to compulsory automobile insurance premiums. It is therefore highly questionable whether this statutory régime gives the PUB jurisdiction to rule on the validity of everything that can be linked to every variable. Section 25(1) gives the PUB authority to approve the changes to compulsory premiums. Sections 25(4) and (5) then specify what the PUB can "*take into consideration*" along the way to making that overall decision. While sections 24(4) and (5) give the PUB an ability to consider an extensive list of variables, they do not give the PUB final say over the operation and application of every part of the *MPI Act* that might otherwise govern those variables – especially where the *MPIC Act* assigns functions directly to the LGIC.

77. For as long as the concept of sufficiency has lacked precision, it was perhaps understandable that the PUB was inquiring into the magnitude of MPI's reserves, and that parties have been advancing different positions. But now that numerical precision has been brought to the reserves, section 25 does not give the PUB authority to decide that the LGIC was without authority to have brought that precision. The very point of the LGIC legislating as it has, is to conclusively settle this longstanding elusive issue. Rather than have interest-holders expend further time, effort and resources continuously relitigating what has proven to be a concept wit no clear endpoint, the LGIC has simply brought a legislative solution by establishing numerical precision.

78. As the annual hearings have demonstrated, there is no shortage of variables that can be taken into account and studied along the way to the PUB coming to its final decision to either approve or vary changes to premiums for compulsory automobile insurance. The introduction of numerical precision to reserves will not eliminate that annual process. It simply means parties no longer need to annually relitigate this one specific question.

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for doing that, is by demonstrating its own observance of all laws, rather than accepting the invitation of witness to ignore laws.

79. The respective roles of the PUB and the LGIC within the context of the *MPIC Act* is highlighted at section 33(1.1) of the *MPIC Act*, which comes immediately after the already-discussed wide-ranging grant of authority to the LGIC at section 33(1) to make regulations. While section 33(1.1) has been amended to remove the LGIC from making the regulations that inject the force of law into new premiums for automobile insurance,[18] it still has the ultimate role of making a regulation for driver-related insurance premiums – albeit subject to being satisfied that the PUB has approved the proposed changes.

80. To that end, this inter-relation of roles in section 33(1.1) establishes how the LGIC is never made subordinate to the PUB under any aspect of the *MPIC Act*. Sequentially, the PUB is placed as a limited pre-conditional actor to Cabinet undertaking its role of making the regulation to implement new driver insurance premiums. The administrative procedure flows as follows:

- MPI applies to the PUB for approval.
- The PUB then grants its approval (with or without revisions).
- At that point, Cabinet has to be satisfied that the PUB has in fact granted its approval. If so satisfied, then it can make the necessary regulation.

81. Under such a procedure, the PUB is assigned a specific role (as a pre-conditional actor), and not as a post-activity reviewer of anything done by Cabinet. There is no suggestion of a legislative intention anywhere in the *MPIC Act* to position the PUB in a role that amounts to second-guessing the validity of any of the regulations made by Cabinet.

82. As demonstrated, the PUB is inserted into the *MPIC Act* in a very limited way. By making the Reserves Regulation, Cabinet has brought numerical precision to a

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[18] The true purpose of the change to section 33(1.1) is best explained by the title of the statute that made the change: *The Red Tape Reduction Act* (SM 2018, c. 29) **[Tab 13]**. Rather than have Cabinet enact the changes to vehicle insurance premiums annually in a growing voluminous regulation, section 6.1 of the *MPIC Act* now directs MPI to publish the premiums by alternative means, including on the MPI website.

concept that is expressly legislated within the *MPIC Act* – the sufficiency of MPI's reserves. It is submitted that the PUB's singular legislative portal into the *MPIC Act* – section 25 of the *CCGA Act* – gives the PUB no authority to rule on the validity of any of the regulations that are made by the LGIC under the *MPIC Act*, including the *Reserves Regulation*.

IV. Main Issue: Validity of the Reserves Regulation

83. Nevertheless, should the PUB disagree with the Attorney General, and should the PUB decide it has jurisdiction to hear and decide the question of the validity of the Reserves Regulation, and should the PUB not decline the CACM's request for it to engage on this issue, then the Attorney General makes the following submissions.

A. Core Principles of Statutory Interpretation

84. As noted above, the CACM's challenge revolves around the question of the interpretation of the particular provisions in the *MPIC Act* that grant to the LGIC authority to make regulations.

85. The same principles of statutory interpretation apply to all legislation. The overriding principle is found at section 6 of *The Interpretation Act*:

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

86. The above rule of "large and liberal" interpretation is routinely reaffirmed by the Supreme Court of Canada. It is also found as having the same meaning as the modern approach to statutory interpretation, which is that:

> *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*[19]

87. To decide the CACM's motion, therefore, the central focal point must be a large and liberal, and properly contextual, interpretation of the three provisions in the *MPIC*

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[19] From *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para 21, quoting Elmer A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at 87. **[See also authorities identified in the CACM's Brief]**

Act pursuant to which Cabinet has made the Reserves Regulation. That is: the preamble of section 33(1), as well as clauses 33(1)(a) and 33(1)(o).

88. Caution must be taken to not use overly restrictive interpretations that serve only the narrow purpose of defeating the true purpose of these clauses. These clauses clearly allow delegated legislation to be made. They must not be interpreted to devoid them of any meaning. Such an interpretation would be contrary to the larger public interest purpose that is inherently served by the ability to make regulations under general grants of authority.

89. It is accepted that the very same principles of statutory interpretation will also apply to an interpretation of the PUB's jurisdiction under section 25 of the *CCGA Act*. But a large and liberal interpretation of section 25 is not a basis from which the PUB should allow itself to be led towards imposing a restrictive interpretation to section 33(1) of the *MPIC Act*. To resolve the interpretive interactions between statutory provisions, other principles will need to be considered – principles that are used to determine validity of delegated legislation.

B. Tests that Apply for Determining the Validity of Delegated Legislation

90. In relation to a challenge to the validity of a regulation, the Supreme Court of Canada "*favours an interpretative approach that reconciles the regulation with its enabling statute*": *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care),* [2013] 3 S.C.R. 810 at para 25 **[CACM's Book of Authorities]**.

91. One possible test that can be used to try to challenge the vires of a regulation, is to determine whether the regulation is <u>inconsistent with the parent statute</u>. The specific test to be applied, as held by the Supreme Court of Canada in *Katz* at para. 24, is whether the regulation is "*inconsistent with the objective of the enabling statute or the scope of the statutory mandate*" **[CACM's Book of Authorities].** In the present case, that would be a comparison of the Reserves Regulation to the *MPIC Act* – the

statute under which it was made. And in doing this, interpretative reconciliation should be favoured.

92. Another possible test that can be used to try to challenge the vires of a regulation, is to assert that the regulation is in conflict with other Acts of the Legislature. The specific test to be applied, again as held by the Supreme Court of Canada, is whether "*compliance with one law involves breach of the other*" or "*two legislative enactments cannot stand together*": *Friends of Oldman River Society v. Canada (Minister of Transport),* [1992] 1 SCR 3 at para 42 **[CACM's Book of Authorities].**

93. At paras. 50 and 51 of its Notice of Constitutional Question, and also in its written Brief, the CACM uses both of these terms interchangeably – inconsistent and conflict. However, it is submitted that the two concepts are not necessarily one and the same. They can be distinguished as to when they are each to be considered.

94. It is submitted that the concept of inconsistency is more appropriate in relation to the parent statute under which a regulation has actually been made – especially when the granted authority is general and unrestricted. By contrast, the concept of conflict applies in relation to other statutes. In either case, however, interpretive reconciliation is an animating concept.

95. As such, the test of inconsistency of the Reserves Regulation should be used in relation to the assessment of the content of the regulation in relation to section 33(1) and its clauses (a) and (o) of the *MPIC Act*, and the *MPIC Act* as a whole. If there is no inconsistency, then the regulation is valid.

96. The test of conflict should then be the one that arises in relation to an argument that the regulation somehow offends the other two external statutes. In this case, that will be *The Crown Corporations Governance and Accountability Act* and *The Public Utilities Board Act*. A conflict has very limited meaning, and is only established after it is demonstrated that there is no way to reach a harmonious interpretation across the statutes.

97. To be sure, the Attorney General submits it is not appropriate to measure the validity of a regulation made under the *MPIC Act*, by testing it solely for mere inconsistency with the purpose and intent of the *CCGA Act* or the *PUB Act*.

C. Challenge to a General Regulation-Making Clause (The Inconsistency Issue)

98. In challenging the validity of a regulation based on the delegating authority, the statutory language that needs to be considered is the language of the enabling clause in the statute. It is important to determine whether the regulation is beyond the scope of the statutory grant, before moving to an analysis of any other external statutory provisions.

99. Interpreting an enabling clause – especially one that grants a general regulation-making power like the preamble of section 33(1) and clause 33(1)(o) – can to some extent pose its own challenges, because the subject-matter of the regulation is not being compared to the specific scope of a targeted regulation-making clause. It is being compared to the broader subject matter of the statute as a whole. To this end, the Federal Court has provided some helpful comments in *Steve Dart Co. v. Canada (Board of Arbitration),* [1974] 2 F.C. 215 [with my emphasis added] **[Tab 14]**:

> That section grants the additional right to make regulations to carry out the purposes and provisions of the Act, but such purposes and provisions must be clearly expressed in or contained within or flow by necessary implication from other sections of the Act. It would permit the making of ejusdem generis Regulations as those authorized in the other sections of the Act providing for the issuing of Regulations. It would also permit a Regulation required to carry out effectively a clearly expressed provision of the Act not falling within one of the other sections authorizing the making of Regulations; it certainly does not provide the right to make Regulations covering a matter which is not even remotely referred to in the Act.

100. The scope of the measuring stick of the “purposes and provisions” needs to be properly understood. It is the purpose and the provisions of the Act under which the regulation is actually made. It is not yet appropriate to start expanding the scope of analysis to external statutes.

101. The Reserves Regulation addresses a subject-matter that is already legislated directly within *The MPIC Act*. And section 18 already speaks to the minimum magnitude of MPI's reserves. It is therefore difficult to see how the Reserves Regulation can be characterized as being inconsistent with the *MPIC Act*. There is no credible argument, it is submitted, that MPI's reserves are "*not even remotely referred to*" in the *MPIC Act*.

102. Cases have been decided throughout Canada in which challenges have been made to the validity of regulations made under general enabling clauses. In only a very few specific cases has a regulation been found invalid or beyond the scope of the general grant of authority.

103. For example, in *Smith v Canada (Attorney General),* [1999] F.C.J. No. 1751 **[Tab 15]**, the Federal Court considered the meaning of "necessary", where the general enabling clause allowed regulations to be made "*as the Governor in Council may consider necessary*." The Federal Court concluded that although this was a broad-ranging regulation making power, the regulations were contrary to the purpose of the Act because the Act intended to facilitate pension division, while the imposition of a time limit was demonstrated to be a barrier to that purpose under that Act. There was, in effect, an inconsistency between the Act and the regulation.

104. There has been some discussion in some cases about the Legislature's choice of language in making a general grant of authority. In *Sobeys Group Inc. v. Nova Scotia (Attorney General),* [2006] N.S.J. No. 386, at paras 17-18 **[Tab 16]**, the Nova Scotia Supreme Court compared the wording "*The Governor in Council may make regulations concerning any matter or thing which appears to him necessary or advisable for the effectual working of this Act*" with "*respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act*." The court held that the former language introduced a <u>subjective</u> element into the decision to make a regulation under a general power. The Court held at para 18:

> <u>It appears from this analysis that had the Minister or Cabinet (the regulating authority) been granted the power to make such regulations as</u>

> he deems necessary then this court would be hard pressed to find the legal authority to question such decision. In the absence of such a subjective authority it is open to the Courts to objectively review the challenged regulations to determine if they were made under the authority of the Act, or, whether such regulations exceeded the specific authority and are thus ultra vires the Cabinet.[20]

105. In an early discussion about this, Elmer A. Driedger, in *Subordinate Legislation* (The Canadian Bar Review, Vol 38, No 1, 1960), discussed some of the different approaches that have been used by Legislatures to grant regulation-making powers at pages 28-29 [all emphases in original] **[Tab 17]**:

> Sometimes the authority is conferred to make regulations *not inconsistent with* the Act. These words seem to be unnecessary. It has been shown that it is not permissible to make regulations contrary to or inconsistent with the Act itself.
>
> Sometimes the authority is to make *such regulations as are neces*sary for carrying out the Act. It is doubtful that the words *as are necessary* add anything. In their absence, the Courts would no doubt strike down a regulation they thought unnecessary. In either case, the Courts would no doubt be the judges of necessity.
>
> A wider authority is conferred if a subjective test of necessity is prescribed. Thus, power may be conferred on the Governor in Council to make *such regulations as he deems necessary (advisable, expedient) for carrying out the purposes* of the Act. In such a case ... the regulation making authority is the sole judge of necessity and the Courts will not question his decision, except possibly if bad faith were established. There is, therefore a vast difference between the two following examples and the extent of the power conferred:
>
> > May make such regulations *as may be necessary* for carrying out of the provisions of this Act.
> >
> > May make such regulations *as he deems necessary* for carrying out the provisions of this Act.

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[20] In *R v CKOY Ltd.*, [1978] S.C.J. No. 64, the SCC emphasized the discretion granted to the Commission was based on the words “as it deems necessary” (at page 8) **[Tab 18]**.

106. It is unclear whether these technical distinctions in language continue to be as significant today, as they may have once been. It may be that the broader test of inconsistency under a general delegation provision is easier to understand and apply, and that any "*subjective*" element of the decision to make a regulation will be an elusive element to assess. Still, the suggestion in the extract from Driedger is that where the necessity or advisability of creating regulations is within the sole discretion of the LGIC, courts will not (and could not) question this decision without some indication of bad faith. No such allegations are made in this case – although "bad faith legislating" is itself a doctrine of questionably limited application.

107. Other language has been held to suggest a broad interpretation of an enabling clause, such as the word "respecting". In *R v Nowegijick*, [1983] S.C.J. No. 5, the SCC held at page 6 **[Tab 19]**:

> "[t]he words 'in respect of' are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters."

108. It is submitted that for the CACM to succeed on its challenge, it must be required to demonstrate a clear case that the Reserves Regulation actually relates to subject-matter that extends beyond what is already being addressed under the *MPIC Act*. More importantly, it needs to establish the Regulation is somehow addressing a subject-matter that is fully beyond any part of the overall purpose of this statute. But there is no suggestion that the Reserves Regulation goes beyond the *MPIC Act*, or is in any way inconsistent with that Act's purposes. On the contrary, the subject-matter of the regulation (reserves) is already directly within the *MPIC Act*, at sections 12(1), 14(2) and 18.[21]

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[21] By way of illustration, the *MPIC Act* contains some express regulation-making provisions that illustrate, quite possibly, where a point can be reached that goes beyond the jurisdictional parameters of a general grant to make regulations.

Sections 30(2), (2.1), (3.1) (4) and (6) are provisions that expressly empower the LGIC to make regulations that govern the interplay between the *MPIC Act* and the *Insurance Act*.

109. The first general grant of authority that the Legislature has made to the LGIC is the preamble of clause 33(1), and under this provision the test for determining the validity of the Reserves Regulation is whether it was made for the purpose of carrying out the provisions of the *MPIC Act* according to their intent, and in a way that is ancillary and not inconsistent with the *MPIC Act*. The Reserves Regulation meets that test.

110. The second general grant of authority made to the LGIC is clause 33(1)(o). Under this provision, the initial question of whether the LGIC considered the making of the Reserves Regulation to be "necessary or advisable" is inherently answered. The fact alone that the regulation was made answers this question. The true part of the test that needs to be explored regarding clause 33(1)(o), is whether the Reserves Regulation is for "*the effective carrying out of the intent and purpose of this Act and the regulations and any insurance plan established under this Act*". Again, the Reserves Regulation meets that test.

111. In addition to the two general grants, there is also clause 33(1)(a) – the specific grant. Here, the issue is whether the concept of a reserve for insurance fits within the meaning of "*plans of automobile insurance*" and "*plans of universal compulsory automobile insurance*". It is submitted that the concept of reserves is inherently included in a large and liberal interpretation of "plans" of insurance.

D. Conflict with Other Statutes

112. CACM's second potential stream of challenge is that the Reserves Regulation is in conflict with provisions in *The Crown Corporation's Governance and Accountability Act*, and perhaps *The Public Utilities Board Act*. A conflict is not a mere inconsistency with a generally framed argument about the purpose and intent of external statutes. It instead needs to be established as a conceptual impossibility

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Section 68 does the same, in relation to *The Corporations Act*. Without these express provisions allowing the LGIC to make regulations on these particular subject-matters, an attempt by the LGIC to make such regulations under the general grant of authority at section 33(1) might be at risk of a successful challenge.

that cannot be interpretively remediated by attempts to reconcile the actual wording of the statutes.

113. One potential example of a conflict is when compliance with one legislative direction (the Reserves Regulation) would require a breach of another (the *CCGA Act*). But there is no demonstration of such a conflict here.

114. In fact, the PUB itself has historically been looking into the issue of the sufficiency of MPI's reserves. It has received some submissions for exactly this magnitude of reserves, and it appears that at one point the PUB may well have even agreed with that magnitude. While in recent years the PUB has not again agreed with this specific submission, there are participants at the present hearings who candidly acknowledged that there would be nothing that would prevent the PUB – if it were to want – to decide to approve an outcome for reserves in exactly the way that has been done by the Regulation.

115. It is illogical to suppose that the substantive content of the Regulation would not be in conflict with the *CCGA Act* if were approved by the Board, but somehow is in conflict for the fact of being implemented by an LGIC regulation. It cannot be said that there is a conflict on this issue.

E. Remedy

116. Should the PUB disagree with the above submissions, and should it come to the conclusion that the LGIC did not have the authority to make the Reserves Regulation, then the issue that will arise at that stage will be the question of the appropriate remedy. In its Notice of Constitutional Question (at para. 55), CACM is asking for the PUB to "find that the *Reserves Regulation* is *ultra vires*". But the PUB does not have the same ability as the courts to conclusively declare a regulation, or portions of it, invalid.

117. Rather, if the PUB wants to fashion a remedy to somehow implement the CACM's position, then the PUB will need to craft an adequate alternative remedy that

accomplishes the same practical outcome. This must be done in a way that fits within the PUB's own delegated sphere of jurisdictional powers – its statutory authority under section 25 of the *CCGA Act* to approve changes to premiums for compulsory automobile insurance.

118. So the true point of debate and discussion at that stage, will be to identify how the PUB might implement its finding on the validity of the Reserves Regulation within its authority to make that ultimate decision.

119. On this application, the CACM is urging the PUB to outright approve the 0.6% average rate reduction as proposed by MPI – a proposal that has been made on the basis of compliance with the Reserves Regulation. If the PUB is inclined to agree with MPI and the CACM, then it is unclear how a finding of invalidity of the Regulation within the context of this specific application process will have any meaning or impact on the decision that is assigned to be made by the PUB.

V. Closing

120. By making the Reserves Regulation, Cabinet has sought to bring an end to the perpetual and prolific debate over the magnitude of MPI's reserves, including the methodology of calculating that magnitude. This is a debate that has existed because of the imprecise language in section 18 of the *MPIC Act*.

121. For its part, Cabinet has not made a regulation that in any way questions or revisits the validity of past PUB findings on MPI's reserves. Rather, having seen the nature of that perpetual and recurring debate, Cabinet has evidently felt that the time has come to use its general ability to make regulations to bring a forward-looking close to this long-unsettled issue. It has brought numerical precision to what was previously a less precise concept.

122. It is submitted that as a matter of broader public policy, it is entirely appropriate that Cabinet has done this. Reserves are fundamentally about "risk tolerance". At the hearings for this application, the PUB heard about different risk tolerance perspectives:

a. Consumer-side interests spoke about reserves as a risk tolerance factor to themselves.

b. MPI spoke about reserves as a risk tolerance factor to itself.

c. Mention was also made about the differences in risk tolerance for public insurers, as compared with private insurers.

d. Some participants expressed the view that insolvency concerns are simply immaterial (or alternatively of "questionable relevance") as a concern for MPI as a public insurer, and therefore should be discounted as a point of concern for reserves.

123. This fourth point is entirely wrong in law, because the Legislature proves it wrong. Solvency and insolvency are inherently interrelated concepts, and the Legislature shows directly in the *MPIC Act* how much of a concern MPI's solvency is to it. Sections 7 to 12, and sections 14 to 17, are either entirely about solvency, or at least partly about it.

124. The fact that that ordinary insolvency proceedings applicable to a private share-based corporation might not have the prospect of being formally triggered over a provincial Crown corporation, does not somehow make all manner of insolvency concerns disappear. On the contrary, that actually makes the concept of insolvency a heightened concern. Not just for the government whose Crown corporation it is, but for everyone who is potentially impacted by matters that affect the public treasury.

125. This leads to the point that there is an additional "risk tolerance" interest that was not discussed directly at these hearings before the PUB, but should be considered in any discussion about MPI's reserves, no matter where it occurs: that of the public treasury that implicitly (if not explicitly) is the ultimate guarantor of the MPI insurance funds.

126. Until now, Cabinet has not inserted itself into the debate about the magnitude of MPI's reserves, while that debate has played itself out before the PUB. It has always been known that MPI has a statutory mandate to comply with section 18, and it can be presumed that up until April 2019, no reason had been seen by Cabinet to step directly into the discussion as it has unfolded before the PUB.

127. Of course, Cabinet has never sought to appear before the PUB to make submissions to the PUB about MPI's reserves. It has not had to. And it should not be suggested that it would ever have needed to, given that it has general powers to make regulations. If Cabinet has seen that now is the time to step into this discussion, there is no reason why it cannot do so by using its authority to make regulations. It

is unnecessary for Cabinet to seek standing to appear as a participant before the PUB, when it retains general authority to make binding regulations over MPI.

128. The Attorney General notes that if Cabinet feels that the government's risk tolerance about reserves has not been adequately factored, then it is entirely appropriate for Cabinet to have made the Reserves Regulation. Should any financial concerns ever arise about MPI's solvency or liquidity, Cabinet is the ultimate public entity that would need to solve those concerns.

129. It is submitted that it is entirely appropriate that Cabinet has therefore set the magnitude of MPI's reserves prospectively, in a way that suits its preferred risk tolerance. With due respect to the parties who think their risk tolerance profile is more relevant than the other's, it is entirely Cabinet's prerogative to have its own risk profile prevail. The public treasury (i.e. government) is the ultimate backstop for MPI's financial health, and Cabinet is the ultimate steward of the public treasury. Even from a public policy standpoint (i.e. not just the strictly legal standpoint), it is entirely sensible that Cabinet has the last word on the "sufficiency" of MPI's reserves, and that it would enshrine that last word in a binding regulation.

130. If the Legislature had wanted the PUB to be the sole and exclusive perpetual guardian of the magnitude of MPI's reserves, it would have done so expressly. It would not have simply had it be done implicitly, through the legislative portal of section 25 of the *CCGA Act*. That provision is a directly link to MPI's function of proposing changes to premiums for compulsory automobile insurance. Section 25 is not from that a general grant of comprehensive final and binding decision-making authority over everything that can potentially affect those changes to premiums – especially to the extent that legislation actually directs otherwise.

131. The Attorney General submits the PUB should dismiss on all possible grounds the CACM's challenge to the validity of the Reserves Regulation.

All of which us respectfully submitted on behalf of the Attorney General of Manitoba

October 28, 2019

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Denis Guénette
General Counsel