

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

NOTICE OF CONSTITUTIONAL QUESTION

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THIS NOTICE is issued under s. 7 of *The Constitutional Questions Act*, C.C.S.M. c. C180.

Provisions Challenged

1. Please note that, in accordance with ss. 7(3) to 7(8) of *The Constitutional Questions Act*, the Consumers' Association of Canada (Manitoba) Inc. ("CAC Manitoba") will challenge the validity of ss. 2(a), 3 and 4 of the *Reserves Regulation*, Man Reg 76/2019 passed pursuant to Order In Council No. 126/2019 under *The Manitoba Public Insurance Corporation Act*.

Location and Date of the Challenge

2. The challenge will be presented as part of the CAC Manitoba closing arguments during the Manitoba Public Utilities Board's public hearing of the MPI 2020/21 General Rate Application ("GRA"). The hearing will take place at the Public Utilities Board ("PUB") Hearing Room, 4th Floor, 330 Portage Avenue, Winnipeg, Manitoba beginning at 9:00 a.m. on October 7, 2019. The hearing is scheduled to be completed on or before October 25, 2019, with arguments likely to be heard the week of October 21, 2019.

Particulars of the Challenge

The Crown Monopoly

3. The Manitoba Public Insurance Corporation ("MPI" or the "Corporation") 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). It is governed by *The Manitoba Public Insurance Corporation Act*, CCSM c P215 (the "MPI Act").

PUB jurisdiction over rate approval

4. The Public Utilities Board is an independent board, created and governed under *The Public Utilities Board Act*, CCSM c P280 (the "PUB Act"). Under *The Crown Corporations Governance and Accountability Act*, CCSM c C336 (the "CCGA Act") and the *MPI Act*, the PUB has been delegated authority by the Manitoba legislature to approve the rates for service charged by MPI to consumers of Basic insurance.
5. 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. The determination of just and reasonable rates requires a balancing of the interests of multiple consumer groups with the fiscal health of MPI.

6. The approval of just and reasonable rates also necessitates considerations of intergenerational equity between today's consumers and future consumers. 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.

PUB jurisdiction over questions of law

7. In carrying out its rate approval duties, the PUB is required to interpret the *PUB Act*, the *CCGA Act* and the *MPI Act*. It is empowered to decide questions of law. This authority includes the power to apply only valid laws.
8. In exercising its rate approval function, it is open to the PUB to determine that a particular statutory or regulatory provision is *ultra vires* and for it to craft appropriate remedies within the limits of the rate approval function.

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

9. *The Automobile Insurance Act (the "1970 Act")* was passed in 1970 in response to perceived challenges in the private marketplace including rising rates and a failure to provide adequate coverage and benefits to consumers.
10. 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.

11. Under s. 29(1)(a) of the 1970 Act, the Lieutenant Governor in Council (the "LGiC") was given broad authority to make regulations respecting driver and vehicle premiums including the power to prescribe driver and vehicle premiums. This authority continued to be exercised by the LGiC in the years between 1970 and 1988.
12. 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".
13. 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 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.
14. 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.
15. 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”), 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

16. *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. 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 Crown monopolies including MPI Basic insurance.

17. *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)

18. 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*.

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

c) The PUB authority with regard to Basic insurance rates under the PUB Act and CCPRA Act

20. While the sole authority for the establishment of rates for Basic insurance rested with the LGiC from 1970 to 1987, the *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.

21. The rate approval function of the PUB included the broad power to approve a different rate than the one sought by MPI.

The independent rate approval authority of the PUB includes the authority to set the RSR level for rate setting 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

22. 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.

23. 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.

24. Among those reserves is the Rate Stabilization Reserve (the "RSR"). The RSR was originally contemplated as a cushion against massive rate shocks occasioned by unforeseen losses. 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.

25. 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:

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

26. Judge Kopstein envisioned the surplus as a cushion against massive rate shocks occasioned by unforeseen losses.

27. The link of the RSR to rate stabilization and its consequent impacts on rate approvals necessarily required PUB consideration of the target range and the methodology underpinning the target range. The PUB could not ensure that the RSR contribution components of its rates were just and reasonable without assessing those contributions against the RSR range itself.

28. 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”¹ which assists “the Corporation in setting rates on long term trends rather than short term financial results.”² (emphasis added)

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

- the appropriate level of the reserve for rate setting purposes within the context of the overall health of the corporation;
- 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 (POP), Risk Analysis (RA), Minimum Capital Test (MCT) and Dynamic Capital Adequacy Testing (DCAT);
- whether additional premiums should be charged to bring the RSR within appropriate levels for rate setting; or
- whether a rebate should be given to consumers because the RSR was above appropriate levels for rate setting.

30. 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 and additional premiums related to unduly low RSR levels on at least four occasions.

31. 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

1 PUB Order 192/89 at 33 – 34.

2 PUB Order 168/90 at 25.

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.³

32. In exercising its balancing 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.⁴

33. 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 filing, MPI appears to have conceded that the PUB can regulate the RSR by determining the methodology used to set the RSR range.⁵

34. 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. That intent was circumvented by the passage of the *Reserves Regulation* in 2019.

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

35. 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.

3 PUB Order 162/16 at 60-61.

4 PUB Order 156/06 at 40.

5 MPI 2019 GRA Filing at RSR section.

36. The intent of the 2018 legislation 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. For purposes of MPI, the effect of the 2018 amendments was to:

- affirm the central role of the PUB in the Basic insurance rate approval function;
- expressly remove the authority of the LGiC to prescribe Basic vehicle premiums as part of the Basic rate; and,
- continue the limit on the LGiC authority to prescribe Basic insurance drivers premiums by maintaining its subjugation to PUB approval.

a) 2018 amendments to the MPI Act

37. With regard to Basic insurance rate approval, important amendments were made to ss. 6 and 33 of the *MPI Act* in 2018.

38. 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 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)

39. 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 owners of motor vehicles*** according to the regions, or otherwise, and according to the classes; (emphasis added)

40. 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; (emphasis added)

41. 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) 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*.

b) replacing the CCPRA Act with the CCGA Act

42. 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.

43. Part 4 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.

44. 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:

- simply enacting Basic driver rates no greater than the PUB approved rate; and,
- having no authority with respect to the premiums charged for vehicle insurance.

A single statutory framework for MPI rate approval

45. Collectively, the common subject matter and the express lateral links from the MPI Act to the CCGA Act, and from the CCGA Act to the PUB Act, as well as between the provisions of the MPI 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.

The 2019 Reserves Regulation

46. The 2018 legislative amendments 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*, Man Reg 76/2019 (the “*Regulation*” or “*Reserves Regulation*”).
47. The *Regulation* seeks to direct “the amount to be maintained by the Corporation in its reserves for the purposes of the MPI Act”. 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”).
48. 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.
49. MPI alleges that the PUB is bound by the *Reserves Regulation*. In the context of the rate approval process, it argues that the *Reserves Regulation* requires the RSR to be at 100% MCT. 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. MPI argues that the PUB cannot ignore the *Reserves Regulation* or favour subordinate alternatives when approving the rate application.

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

50. Regulations are subordinate legislation. Subordinate legislation cannot conflict with its parent legislation or with other Acts of the Legislature.
51. As subordinate legislation, regulations are *ultra vires* to the extent they are inconsistent with the objective of the enabling statutory framework or the scope of the statutory mandate. To the extent that a regulation is inconsistent with the statutory framework or it contravenes the statutory requirements, it is *ultra vires* and unenforceable.
52. Sections 2a), 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:
- 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;
 - 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;
 - 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;
 - 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;

- 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 level at or above 100% MCT;
- 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,
- 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.

53. For these and other reasons, 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

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

- 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;


- 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; the *MPIC Act*, under which the LGiC created the *Regulation*, does not;
- 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; and,
- 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

55. 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:

- find that the *Reserves Regulation* is *ultra vires*;
- 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” for Basic insurance.

All of which is respectfully submitted this 6th day of September, 2019.



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