**THE PUBLIC UTILITIES BOARD OF MANITOBA**

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| 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 |

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# WRITTEN BRIEF

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## *Overview*

1. The purpose of the legislative scheme as set out in the interaction of *The Public Utilities Board Act* ("*PUB Act*"),[1] *The Crown Corporations Governance and Accountability Act* ("*CCGA Act*"),[2] and *The Manitoba Public Insurance Corporation Act* ("*MPIC Act*")[3] is to grant the Public Utilities Board ("PUB") independent rate approval authority, which is evidence-based and immune from political interference, for Manitoba Public Insurance's ("MPI" or the "Corporation") Basic insurance.

2. For at least 30 years, the PUB has considered that "the magnitude and constitution of the Rate Stabilization Reserve is an integral part of the due and proper fixing of rates charged by the Corporation".[4]

1 *The Public Utilities Board Act,* CCSM c P280 [*PUB Act*].
2 *The Crown Corporations Governance and Accountability Act,* CCSM c C336 [*CCGA Act*].
3 *The Manitoba Public Insurance Corporation Act*, CCSM c P215 [*MPIC Act*].
4 PUB Order 192/89 at 33 – 34.

3. The *Reserves Regulation* (the "Regulation" or "*Reserves Regulation*") is invalid because it is "inconsistent with the objective of the enabling statute or the scope of the statutory mandate."[5] The *Reserves Regulation* interferes directly and is inconsistent with the independent rate approval authority of the PUB for MPI's Basic insurance.

4. By mandating a minimum of an equivalent to 100% Minimum Capital Test[6] to be held in MPI's Rate Stabilization Reserve (the "RSR"), the *Reserves Regulation* usurps the PUB's authority in determining the appropriate level of reserves for rate approval purposes. The PUB can not ensure that the RSR contribution components of rates, which it has the authority to approve, are just and reasonable without assessing those contributions against the RSR range itself.

5. Sections 2(a), 3, and 4 of the *Reserves Regulation* inexorably frustrate the legislative framework underlying the independent rate approval process by:

   a) usurping the jurisdiction of the PUB in approving just and reasonable rates in a public process to determine an appropriate Basic insurance RSR level for rate setting;

   b) usurping the jurisdiction of the PUB in approving just and reasonable rates in a public process to approve an appropriate methodology for the determination of the RSR levels;

   c) imposing a minimum Basic insurance RSR level (the 100% MCT) that had been expressly rejected by the PUB, in the context of an independent rate approval exercise, as a maximum target;

   d) requiring the PUB to impose rate increases in circumstances where the Basic RSR (which "must" be maintained at an amount determined using a MCT ratio of 100%)

5 *Katz Group Canada Inc v Ontario (Health and Long Term Care)*, 2013 SCC 64 at para 24, [2013] 3 SCR 810 [*Katz Group*].

6 MCT is a standard imposed by the federal Office of the Superintendent of Financial Institutions (the "OSFI"). It is a ratio, expressed as a percentage, of capital available to a Corporation based on an assessment of certain, standard enumerated risks. Private, federally regulated property & casualty insurers are required to maintain a 100% MCT by the OSFI to ensure their solvency. MCT percentage = 100 * (capital available to P&C insurer) / (sum of capital required for insurance risk + required for market risk + required for credit risk + operational risk – diversification credit). See for more detail: http://www.osfi-bsif.gc.ca/eng/fi-if/rg-ro/gdn-ort/gl-ld/Pages/mct2018.aspx.

is below 100% and no drawdown from other lines of business is feasible or possible;

e) prohibiting the PUB in its rate approval process from drawing down reserves for the purpose of promoting rate stability in any circumstances other than when the RSR can be maintained at its mandatory minimum level at or above 100% MCT;

f) frustrating the purpose of the RSR by requiring the maintenance of funds equal to 100% MCT in the RSR, even in situations where drawing down or depleting the RSR is necessary to mitigate rate shock or to protect against rate increases occasioned by unforeseen events; and

g) restricting the ability of the PUB in its public rate approval process to disallow unreasonable costs if the effect would be to draw down the basic RSR below the mandatory 100% MCT.

6. As a result, the *Reserves Regulation* is invalid for the purpose of rate approval in the 2020 GRA. For the purpose of exercising the independent rate approval authority of the PUB and consistent with the statutory framework, CAC Manitoba asks the PUB to:

   a) find that sections 2a), 3, and 4 of the *Reserves Regulation* are invalid;

   b) continue to exercise its rate approval function consistent with the statutory framework and its long standing finding that the magnitude and constitution of the RSR is an integral part of determining just and reasonable rates for Basic insurance.

## *Facts*

7. MPI is a Crown corporation. Operating as a statutory monopoly, it provides compulsory automobile insurance (Basic insurance) in Manitoba. It also offers additional insurance products beyond the scope of its statutory monopoly (Extension and Special Risk Extension). MPI is governed by the *MPIC Act*.

8. The PUB is a board, enacted and governed pursuant to the *PUB Act*.[7] By virtue of the operation of provisions of the *CCGA Act*[8] and the *MPIC Act,*[9] the PUB was delegated authority by the Legislature to regulate the rates charged by MPI to ratepayers for their compulsory automobile coverage, or Basic insurance. The PUB is required to approve rates that are just and reasonable, a legal term of art with a specific meaning within the field of utilities regulation.

9. MPI maintains a reserve fund called the Rate Stabilization Reserve. The purpose of the RSR is: "To protect motorists from rate increases that would otherwise have been necessary due to unexpected variances from forecasted results and due to events and losses arising from non-recurring events or factors."[10]

10. In the years leading up to the 2019 General Rate Application, which took place in 2018, "through an extensive collaborative process, an approach to estimating a Basic target capital range was developed as an adaption of the [Dynamic Capital Adequacy Testing] investigation."[11] In fact, the PUB found in 2018 that "[o]ver the course of recent years, a consensus had been reached that a 1-in-40-year (or 97.5 th percentile) probability level and a two- year time horizon are appropriate for Basic for both the lower and upper thresholds of the Basic target capital range."[12]

11. For "purposes of setting the upper threshold of the Basic target capital range," the PUB has previously withdrawn "its support of the use of the MCT and a threshold MCT ratio of 100%", stating that it was "concerned that the degree of conservatism implied by the Corporation's proposal may be excessive based on the Corporation's scenario testing at the more extreme percentile levels of possible outcomes, potentially giving rise to a risk of moral hazard."[13]

12. In PUB Order 159/18, issued in December 2018, the PUB found that while "considerable work has been devoted and progress made over many previous GRAs

7 *PUB Act, supra* note 1.
8 *CCGA Act, supra* note 2.
9 *MPIC Act, supra* note 3.
10 PUB Order 159/18 at 91; section 8.1.
11 PUB Order 159/18 at 94.
12 PUB Order 159/18 at 95.
13 PUB Order 162/16 at 60.

and through a collaborative process with stakeholders on the issue of the appropriate methodology to be used to establish the Basic Total Equity target capital range",[14] it was concerned that it was receiving the same arguments from parties and would like to avoid revisiting the same argument. To that end, it expressed its intention "to engage the services of an independent consulting actuary with experience in target capital analysis to engage stakeholders in discussion to understand their preferred approaches to Basic target capital analysis and prepare expert evidence for the 2020 GRA, setting out the expert's opinion on best practices in that regard."[15]

13. In April of 2019, the Lieutenant Governor in Council ("LGiC") enacted the *Reserves Regulation*.[16] The Regulation stipulates that "the minimum amount the corporation must maintain" in its RSR is "the amount determined using a MCT ratio of 100%."[17] MPI's 2020 General Rate Application, filed in June of 2019, includes a Capital Management Plan which incorporates a capital target for the RSR of an MCT ratio of 100%.

14. On September 6, 2019, the Manitoba Branch of the Consumers' Association of Canada filed a Notice of Constitutional Question with the Public Utilities Board, pursuant to ss. 7(3) to 7(8) of *The Constitutional Questions Act,*[18] challenging the validity of the *Reserves Regulation.*

## *Public Utilities Board Jurisdiction Over Questions of Law*

15. In carrying out its rate approval duties, the PUB is required to interpret the *PUB Act*, the *CCGA Act* and the *MPI Act*. Within the rate approval process, the PUB is empowered to decide questions of law. Tribunals who are empowered to determine questions of law are also empowered to decide whether subordinate legislation is valid.

16. The authority of administrative tribunals to determine the validity of subordinate legislation has been summarized as:

> An administrative tribunal may be asked to rule on the validity of some

14 PUB Order 159/18 at 10.
15 *Ibid* at 11.
16 *Reserves Regulation,* Man Reg 76/2019.
17 *Ibid* at s 2(a).
18 *The Constitutional Questions Act,* CCSM c C180.

> provision in its constitutive documents on non-constitutional grounds as well. For example, a party may impugn the validity of subordinate legislation before the tribunal on the ground that, properly interpreted, the legislation did not contain the necessary grant of authority. And since the determination of this challenge will turn on an interpretation of the enabling statute, adjudicative tribunals will normally possess the power to decide whether the subordinate legislation is valid [footnote in original omitted] in the absence of some clear indication in the legislation to the contrary.[19]

17. Case law relating to the authority of administrative tribunals to determine constitutional questions or questions relating to the *Charter* provides helpful context relating to the authority of administrative decision-makers to decide questions of law, including the validity of laws. An administrative tribunal that has the power to decide questions of law "arising under a particular legislative provision will be presumed to have the power to determine the constitutional validity of that provision."[20] In other words, "the power to decide a question of law is the power to decide by applying only valid laws."[21]

18. Taking the constitutional/*Charter* comparison one step further, the ability of an administrative tribunal to decide questions of law related to a subject matter properly before it necessarily has the ability to award appropriate remedies, even constitutional remedies, unless this power was expressly removed.[22] While this case law concerns constitutional remedies, specifically section 24 *Charter* remedies, the underlying rationale is a reflection of the Court's preference to allow administrative tribunals to determine issues in the first instance to avoid the bifurcation of claims.[23]

19. Application of these principles to this matter require a finding that the PUB, which has

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19 Donald J M Brown, Q.C. and The Honourable John M. Evans, "Judicial Review of Administrative Action in Canada", Chapter 13:4300, page 13-78.1 (July 2019) and 13-79 (December 2018). See also *Chan v Canada (Minister of Employment and Immigration),* [1994] 2 FC 612 (FCTD) at para 17 where Rothstein J. stated: "in making decisions, immigration officers must have jurisdiction to decide relevant questions of law and that such jurisdiction includes deciding questions as to the validity of regulations pursuant to which such decisions are made."

20 *Martin v Nova Scotia (Worker's Compensation Board)*, 2003 SCC 54 at para 36, [2003] 2 SCR 504.

21 *Ibid*.

22 *R v Conway*, 2010 SCC 22 at paras 78-82, [2010] 1 SCR 765.

23 See *ibid* at para 79: "a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction."

the ability to decide questions of law, necessarily also has the ability to determine the validity of a regulation and order appropriate remedies relevant to that determination.

20. The "mandate of the PUB" is "to review and approve the MPIC's rate bases and premiums charged with respect to compulsory driver and vehicle insurance."[24] This mandate, as set out in what is now section 25 of the *CCGA Act, "*must be interpreted in accordance with the scheme of the legislation".[25] The scheme of the legislation includes the interaction of the *PUB Act,* the *CCGA Act* and the *MPIC Act.*[26]

21. The PUB is required, by the three statutes referenced above, to set rates for services that are just and reasonable and in the public interest.[27] The meaning of "just and reasonable" and "public interest" are for the PUB to determine by interpreting the statutes setting out the legislative scheme. This empowers the PUB to necessarily decide questions of law given that the interpretation of enabling statutes is a question of law.[28] In fact, the Federal Court of Appeal has held that determining the meaning of "just and reasonable" within another regulatory statutory scheme was a question of law.[29]

22. This power to decide questions of law is also evident from a review of the *PUB Act*, which provides that an appeal lies from any final order or decision of the PUB to the Manitoba Court of Appeal upon any question involving the jurisdiction of the board, or **any point of law,** or any facts expressly found by the board relating to a matter before the PUB.[30] Given that the Manitoba Court of Appeal can review an appeal from a decision or order of the PUB on any point of law, it follows that the PUB must necessarily have the authority to interpret law and therefore to decide questions of law.

23. As a result, in exercising its rate approval function and pursuant to its authority to decide questions or law, it is open to the PUB to determine that a particular statutory or

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24 *Public Utilities Board v Manitoba Public Insurance Corporation,* 2011 MBCA 88 at para 31, 275 Man R (2d) 1 [*PUB v MPIC 2011*]
25 *Ibid* at para 33.
26 *Ibid*.
27 *Consumers' Association of Canada (Man) Inc et al v Manitoba Hydro Electric Board*, 2005 MBCA 55 at paras 63-65, 195 Man R (2d) 12 [*CACMB v MB Hydro (2005)*]
28 See for example: *Canada (Attorney General) v Mossop,* [1993] 1 SCR 554 at para 25, 100 DLR (4th) 658.
29 *Trans Mountain Pipe Line Co v Canada (National Energy Board)*, [1979] 2 FC 118 at para 9.
30 *PUB Act, supra* note 1 at s 58(1).

regulatory provision is invalid and for it to craft appropriate remedies within the limits of the rate approval function.

24. It is of note that the PUB lacks the powers of a section 96 court to declare any statutory or regulatory provision *ultra vires*, and is not bound by its previous decisions. As such, it would appear likely any findings made with respect to the *Reserves Regulation* would be confined in their impact to the specific GRA, depending upon subsequent PUB panels.

## *Regulations are Subordinate Legislation*

25. The *Reserves Regulation,* being a regulation enacted by the LGiC, is law created by the executive branch. Regulations such as this are subordinate legislation, in that they derive their legal authority from grants of authority by the legislature to the executive.[31]

26. As a general rule, subordinate legislation, whose existence is authorized by grants of authority found in statutes of the Legislature, cannot conflict with either the statute that authorized its creation or other statutes of the Legislature.[32] In fact:

> It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation.[33]

27. To the extent that a regulation is inconsistent with the statutory framework or it contravenes the statutory requirements, it is invalid and unenforceable: "[a] successful challenge to the vires of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate."[34]

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31 In *Giant Grosmont Petroleums Ltd v Gulf Canada Resources Ltd*, 2001 ABCA 174 at para 17, the ABCA succinctly noted that "It is a fundamental principle of public law that all governmental action be supported by a grant of legal authority" citing D. Brown & J. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 1998) at para. 13:1100.

32 *Katz Group, supra* note 5 at para 24. See also *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at para 42.

33 Elmer A. Driedger, Construction of Statutes (2nd ed. 1983), at p 247, cited in *Bristol-Myers Squibb Co v Canada (AG)*, 2005 SCC 26 at para 38, [2005] 1 SCR 533.

34 *Katz Group, supra* note 5 at para 24.

28. Regulations, however, at least when challenged in courts, are presumed to be valid, and the presumption of coherence operates to provide the party challenging the validity of a regulation has a difficult legal burden to meet.[35] Furthermore, when challenging a regulation for being counter to the legislative objective of its parent legislation, considerations of the efficacy or "the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice"" are irrelevant.[36] The focus of the inquiry must rather be on the objective of the enabling statute or the scope of the statutory mandate. The standard for establishing a regulation as invalid is exacting.[37]

## *Statutory Interpretation: Textual, Contextual and Purposive*

29. The PUB's determination of whether the *Reserves Regulation* is valid requires an exercise of statutory interpretation. This is because, as discussed earlier, in order to determine whether a subordinate legislation is valid, it must be "be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate."[38] In the case of the *Reserves Regulation*, it is necessary to examine not only the purpose of the *MPIC Act*, but also the *PUB Act* and the *CCGA Act*, which together, provide the framework for the PUB's independent rate approval authority for MPI's Basic insurance.

30. It is well established that "[t]he interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole."[39]

31. Context is especially important "where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme," in which case "the surroundings that colour the words and the scheme of the Act are more expansive."[40] In such circumstances, the established principles will give rise to "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes

35 *Ibid* at paras 25-28.
36 *Ibid.*
37 *Ibid* at paras 25-28.
38 *Ibid* at para 24.
39 *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para 10, [2005] 2 SCR 601.
40 *Bell ExpressVu Ltd Partnership v Rex*, 2002 SCC 42 at para 27, [2002] 2 SCR 559 [*Bell ExpressVu*]

dealing with the same subject matter."[41]

32. The purpose of the legislative text is crucial to an appropriate interpretation:

> To achieve a sound interpretation of a legislative text, interpreters must identify and take into account the purpose of the legislation. This includes the purpose of the provision to be interpreted as well as larger units — parts, divisions, and the Act as a whole. Once identified the purpose is relied on to help establish the meaning of the text. It is used as a standard against which proposed interpretations are tested: an interpretation that promotes the purpose is preferred over one that does not, while interpretations that would tend to defeat the purpose are avoided.[42]

33. Modern principles of statutory interpretation are also embodied in Manitoba's *Interpretation Act,* which states 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." (emphasis added)[43]

34. The principle that interpreting a statute requires a consideration of the larger statutory framework where multiple statutes operate in concert to achieve certain legislative objectives, is applicable when interpreting subordinate legislation. When interpreting a statutory provision within a larger legislative framework, the presumption of legislative coherence is relevant. Courts will attempt to interpret regulations in a manner that is consistent with other statutory enactments.[44]

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41 *R v Ulybel Enterprises Ltd,* 2001 SCC 56 at para 52, [2001] 2 SCR 867, cited in *Bell ExpressVu, ibid* at para 27. See also *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at para 37 [*Reference re Broadcasting Policy*]. See also *Bell ExpressVu, ibid* at paras 44-46, 52, 55, in which the the purpose of the statutes in question was to regulate and supervise the transmission of programming to the Canadian public; after considering the entire context of s. 9(1)(c), and after reading its words in their grammatical and ordinary sense in harmony with the legislative framework in which the provision was found, no ambiguity was found.

42 Ruth Sullivan, *Statutory Interpretation,* 3rd ed (Toronto: Irwin Law, 2016) at 185 [Sullivan, *Statutory Interpretation*].

43 *The Interpretation Act*, CCSM c I80, s 6. See also *Boles v Director, River East/Transcona*, 2019 MBCA 65 at para 23 where, in chambers, the MBCA recognized this provision as part of an approach to interpreting statutes. See also *Rizzo & Rizzo Shoes Ltd, Re*, [1998] 1 SCR 27 at para 22*,* 154 LDR (4th) 193 wherein the SCC relied upon Ontario's *Interpretation Act* when interpreting an Ontario statute.

44 *Thibodeau v Air Canada,* 2014 SCC 67 at paras 89, 93, [2014] 3 SCR 340 (Cromwell J for a five judge majority).

35. On account of the presumption of coherence, complementary statutory schemes must be read together to avoid conflict and necessarily, subordinate legislation cannot be enacted such that it is in conflict with other acts of the legislature. The other side of this presumption, however, is that conflict is strictly defined, only arising when the two enactments cannot "stand together":

> Absurdity also refers to situations where the practical effect of one piece of legislation would be to frustrate the purpose of the other (Lévis, at para. 54; Sullivan, at p. 330).
>
> This view is not inconsistent with the approach to conflict adopted in federalism jurisprudence. For the purposes of the doctrine of paramountcy, this Court has recognized two types of conflict. Operational conflict arises when there is an impossibility of compliance with both provisions. The other type of conflict is incompatibility of purpose. In the latter type, there is no impossibility of dual compliance with the letter of both laws; rather, the conflict arises because applying one provision would frustrate the purpose intended by Parliament in another.[45]

36. In this case, the *Reserves Regulation* is invalid given that its application "would frustrate the purpose intended"[46] by the Legislature through the legislative scheme, consisting of the *PUB Act*, the *CCGA Act* and the *MPIC Act*, which creates the independent rate approval authority of the PUB for MPI Basic rates.

## *PUB Jurisdiction Over Rate Approval: PUB Act, MPIC Act, CCGA Act*

37. The PUB is an independent administrative decision-maker created pursuant to the *PUB Act*.

38. The Manitoba Court of Appeal has recognized that the PUB's jurisdiction to approve the rates for service charged by MPI to consumers of Basic insurance arises from the interplay between three acts:

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45 *Reference re Broadcasting Policy, supra* note 41 at paras 43-44.
46 *Reference re Broadcasting Policy, supra* note 41 at paras 43-44.

> While all parties agree that its mandate, as set out in s. 26, must be interpreted in accordance with the scheme of the legislation, the PUB has looked at only two statutes, being *The PUB Act* and *The CCAA*. In fact, that scheme also includes *The MPIC Act*, which legislates additional significant controls by the government over the activities of the MPIC.[47]

39. In determining whether to approve or vary Basic insurance rates, the PUB must consider whether the rates are just and reasonable, not unduly discriminatory and in the public interest.[48] The determination of just and reasonable rates requires a balancing of the interests of multiple consumer groups with the fiscal health of MPI.[49]

40. As stated by the Manitoba Court of Appeal:

> The PUB has two concerns when dealing with a rate application; 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. These issues were addressed in the PUB's decision.[50]

41. The approval of just and reasonable rates also necessitates considerations of intergenerational equity between today's consumers and future consumers.[51] A key objective is to ensure that current and future consumers pay no more and no less than the prudent and necessary costs for the service they receive.[52]

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47 *PUB v MPIC (2011)*, *supra* note 24 at para 33.
48 *PUB Act, supra* note 1 at s 77 (a). See also *CACMB v MB Hydro (2005), supra* note 27 at para 65.
49 *CACMB v MB Hydro (2005), supra* note 27 at paras 63-65.
50 *Ibid* at paras 63-67.
51 *Ibid*, especially in relation to retained earnings for Manitoba Hydro, which can serve to better protect the utility and consumers from the financial impact of future drought. The MBCA found that the decision to build retained earnings more quickly clearly meets the intent of the legislation and is within the jurisdiction afforded the PUB in s. 26 of the *Accountability Act*.
52 *CCGA Act, supra* note 2 at s 25(4)(a).

**The legislative intent to establish an independent rate approval process for Basic insurance**

a) The rate prescribing power of the Lieutenant Governor in Council from 1970 to 1988

42. *The Automobile Insurance Act* (the "1970 Act") was passed in 1970 in response to perceived challenges in the private insurance marketplace including rising rates and a failure to provide adequate coverage and benefits to consumers.[53]

43. The solution to these ills as envisioned by the Legislature was a compulsory public automobile insurance scheme. To give effect to this solution, a Crown corporation was to be incorporated and compulsory auto insurance was to be operated in a manner comparable to a public utility. It was hoped that this would result in lower rates and improved payment of benefits to consumers.[54] The "legislature created an all-encompassing insurance scheme to provide immediate compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile."[55]

44. Under s. 29(1)(a) of the 1970 Act, the LGiC was given broad authority to make regulations respecting driver and vehicle premiums including the power to prescribe driver and vehicle premiums.[56] This authority continued to be exercised by the LGiC in the years between 1970 and 1988.

45. On February 1, 1988, as part of the re-enactment of Manitoba's statutes, the *MPI Act* replaced the 1970 Act. Section 33(1)(c) maintained the power of the LGiC to make regulations "prescribing the premiums payable by drivers and owners of motor vehicles".[57]

46. The unfettered and unchallenged role of the LGiC with regard to Basic insurance rate setting remained intact until MPI began to experience large losses on its Basic

53 Manitoba Automobile Insurance Committee, 1970, *The Report of the Manitoba Automobile Insurance Committee, 1970* (Winnipeg: 1970) at 24; Manitoba, Legislative Assembly, *Hansard*, 29th Leg, 2nd Sess, Vol 74 (May 12, 1970) at 1880 – 85 (Howard Pawley).
54 Manitoba Automobile Insurance Committee, *ibid*.
55 *McMillan v Thompson (Rural Municipality)*, [1997] MJ No 67 at para 54.
56 *The Automobile Insurance Act,* SM 1970, c 102, s 29(1).
57 *MPIC Act, supra* note 3 at s 33(1).

insurance operations in the mid-1980s. In the aftermath of these disastrous financial results and amidst a public backlash against significant rate increases and unprecedented increases in deductibles, Judge Robert Kopstein was appointed as the Commissioner of the Autopac Review Commission.[58]

47. Judge Kopstein's Report was filed in 1988. Noting public suspicions of political interference in rate setting and the support by many members of the public for independent public scrutiny of rates including PUB approval of Basic insurance rate increases, Judge Kopstein recommended that MPI management and its board of directors be granted the authority to finalize rates subject only to review by the PUB.[59]

48. In the aftermath of the Kopstein Report, the rate approval process for Basic insurance was substantially altered. On December 20, 1988, the Manitoba Legislature enacted *The Crown Corporations Public Review and Accountability and Consequential Amendments Act* (the "*CCPRA Act*"),[60] the direct predecessor to the *CCGA Act.*

b) Limitations to the rate prescribing power of the LGiC in 1988 by virtue of the independent rate approval function of the PUB under the *CCPRA Act*

49. *The CCPRA Act* was intended to respond to concerns relating to the alleged mismanagement and political interference that had befallen Manitoba's Crown Corporations including MPI.[61] A key element of the legislation was the granting of authority to the PUB to provide independent third-party rate approval for a number of

58 Judge Robert Kopstein, Commissioner, Autopac Review Commission, "Position Paper No. 7: Need for New Financial Policies and Improved Financial Management" (1988), Recommendation 7.11 at 30 [*Kopstein Paper No. 7*].

59 Judge Robert Kopstein, Commissioner, Autopac Review Commission, "Position Paper No. 3: Improving Autopac Ratemaking and Coverage" (1988) at 54-56; Judge Robert Kopstein, Commissioner, Autopac Review Commission, "Position Paper No. 1: Towards Greater Accountability for Autopac" (1988) at 30.

60 *The Crown Corporations Public Review and Accountability and Consequential Amendments Act*, SM 1988-89, c 23 (*CCPRA*).

61 See for example: Manitoba, Legislative Assembly, Hansard, 34th Leg, 1st Sess, Vol 72 (November 4, 1988) at 2803, 2805, 2808 (Clayton Manness). For example, with respect to MPIC: "Manitobans saw that Crowns were subject to horrible political interference. MPIC boards were stacked with political friends, also at M PIC, deliberately hid reinsurance losses, and we just again have to refer to some of the comments made by Mr. Kopstein in his report, deliberately hid some of the reinsurance losses, indeed admitted to in committee by the former MLA for Gimli who said he took a political decision with respect to some of the financial disclosures associated with MPIC. What else did Manitobans see with respect to M PIC? They saw massive losses. They saw reserves depleted in the space of two years, ones that had been built up over some 15 years, in the space of two years totally wiped out."

Crown monopolies including MPI's Basic insurance.[62]

50. While granting the PUB third-party rate approval regarding Basic insurance, the Legislature, via the CCPRA Act, also expressly subjugated the LGiC's ability to set rates to authority to the PUB. The *CCPRA Act* amended s. 33 of the *MPI Act* by making any change to the regulation related to the premiums charged for Basic insurance subject to the approval of the PUB:

> 33(1.1) No regulation relating to premiums charged by the corporation for compulsory driver and vehicle insurance shall be passed pursuant to subsection (1) **unless the Lieutenant Governor in Council is satisfied that the proposed change has been approved by The Public Utilities Board** pursuant to Part IV of *The Crown Corporations Public Review and Accountability Act*. [emphasis added][63]

51. In addition to amending the *MPI Act,* s. 26 of the *CCPRA Act* provided the PUB with the authority to review rates for service for Basic insurance under the *PUB Act*. It granted the PUB authority to approve just and reasonable rates consistent with its mandate under the *PUB Act* and the *CCPRA Act*.[64]

52. Since 1988, MPI has had an annual hearing before the PUB to have its rates for Basic insurance approved.[65]

c) Summary of the PUB authority with regard to Basic insurance rates under the *PUB Act* and *CCPRA Act*

53. The rate approval function of the PUB was broad, with its function "not only to protect consumers from unreasonable changes, but also to ensure the fiscal health of the

62 *Ibid* at 2806: "Bill No. 37 of course, through the Public Utilities Board process, will provide for independent third-party approval and the regulation of Hydro, Telephone and Autopac rates. It will provide for consideration by the Public Utilities Board, as I have indicated, of compelling social policy considerations. It will provide for multiyear reviews and approvals. It will make explicit Public Utilities Board powers with respect to orders for refund or compensation to be paid by the corporation, and will make explicit the Public Utilities Board's right to make application for and to receive opinion from the Court of Appeal."

63 *MPIC Act, supra* note 3 at s 33(1.1), as it appeared prior to the 2018 amendments.

64 *CCPRA, supra* note 60 at s 26.

65 *PUB v MPIC (2011), supra* note 24 at para 7.

Corporation and fairness between different classes of consumers."[66] Its broad power included being able to approve a different rate than the one sought by MPI.[67] While the sole authority for the establishment of rates for Basic insurance rested with the LGiC from 1970 to 1987, the 1988 *CCPRA Act* expressly conferred rate approval jurisdiction on the PUB. In terms of new Basic insurance rates, the authority of the LGiC was limited to the establishment of rates previously approved by the PUB.

**Legislative amendments in 2018 confirmed the PUB rate approval authority and expressly eliminated the authority of the LGiC to prescribe Basic vehicle rates and premiums**

54. The provisions in the *MPI Act* and the *CCPRA Act* which authorized the rate approval function of the PUB as well as the limits on the rate prescription authority of the LGiC remained essentially unchanged until legislative amendments in 2018.[68]

55. The intent of the 2018 amendments was to more clearly delineate the roles and responsibilities of Crown corporations (represented by their boards), government and regulatory bodies in order to promote outcome-based results, increased efficiency and decreased political influence in the operation of vital Crown corporations.[69] As described in further detail below, for purposes of MPI, the effect of the 2018 amendments was to:

    a) affirm the central role of the PUB in the Basic insurance rate approval function;

    b) expressly remove the authority of the LGiC to prescribe Basic vehicle premiums as part of the Basic rate; and,

    c) continue the limit on the LGiC authority to prescribe Basic insurance driver premiums by maintaining its subjugation to PUB approval.

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66 *Coalition of Manitoba Motorcycle Groups Inc v Public Utilities Board (Man),* [1995] 102 Man R (2d) 155 at para 23 [*CMMG v PUB*].
67 *Ibid.*
68 *The Red Tape Reduction and Government Efficiency Act*, 2018, SM 2018 c 29.
69 Manitoba, Legislative Assembly, *Hansard*, 41st Leg, 2nd Sess, Vol 23B (March 9, 2017), at 583 (Ron Schuler); Manitoba, Legislative Assembly, Hansard, 41st Leg, 2nd Sess, Vol 36 (April 10, 2017) at 1209-1210 (Ron Schuler); Manitoba, Legislative Assembly, Hansard, 41st Leg, 2nd Sess, Vol 62B (June 1, 2017) at 2733 (Ron Schuler).

a) replacing the *CCPRA Act* with the *CCGA Act*

56. While the *CCPRA Act* was replaced by the *CCGA Act* in 2018, Part 4 which sets out the rate approval function of the PUB with regard to MPI Basic insurance rates for service was largely unchanged except for numbering.

57. Part 4 of the *CCGA Act* expressly subjugates MPI to the jurisdiction of the PUB with respect to rates for services. Section 25(1) (formerly 26(1) under the *CCPRA Act*) provides that "despite any other Act or law" the rates for services for MPI shall be reviewed by the PUB under the *PUB Act* and no changes to said rates of service shall be introduced without the approval of the PUB.[70]

b) 2018 amendments to the *MPIC Act*

58. The 2018 Legislative amendments effectively provided the PUB with the express legal authority to approve rates for Basic driver and vehicle insurance, to the exclusion of other potential decision makers. Consistent with the long-standing legislative intent to remove the threat of political interference from rate approval processes for MPI Basic insurance, these enactments also limited the authority of the LGiC to:

    a) simply enacting Basic driver rates no greater than the PUB approved rate; and,

    b) having no authority with respect to the premiums charged for vehicle insurance.

59. With regard to Basic insurance rate approval, important amendments were made to ss. 6 and 33 of the *MPIC Act* in 2018.[71]

60. The following amendments to s. 6 establish that the amounts charged for plan premiums, which includes the amounts charged for Basic vehicle insurance, were to be set by the Corporation, subject to the approval of the PUB in accordance with the *CCGA Act.* No provision was made by the Manitoba legislature for the LGiC to have any role in the rate approval process for Basic vehicle insurance:

> 6.4(1) The corporation's plan premiums for its plans of universal

70 *CCGA Act, supra* note 2 at s 25(1).
71 *The Red Tape Reduction and Government Efficiency Act*, 2018, SM 2018 c 29.

compulsory automobile insurance must not be changed, and no new plan premiums for such insurance may be established by the corporation, except in accordance with this section.

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.** (emphasis added)

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*.** (emphasis added)[72]

61. To similar effect, the Manitoba Legislature expressly removed the ability of the LGiC to make regulations with respect to premiums payable by owners of motor vehicles. The former subsection 33(1)(c) of the *MPIC Act*, as it existed prior to the 2018 enactments read:

> (c) establishing classes and sub-classes of drivers, by regions of the Province of Manitoba, or otherwise, establishing such regions, establishing classes of motor vehicles and trailers, and **prescribing the premiums payable by drivers and <u>owners of motor vehicles</u>** according to the regions, or otherwise, and according to the classes;[73] [emphasis added]

62. The preceding version of section 33(1)(c) was replaced by the following 2018 enactments, which removed the reference to motor vehicle premiums:

> (c) establishing classes and sub-classes of drivers, by regions or otherwise, and **prescribing the base driver premiums and additional driver premiums** payable by drivers according to their class or sub-class;[74] [emphasis added]

72 *MPIC Act, supra* note 3 at s 6.
73 *Ibid* at s 33(1)(c) as it appeared prior to the 2018 amendments.
74 *MPIC Act, supra* note 3 at s 33(1)(c).

63. Section 33(1.1) also was amended to remove references to vehicle insurance premiums. The amended section reaffirms the obligation to obtain PUB approval for any Basic driver premium:

> 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*.[75] [emphasis added]

**A single statutory framework for MPI rate approval**

64. Collectively, the common subject matter and the express lateral links[76] from the *MPIC Act* to the *CCGA Act,* and from the *CCGA Act* to the *PUB Act*, as well as between the provisions of the *MPIC Act* and the *CCGA Act,* which expressly provide the PUB with jurisdiction over MPI Basic insurance rates for services (the latter under the authority of the *PUB Act*), establish a single statutory framework authorizing the PUB to approve the amount of money MPI charges Basic insurance consumers.

65. While the rate approval function of the PUB was broad prior to 2018, included being able to approve a different rate than the one sought by MPI,[77] the 2018 amendments made it even clearer that the PUB has broad authority with respect to approval of the amounts charged for plan premiums, which includes the amounts charged for Basic vehicle insurance. It also expressly removed any role for the LGiC in setting vehicle rates. The setting of the RSR target level has been an integral element of independent rate approval process for vehicle rate since 1989.

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75 *MPIC Act, supra* note 3 at s 33(1.1). The previous *MPIC Act,* s 33(1.1) read: No regulation relating to **premiums charged by the corporation for compulsory driver and vehicle insurance** shall be passed pursuant to subsection (1) unless the Lieutenant Governor in Council is satisfied that the proposed change has been approved by The Public Utilities Board pursuant to Part 4 of *The Crown Corporations Public Review and Accountability Act*.

76 *MPIC Act, supra* note 3 at ss 6.4, s 33(1.1); *CCGA Act, supra* note 2 at s 25(1).

77 *CMMG v PUB, supra* note 66 at para 23.

**The independent rate approval authority of the PUB includes the authority to set the RSR level for rate approval purpose, to consider the appropriate methodology for determining the RSR level and to approve premiums related to the build up or reduction of the RSR to within approved levels**

66. The PUB is a creature of statute and can only exercise the powers expressly granted to it by the Legislature or those powers it obtained by way of necessary implication. As set out above, the scope of the PUB's jurisdiction with respect to regulating MPIC's rates is broad and arises from the interaction of three statutes: the *PUB Act*, the *CCGA Act* and the *MPIC Act*.

67. Determining whether the PUB has authority to set reserves for rate stabilization requires a consideration of these three statutes given that "[w]hen legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it."[78]

68. Under what was then s. 26 of the *CCPRA Act* (now s. 25 of the current *CCGA Act*), the PUB was granted broad authority in considering the factors it determined relevant to Basic insurance rate approval. Section 25(1) of the *CCGA Act* specifically requires the rates for services for MPI to be reviewed by the PUB under the *PUB Act*.[79]

69. Since 1988, the PUB has regularly exercised this authority to review and approve the proposed rates for service of MPI. It has done so by taking into account projected costs and revenues for the test year, the prudence and reasonableness of MPI in managing those costs and revenues and the overall health of the corporation including any necessary reserves.[80]

78 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 SCR 140, 2006 SCC 4 at para 51 ["*ACTO*"].

79 *CCGA Act, supra* note 2 at s 25(1).

80 See *CCGA Act, supra* note 2 at s 25 (previously s 26 of the *CCPRA Act*). See also PUB Order 98/14 at 28 where the Board characterized the key elements of its independent review function and rate-setting role as follows:

- Ensuring that forecasts are reasonably reliable;
- Ensuring that actual and projected costs incurred are necessary and prudent;
- Assessing the reasonable revenue needs of an applicant in the context of its overall general health;
- Determining an appropriate allocation of costs between classes; and
- Setting just and reasonable rates in accordance with statutory objective.

70. Among those reserves is the Rate Stabilization Reserve. The RSR was originally contemplated as a "cushion against massive rate shocks occasioned by unforeseen losses."[81] For rate setting purposes, it is now intended to "protect motorists from rate increases that would otherwise have been necessary due to unexpected variances from forecasted results and due to events and losses arising from non-recurring events or factors."[82]

71. The roots of the RSR can be traced to the financial difficulties faced by the Corporation in the mid-1980s and to the ensuing public backlash to significantly increased rates for Basic insurance flowing from the efforts of MPI to address its fiscal challenges. Among the recommendations of the resulting Kopstein Report were that:

    a) MPI should retain a target surplus of about 15% of premiums with remedial action being taken if that surplus falls below 10% or rises above 20%;[83] and,

    b) MPI should not budget for a loss. Instead, it should budget such that any surplus be used to replenish depleted reserves to the target range (and vice versa).[84]

72. Judge Kopstein envisioned the surplus as a cushion against massive rate shocks occasioned by unforeseen losses.[85]

73. The link of the RSR to rate stabilization and its consequent impacts on rate approvals necessarily require PUB consideration of the target range and the methodology underpinning the target range. **The PUB can not ensure that the RSR contribution components of rates, which it has the authority to approve, are just and reasonable without assessing those contributions against the RSR range itself**.

74. By ordering payments into the RSR, the PUB is ordering ratepayers to pay today for costs they will likely, but not necessarily, have to occur in the future (when the non-recurring event happens). This is, necessarily, within the PUB's jurisdiction to set just and reasonable rates, as deciding this requires balancing the interests of consumers

81 *Kopstein Paper No. 7, supra* note 58 at p 27.
82 PUB Order 159/18 at section 8.1, p 91.
83 *Kopstein Paper No. 7, supra* note 58, Recommendation 7.11 at 30.
84 *Ibid* at Recommendation 7.11, at 30.
85 *Kopstein Paper No. 7, supra* note 58 at 27.

and the interests of the corporation.[86] The PUB is empowered to determine what is "just and reasonable", and as per principles of public utility rates, rate and revenue predictability and stability are factors to be considered when setting reasonable rates.[87]

75. As such, if the PUB is able to come to the conclusion that it is just and reasonable to allow MPI to retain funds in order to protect ratepayers from rate shock that the Board is reasonably certain they will experience on account of reliable evidence, then it is empowered to do so, which necessarily requires it to be able to create a reserve to stabilize rates.

76. As the PUB is empowered to create the RSR, if it deems it necessary to set just and reasonable rates, and is also able to order that contributions to/from the RSR are included in rates, for the purposes of rate approval, the PUB must necessarily be able to regulate the size of the RSR, and therefore the methodology used to set its size. Each of these authorities flow from the PUB's express authority to ensure that the rates charged by MPI for Basic insurance are just and reasonable, as set out in the legislative scheme created by the interaction of the *PUB Act*, the *CCGA Act* and the *MPIC Act*.

77. In fact, from the onset of its Basic insurance rate review function, the PUB has considered itself authorized to consider the appropriateness of the RSR. It has expressly found that: "the **magnitude and constitution of the Rate Stabilization Reserve is an integral part of the due and proper fixing of rates** charged by the Corporation pursuant to the Manitoba Public Utilities Corporation and Crown Acts"[88] which assists "the Corporation in setting rates on long term trends rather than short term financial results."[89] [emphasis added]

78. Over the past three decades, the PUB has made the RSR an integral element of its rate approval function by considering and determining:

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86 *CAC v MB Hydro (2005)*,*supra* note 27 at paras 63-67.
87 James C Bonbright, Albert L Danielsen and David R Kamerschen, *Principles of Public Utility Rates*, 2nd ed (Arlington, Virginia: Public Utilities Reports, Inc., 1988), 381-384.
88 PUB Order 192/89 at 33 – 34.
89 PUB Order 168/90 at 25.

a) the appropriate level of the reserve for rate setting purposes within the context of the overall health of the corporation;

b) the appropriate methodology for determining the RSR level including appropriate consumer and corporate risk tolerances. This analysis has involved the consideration of methodologies such as the Percent of Premium, Risk Analysis, MCT and Dynamic Capital Adequacy Testing (DCAT);

c) whether additional premiums should be charged to bring the RSR within appropriate levels for rate setting; or

d) whether a rebate should be given to consumers because the RSR was above appropriate levels for rate setting.[90]

79. With respect to setting the thresholds for the RSR as part of its rate approval role, in recent years, "through an extensive collaborative process, an approach to estimating a Basic target capital range was developed as an adaptation of the DCAT investigation."[91]

80. The DCAT is an actuarial tool and, in effect, a form of stress testing. It involves, during a forecast period, running scenarios and gauging the financial performance of the corporation. It can be tailored to the risk profile of the corporation being assessed. In recent GRAs, the PUB has found it prudent to deploy a DCAT that considers a 1-in-40 year event probability, allowing for regulatory and management actions, at least with respect to the lower range of the RSR.[92] In effect, the RSR's lower threshold would be sufficient if the reserve would not be depleted in the event of the most extreme forecasted negative event, anticipating routine regulatory and management remedial actions.

90 See MPI 2020 General Rate Application, 15 October 2019 Transcript, pages 1208-10, where Mr. Luke Johnston, MPI's Chief Actuary and Vice-President, Product & Risk Management confirmed these are elements considered by the PUB.
91 PUB Order 159/18 at 94.
92 See PUB Order 128/15.

81. The Board has stated:

> With respect to considerations relating to the upper threshold, the Board understands the merits of the MCT for providing a relatively simple, convenient and objective metric of Basic's relative financial strength. Nevertheless, the Board continues to prefer to have the upper threshold determined in a like manner to the lower threshold, thereby directly reflecting Basic's risk profile through scenario testing substantially modeled from Basic's own experience.[93]

82. On many occasions, the PUB has considered the appropriate RSR level as well as the appropriate methodology for setting the RSR level or target range. While the PUB has considered and employed a number of methodologies for setting the RSR level, it **has never accepted** the 100% MCT as a **minimum** level for the RSR. In 2016, it expressly rejected the 100% MCT as a **maximum** level for the RSR.[94]

83. In exercising its responsibilities (including considerations of intergenerational equity) and making its determinations regarding the appropriate level of the RSR, the PUB has found that the RSR should not "be so large as to make it a virtual impossibility that a premium surcharge representing a rate shock, even a general rate shock, would ever be required."[95]

84. In the exercise of its rate approval authority over the past three decades, the PUB has ordered rebates related to excessive RSR levels on at least five occasions[96] and additional premiums related to unduly low RSR levels on at least four occasions.[97]

85. MPI has never successfully challenged, through judicial oversight, the authority of the PUB to set the appropriate level of the RSR for rate setting purposes or to impose premiums or rebates in accordance with its RSR target. As recently as its 2019 GRA

93 PUB Order 130/17 at 79.
94 PUB Order 162/16 at 60-61.
95 PUB Order 156/06 at 48.
96 See PUB Order 151/00; PUB Order 150/05; PUB Order 156/06; PUB Order 150/07; PUB Order 122/10, varied by PUB Order 43/11.
97 See PUB Order 130/95; PUB Order 116/96; PUB Order 93/97; PUB Order 154/98. PUB Order 177/99 reduced the total rebuilding fee charged to 0%.

filing, MPI appears to have conceded that the PUB can regulate the RSR by determining the methodology used to set the RSR range.[98]

86. In a 2018 Order, the PUB indicated that it would be retaining an independent actuary to consider issues related to the RSR for the purposes of rate setting in the next GRA.[99] That intent was circumvented by the passage of the *Reserves Regulation* in 2019.

## *The 2019 Reserves Regulation*

87. The 2018 legislative amendments to the *MPIC Act* and the *CCGA Act* did not interfere with the well established authority of the PUB with regard to the RSR. However, in April of 2019, the LGiC enacted the *Reserves Regulation.*[100]

88. The Regulation seeks to direct "the amount to be maintained by the Corporation in its reserves for the purposes of the [MPIC] Act".[101] Contrary to prior decisions by the PUB in the exercise of its independent rate approval role, the *Reserves Regulation* dictates that the "minimum amount the corporation must maintain" in its Basic insurance RSR is "the amount determined using a MCT ratio of 100%" (the "100% MCT").[102]

89. The Regulation also directs that amounts in the Basic insurance RSR that are in excess of the MCT ratio of 100% can only be used by the Corporation "for the purpose of reducing the rate indication required for the plan of universal compulsory automobile insurance in a subsequent year."[103]

90. MPI alleges that the PUB is bound by the *Reserves Regulation*.[104] In the context of the rate approval process, it argues that the *Reserves Regulation* requires the RSR to be at an MCT ratio of at least 100% and that the *Reserves Regulation* limits the

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98 MPI 2019 GRA Filing at RSR section where MPI applied for:
1. A minimum (lower) RSR target of 34% Minimum Capital Test (MCT), equivalent to a forecasted Total Equity balance of $143 million as at February 28, 2019, based on a 1-in-40 probability Dynamic Capital Adequacy Test (DCAT) scenario.
2. A maximum (upper) RSR target of 85% MCT, equivalent to a forecasted Total Equity balance of $305 million as at February 28, 2019, based on a 2 year, 1-in-40 DCAT scenario with no management action.

99 PUB Order 159/18, p 10-11, 100-101.
100 *Reserves Regulation, supra* note 16.
101 *Ibid* at s 1.
102 *Ibid* at s 2(a).
103 *Reserves Regulation, supra* note 16 at s 3.
104 MPI 2020 GRA, CAC (MPI) 2-8.

jurisdiction of the PUB to "direct MPI to use an alternative to the MCT in order to generate a different minimum target for the RSR."[105] It claims that the *Reserves Regulation* is a "specific factor that must be considered in the calculation of the amount Basic ratepayers will pay for Basic premiums."[106] MPI argues that the "PUB cannot ignore the *Reserves Regulation* or favour subordinate alternatives when approving the rate application."[107]

91. Respectfully, MPI's position is untenable. This argument fails to recognize the Legislature's intention that the PUB be given exclusive jurisdiction to set Basic rates that it, and it alone, considers to be just and reasonable. This position forces the PUB to accept the interference of the LGiC in the independent rate setting process, transgressing on the PUB's exclusive jurisdiction to determine what is meant by just and reasonable rates

## *Impacts of the Reserves Regulation on the legislative rate approval framework*

92. Sections 2(a), 3, and 4 of the *Reserves Regulation* (the impugned provisions) unlawfully interfere with the objective, scope and application of the statutory framework granting the PUB independent rate approval authority for MPI Basic insurance. The impugned provisions inexorably frustrate the legislative framework underlying the independent rate approval process by:

    a) usurping the jurisdiction of the PUB in approving just and reasonable rates in a public process to <u>determine an appropriate Basic insurance RSR level</u> for rate setting;

    b) usurping the jurisdiction of the PUB in approving just and reasonable rates in a public process to <u>approve an appropriate methodology for the determination of the RSR levels</u>;

    c) imposing a minimum Basic insurance RSR level (the 100% MCT) that had been

105 *Ibid.*
106 MPI 2020 GRA, CAC (MPI) 1-7.
107 *Ibid.*

expressly rejected by the PUB, in the context of an independent rate approval exercise, as a maximum target;

d) requiring the PUB to impose rate increases in circumstances where the Basic RSR (which "must" be maintained at an amount determined using a MCT ratio of 100%) is below 100% and no drawdown from other lines of business is feasible or possible;

e) prohibiting the PUB in its rate approval process from drawing down reserves for the purpose of promoting rate stability in any circumstances other than when the RSR can be maintained at its mandatory minimum level at or above 100% MCT;

f) frustrating the purpose of the RSR by requiring the maintenance of funds equal to 100% MCT in the RSR, even in situations where drawing down or depleting the RSR is necessary to mitigate rate shock or to protect against rate increases occasioned by unforeseen events; and,

g) restricting the ability of the PUB in its public rate approval process to disallow unreasonable costs if the effect would be to draw down the basic RSR below the mandatory 100% MCT.

93. As a result, the impugned provisions cannot stand within the statutory framework without irreparably impairing the responsibility of the PUB to approve just and reasonable rates in a public process.

**Any conflict between the statutory framework and the Reserves Regulation must be resolved in favour of the independent rate approval of the PUB**

94. The authority of the PUB under its governing statutory scheme takes precedence over the ability of the LGiC to make regulations in that:

a) the authority of the PUB to set just and reasonable rates and to regulate the size of the RSR flows from inter-related statutory enactments within a statutory framework. As subordinate legislation, the *Reserves Regulation* cannot conflict with its parent statute or another statute of the Legislature and it cannot overwrite the obligations

imposed on another body by statute;[108]

b) both the *CCGA Act* and the *PUB Act* contain conflict of laws clauses that provide in the event of a conflict, that those enactments are to be preferred;[109] the *MPIC Act*, under which the LGiC created the *Regulation*, does not;

c) the *CCGA Act* was enacted more recently than the other Acts and is presumed to take precedence over the other Acts in the event of conflict;[110] and,

d) the statutory purpose for which the *CCGA Act* and its predecessor legislation was enacted clearly demonstrates a legislative intent that the LGiC be subordinate to the PUB in the rate approval process.

## *Remedy sought*

95. For the purpose of exercising the independent rate approval authority of the PUB and consistent with the statutory framework, CAC Manitoba asks the PUB to:

a) find that sections 2a), 3, and 4 of the *Reserves Regulation* are invalid;

b) continue to exercise its rate approval function consistent with the statutory framework and its long standing finding that "the magnitude and constitution of the Rate Stabilization Reserve is an integral part of the due and proper fixing of rates"[111] for Basic insurance.

All of which is respectfully submitted this 22nd day of October, 2019.

Katrine Dilay, Byron Williams, Robert Walichnowski & Christopher Klassen

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108*Katz Group, supra* note 5 at paras 24-28.

109See *PUB Act, supra* note 1 at s 106; *CCGA Act, supra* note 2 at s 3(1) and 3(2). See also section 25(1) of the *CCGA Act* which provides that "despite any other Act or law", the rates for services charged by MPI are to be reviewed by the PUB under the PUB Act.

110CED, *Statutes,* III.3.(n).(ii) at §161. In a conflict between statutes in pari materia, the statute that is later in date or, if the statutes are of the same date, the one that received royal assent last should prevail. See *Vancouver (City) v British Columbia Telephone Co* (1905), 1 WLR 461, at paras 18-19.

111PUB Order 192/89 at 33-34.

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