



## SUBMISSION OF MANITOBA KEEWATINOWI OKIMAKANAK INC.

1. By letter dated June 18, 2021, the Board invited interested parties to make further written submissions to address Manitoba Hydro's response to Order 53/21 filed on June 9, 2021. Potential intervenor MANITOBA KEEWATINOWI OKIMAKANAK INC. ("MKO") makes this submission.

### *Judicial notice*

2. The Supreme Court of Canada has set out the procedural effect of judicial notice and the two situations when a court may appropriately take judicial notice of facts:

48 In this case, the appellant relies heavily on proof by judicial notice. Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so *notorious or generally accepted* as not to be the subject of debate among reasonable persons; or (2) *capable of immediate and accurate demonstration* by resort to readily accessible sources of indisputable accuracy: *R. v. Potts* (1982), 1982 CanLII 1751 (ON CA), 66 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055. [*Italics added.*]

*R. v. Find*, 2001 SCC 32 at para. 48

3. This Board is not strictly bound by the technical rules of legal evidence:

#### **Rules of evidence not binding on board**

24(2) The board is not bound by the technical rules of legal evidence.

*The Public Utilities Board Act*, CCSM c P280, section 24(2)

4. Therefore, the Board has greater freedom to take judicial notice of facts than a court has under the Supreme Court of Canada's rule in *R. v. Find*.

#### *Onus and evidence*

5. The Consumers Coalition's application is essentially a leave application. The onus in leave applications is on the applicant to convince the court that leave should be granted. The overall onus in this application, therefore, is on the Consumers Coalition. However, MKO submits that the evidentiary burden is on the respondent Manitoba Hydro.

6. A peculiarity of statutory monopoly regulatory proceedings is that the regulated entity has almost a complete monopoly of the evidence. The regulatory body and the other parties possess little evidence in comparison and are almost completely dependent on the regulated entity for evidence. Its virtual monopoly of evidence gives the regulated entity great control in regulatory proceedings. Such is the case with Manitoba Hydro here.

7. The Consumers Coalition did its best with the evidence that is publicly available in its application filed in this proceeding on March 26, 2021. Most of the key facts upon which the Coalition relied may properly be subject to judicial notice: prior orders of this Board, the fact that there has not been a hearing to follow up on those orders, publicly announced Manitoba Hydro electricity export sales, the present COVID-19 pandemic, and the plain passing of time. Per *R. v. Find*, these are either (1) notorious or generally accepted facts, or (2) facts capable of immediate and accurate demonstration, or both. The basic facts upon which the Consumers Coalition bases its application are, in words from *R. v. Find*, "clearly uncontroversial or beyond reasonable dispute."

8. MKO submits that, once the applicant Consumers Coalition has made a *prima facie* case for a status update proceeding, the evidentiary onus or burden shifted to Manitoba Hydro. If that were not the case, then no party could ever succeed in an application for a rates review because of the regulated entity's virtual total control of evidence. Order 53/21 recognizes this "information asymmetry" and orders Manitoba Hydro to provide its latest financial forecasts to address that asymmetry.

9. Manitoba Hydro's letter of June 9, 2021, can only be described as non-responsive. It is submitted by a lawyer and not by a proper witness with personal knowledge of the facts the letter contains. Most of the facts it purports to depose are not properly subject to judicial notice because they are not either (1) notorious or generally accepted facts or (2) facts capable of immediate and accurate demonstration. Therefore, they ought to have been submitted in a sworn or affirmed affidavit, which they were not. Manitoba Hydro has not discharged the evidentiary onus that MKO says it had after the Consumers Coalition or, which amounts to the same thing, has not complied in any way with Order 53/21.

*Manitoba Hydro status update 2001–02*

10. Can the Board grant the Consumer Coalition's application in the absence of evidence from Manitoba Hydro. MKO submits that it can because it has done so before.

11. MKO is delivering with this submission a copy of Order 9/02 from the Board's Manitoba Hydro status update proceeding that took place from about December 2001 to about December 2002. The copy of the Order was obtained from the Board's web site (at <http://www.pub.gov.mb.ca/pdf/02hydro/009-02.pdf>). MKO submits that the Board can take judicial notice of its own Order because to do so is permitted by the rule in *R. v. Find*. (There is one oddity. The Order was made on January 17, 2002, but the headers at the top of its pages show the date September 20, 2004. Notwithstanding

that mystery, MKO has no reason to doubt the Order's accuracy because of its source.)

12. We reproduce below excerpts from Order 9/02 (with page number references from the Order) that give a flavour of the 2001-02 proceeding:

[Page 1]

A Notice of Public Hearing and the PHC, dated December 6, 2001, was filed as Exhibit #PUB-2 at the PHC. The Notice described the various matters Manitoba Hydro filed with the Board including: ...

(ii) information, including financial results, forecasts, processes, cost of service methodology revisions and events which have impacted the electrical industry since the Board's General Rate Order No. 51/96 dated April 15, 1996, to enable the Board to review existing Manitoba Hydro rates, as Manitoba Hydro is not seeking any general rate changes for its electrical customers; ...

[Page 2]

### **Examination of Existing Sales Rates**

Consumers' Association of Canada (Manitoba) Inc. and the Manitoba Society of Seniors ("CAC/MSOS"), supported by other parties seeking intervenor status, argued that Manitoba Hydro's rates were last reviewed in 1996, and since that time, there has been a substantial change in circumstance. All parties seeking intervenor status sought confirmation from the Board that the scope of the public hearing would include an examination of Manitoba Hydro's existing sales rates to ensure that they were still just and reasonable. It was the position of the parties seeking intervenor status that if, as a result of a review during the public hearing, these existing rates were not found by the Board to be just and reasonable, then such existing rates would be subject to change, by Order of the Board, following the public hearing.

[Page 3]

**Board Findings**

The issue of review of rates has been addressed by the Board through previous correspondence, including the Board's letter to Manitoba Hydro dated October 26, 2001 wherein the Board indicated that at this proceeding:

“Manitoba Hydro has the onus to demonstrate that the rates currently charged and proposed for 2002/03 are just and reasonable.

This will require the filing of Phase I – revenue requirement information and Phase 2 – cost of service rate design information.”

In light of the long passage of time since Manitoba Hydro's sales rates were last reviewed in a public forum, the Board will order that one of the purposes of this hearing is to determine whether Manitoba Hydro's existing sales rates are just and reasonable.

[Page 11]

**IT IS THEREFORE ORDERED THAT:**

(1) One of the purposes of this hearing is to determine whether the existing sales rates of Manitoba Hydro are just and reasonable, and to confirm the existing sales rate, or order such changes to existing sales rates as may be appropriate. ...

13. In summary of the foregoing quotation, Order 9/02 says:
- (1) the Board last made a general rate order for Manitoba Hydro electricity rates on April 15, 1996;
  - (2) Manitoba Hydro was not applying for any change of rates in 2001–03; and
  - (3) “in light of the long passage of time” since the Board reviewed Manitoba Hydro's electricity rates, the board was ordering a review of rates with an onus on Manitoba Hydro to show that they are just and reasonable.”

14. The present situation in this proceeding is similar to that in 2001–02. There has been a long passage of time since Orders 59/18 and 69/19 were made and notorious events of which the Board may take judicial notice have occurred in the interim that *prima facie* could have an effect on electricity pricing and the financial health of Manitoba Hydro.

*MKO's position*

15. Manitoba Hydro has not complied with Order 53/21. There are good arguments for compelling Manitoba Hydro to comply with the Order by filing proper evidence. But at this “leave application” stage, MKO submits that the Consumers Coalition has satisfied its overall onus for conducting a hearing. The Board gave Manitoba Hydro the opportunity to rebut the Consumers Coalition’s application and it has effectively chosen not to. The Board should do as it did in Order 9/02 and grant the Consumers Coalition’s application and proceed to scheduling the requested hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

June 24, 2021

JERCH LAW

Per:



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MARKUS BUCHART

Lawyers for the potential intervenor  
MANITOBA KEEWATINOWI  
OKIMAKANAK INC.