THE PUBLIC UTILITIES BOARD OF MANITOBA

IN THE MATTER OF:	Manitoba Public Insurance Corporation 2022/23 General Rate Application
AND IN THE MATTER OF:	Manitoba Public Insurance Corporation 2022 Special Rebate Application

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LEGAL SUBMISSIONS

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I. Executive Summary

1. Manitoba Public Insurance (MPI) has breached ratepayer trust and contravened the *Manitoba Public Insurance Corporation Act* (MPIC Act) by transferring capital from its Extension reserve to its Driver and Vehicle Administration (DVA) line of business.
2. Despite an unlawful transfer of funds having already taken place, the Public Utilities Board (PUB) has the legal authority to make ratepayers whole by ordering that all excess capital accumulated by the corporation through the Covid-19 pandemic be returned to customers, despite the terms of the government of Manitoba's *Reserves Regulation*.

3. As a Crown corporation providing compulsory insurance products in a regulated monopoly market, MPI occupies a special position of public trust with corresponding expectations of accountability. A function of this accountability is section 14(2) of the *MPIC Act,* which preserves ratepayers' interests in the corporation's independence by prohibiting use of insurance profits by government or for government purposes.
4. MPI's DVA line of business demonstrably serves a "government purpose" within the meaning of section 14(2). The terms of the government's 2004 delegation of DVA services to MPI and today's statutory scheme both make clear that it is the government, and not MPI, bearing ultimate responsibility for DVA. MPI's own characterization of its role as mere "administrator", delivering services "on behalf of" government and acting as government's "agent" clearly cast government as the party exercising control and the transfer from Extension as violating section 14(2).
5. Despite the application of section 14(2), MPI has transferred funds from Extension to DVA and proposes to transfer more by the end of this fiscal year. It is on the record of this proceeding that had these transfers not taken place and the protections of section 14(2) not been violated, these funds would have been returned to ratepayers.
6. To preserve public trust and respect the statutory scheme in place, it is open to the PUB to return to ratepayers the <u>full amount</u> of excess capital accumulated during the rebate period, including those funds already transferred and forecast to be transferred to DVA. Should a rebate of this size draw the Basic Rate Stabilization Reserve below the 100% Minimum Capital Test (MCT) target, the Board may rely on its finding in Order 176/19 and again decline to be bound by sections 2(a) and 3 of the *Reserves Regulation*.

II. <u>Introduction and Background</u>

7. Days before the end of the 2020/21 fiscal year, MPI transferred all excess capital in its Extension reserve, totalling $60 million, to the DVA program. MPI plans to

transfer an additional $53[1] million before the end of the 2021/22 fiscal year for a total of $113 million over two years.

8. The excess capital accumulated for reasons already thoroughly canvassed by this Board in MPI's first two Special Rebate Applications. In short, the impacts of the Covid-19 pandemic on Manitobans' driving habits led to substantially lower-than-forecasted claims costs. Excess premiums collected before November 21, 2020 were returned to ratepayers by previous rebates approved by the PUB.[2]
9. The disparity between claims costs and premiums collected persists, and an additional $113 million of excess premiums are projected to have accumulated in MPI's Extension reserve by March 31, 2022.
10. As set out on the record of this proceeding, MPI committed itself during the 2020 General Rate Application to deal transparently with excess retained earnings by "automatically" transferring them to the Basic reserve to be returned to ratepayers.[3]
11. However, contrary to their promised course of action, MPI transferred these funds to DVA, a non-regulated line of business which provides services that were historically administered by government and which remain substantially under government's direction and control.
12. Section 14(2) of the *MPIC Act* serves to maintain the accountability of MPI and government to the public by protecting the premiums paid by ratepayers from government interference. It is not MPI's role as an insurer to raise government revenues or subsidize government undertakings.
13. However, by transferring funds to DVA, this is precisely what MPI has done. The following sections rely on the intent of the legislature and the context of the legislative scheme to illustrate, first, that section 14(2) applies to the funds in MPI's Extension reserve, and second, that DVA is a government purpose within the meaning of s 14(2).[4]

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[1] Recognizing that most references on the record identify the amount intended to be transferred in 2021/22 from Extension to DVA as $53 million, CAC(MPI) 1-91 identifies this amount as $54 million.
[2] See generally PUB Orders 67/20 and 145/20.
[3] See, for example, October 20, 2021 transcript at 1427-1434 (Dilay, Giesbrecht).
[4] See *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26. [Exhibit CAC-12-2 at Tab 9]

14. To conclude, for the benefit of the Board in canvassing the availability of appropriate remedies, the final section will confirm that the *Reserves Regulation*[5] under the *MPIC Act* does not impair the Board's authority to respond to MPI's unlawful action by returning the full amount of excess premiums collected during the Covid-19 pandemic to ratepayers.

III. **Section 14(2) of the *MPIC Act* reinforces public trust and accountability**

15. Section 14(2) of the *MPIC Act* contains broad protection of money in MPI's possession from appropriation or use by government:

> Restriction on use of moneys by government
> 14(2) No moneys, funds, reserves, investments and property, whether real or personal, acquired, administered, possessed or held by the corporation, nor any profits earned by the corporation in the activity of automobile insurance, may be taken, used or appropriated by the Government of Manitoba for any purpose whatever, except as provided under section 12 or in repayment of advances by or moneys borrowed from, the Government of Manitoba and interest thereon.[6]

16. This section is strikingly broad and its intent is clear. Section 14(2) applies to all "moneys, funds, reserves, investments and property, whether real or personal, acquired, administered, possessed or held by the corporation", and prohibits their use by government "for any purpose whatever", subject to minor exceptions. Section 14(2) imposes broad protection of MPI's money from use for government purposes.

17. The Legislature's intent to guarantee MPI's independence from government interference is evident throughout the corporation's history. Provisions comparable to today's section 14(2) have been present in MPI's enabling legislation since the first enactment of *The Automobile Insurance Act*[7] in 1970 (the "1970 *Act*"). In that *Act,* section 8(2) stipulated that:

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[5] Man Reg 76/2019.
[6] *The Manitoba Public Insurance Corporation Act,* CCSM c P215 at s 14(2) [*MPIC Act*]. [Exhibit CAC-12-2 at Tab 1]
[7] *The Automobile Insurance Act,* SM 1970 c 102. [Exhibit CAC-12-2 at Tab 2]

> …no moneys, funds, reserves, investments and property, whether real or personal, acquired, administered, possessed or held by the corporation, nor any profits earned by the corporation, may be taken, used or appropriated by the Government of Manitoba for any purpose whatever…[8]

18. Similar exceptions to this provision for funds invested by the Government of Manitoba existed in 1970 as they do today,[9] and substantially the same purpose was served. Comments made in the Legislature before the passing of the 1970 *Act* confirmed that rules against diverting revenues to government were common in Crown-operated agencies at the time, and that consistent with this practice it was not the government's "policy or the intention to use a publicly owned agency to earn money, the surplus of which would be funnelled into consolidated revenue…"[10] Section 8(2) served exactly this purpose.
19. Importantly, however, in the *1970 Act*, MPI's provision of automobile insurance was exempted from the application of section 8(2).[11] This was modified by a 1974 amendment, however, which explicitly added the words "in the activity of universal compulsory automobile insurance" to protect the profits in the Basic insurance line of business from government interference:

> 8(2) No moneys, funds, reserves, investments and property, whether real or personal, acquired, administered, possessed or held by the corporation, **nor any profits earned by the corporation in the activity of universal compulsory automobile insurance,** may be taken, used or appropriated by the government of Manitoba for any purpose whatever, except as provided under section 6.6 or in repayment of advances by or moneys borrowed from, the government of Manitoba and interest thereon.[12]

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[8] *The Automobile Insurance Act,* SM 1970 c 102 s 8(2). [Exhibit CAC-12-2 at Tab 2]
[9] Section 8(2) of the 1970 *Act* contained an exception for funds invested by government on behalf of MPI comparable to today's section 12. *Ibid* at s 6(8).
[10] Manitoba, Legislative Assembly, *Hansard*, 29th Leg, 2nd Sess, Vol XVII No 176 (August 12, 1970) at 4600 (Sidney Spivak). [Exhibit CAC-12-2 at Tab 21]
[11] *The Automobile Insurance Act,* SM 1970 c 102 at ss 8(3), 27, 28. [Exhibit CAC-12-2 at Tab 2]
[12] *An Act to Amend the Automobile Insurance Act*, SM 1974 c 58 s 8. [emphasis added][Exhibit CAC-12-2 at Tab 3]

20. The protection of ratepayers' premiums from government was broadened further in 1984 to include not only profits from compulsory insurance (Basic), but profits from "all automobile insurance for which premiums are prescribed in the regulations"[13] from use by government. Then, as now, premiums for Extension insurance were set by regulation,[14] confirming that section 8(2) served to ensure that ratepayers' insurance premiums were not to be used for "any government purpose whatever".[15]
21. The former section 8(2) was re-enacted in 1987 as section 14(2) and remains in substantially the same form today.[16] The legislature's intention to protect funds in MPI's possession from use by government or for government purposes has been consistently clear and the scope of this protection has been expanded twice.
22. Neither the former section 8(2) nor the current section 14(2) have been judicially considered, but comments by the Manitoba Court of Appeal addressing a comparable provision in *The Manitoba Hydro Act* support a characterization of section 14(2) that prohibits the use of MPI's profits for any initiative typically or historically under the purview of government.
23. That provision, being section 43(3) of *The Manitoba Hydro Act*,[17] explains that "the funds of the corporation shall not be employed for the purposes of the government or any agency of the government…"[18] The Court of Appeal found that despite having the authority to consider factors such as social policy and bill affordability in rate setting, the Public Utilities Board was prevented by section 43(3) from creating customer classes for the purpose of "implementing broader social policy aimed at poverty reduction…"[19] as constituted a government purpose. The Court explained that:

[13] *The Statute Law Amendment Act (1984)*, SM 1984-85 c 17 s 3(4) [Exhibit CAC-12-2 at Tab 4]
[14] See, for example, *An Act to Amend the Automobile Insurance Act, supra* note 9 at ss 5, 25.
[15] *An Act to Amend the Automobile Insurance Act*, SM 1974 c 58 at s 8. [Exhibit CAC-12-2 at Tab 3]
[16] RSM 1987 c P215.
[17] *The Manitoba Hydro Act*, CCSM c H190. [Exhibit CAC-12-2 at Tab 23]
[18] *Ibid* at s 43(3).
[19] *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board) et al,* 2020 MBCA 60 at para 85. [Exhibit CAC-12-2 at Tab 10]

> [86] A plain and purposive reading of section 43(3) of the Hydro Act evidences that funds and revenue of Manitoba Hydro are not to be used by the government to serve any purpose other than that of Manitoba Hydro.[20]

Similarly, in the present matter, funds collected from ratepayers are being kept within the corporation but are being used to serve a government purpose. Consistent with the Court of Appeal's finding concerning section 43(3) of *The Manitoba Hydro Act*, this is a clear violation of section 14(2) of the *MPIC Act*.

24. Based on its history and supplemented by the words of the Manitoba Court of Appeal, section 14(2) of the *MPIC Act* protects funds in MPI's possession, and in particular its insurance profits, from use by government or for government purposes, for the benefit of all ratepayers.

IV. **MPI's transfer from Extension to DVA violated the protections of section 14(2)**

25. While the legislative intent of section 14(2) is clear, an application of the provision to the present circumstances requires confirmation, first, that the funds transferred to DVA are among those protected by the provision, and second, that MPI's operation of DVA "on behalf of government"[21] constitutes a government purpose. The following paragraphs illustrate that MPI's past and proposed transfers from Extension to DVA contravene the protections of section 14(2).

Excess capital in the Extension Reserve is Protected by Section 14(2)

26. The excess capital in MPI's Extension reserve which was transferred to DVA consisted of automobile insurance profits within the meaning of section 14(2).
27. As noted above, section 14(2) applies to "moneys, funds, reserves, investments and property, whether real or personal, acquired, administered, possessed or

[20] *Ibid* at para 86.
[21] See, for example, MPI 2022 General Rate Application Part I – Overview at 9. See also October 12, 2021 transcript at 217-218 (Herbelin).

held by the corporation" and "any profits earned by the corporation in the activity of automobile insurance…"[22]

28. Most of these terms are not defined in the *Act*. The phrase "profits earned by the corporation in the activity of automobile insurance", however, as explained by reference to other statutes, includes the contents of the Extension reserve which were transferred to DVA.

29. In defining "automobile insurance", the *MPIC Act* defers to *The Insurance Act*,[23] which defines the activities of "automobile insurance" in its regulations as consisting of the following services:

> The class of automobile insurance is insurance under which insurer
>
> (a) undertakes to indemnify a person against liability arising out of
>
> (i) bodily injury to or the death of another person, or
> (ii) the loss of or damage to property, caused by an automobile or the use or operation of an automobile;
>
> (b) undertakes indemnify a person against, or to pay insurance money or another thing of value in respect of, the loss or loss of use of, or damage to, an automobile; or
>
> (c) as part of a contract of automobile insurance that provides the insurance described in subclause (a)(i), undertakes
>
> (i) to indemnify a person against loss, or to pay insurance money or another thing of value in respect of loss, resulting from bodily injury to, or the death of, a person caused by an accident, or
> (ii) to pay a specified amount of insurance money in the event of bodily injury to, or the death of, a person caused by an accident, when the accident is caused by an automobile or the use or operation of one, whether or not liability exists in respect of the accident.[24]

[22] *MPIC Act, supra* note 6 at s 14(2). [Exhibit CAC-12-2 at Tab 1]
[23] *Ibid* at s 1(1). See also *The Insurance Act*, CCSM c I40.
[24] *Classes of Insurance Regulation*, Man Reg 221/2014 at Schedule 1. [Exhibit CAC-12-2 at Tab 5]

30. Based on the breadth of services listed, both MPI's universal compulsory automobile insurance (Basic) and its non-monopoly Extension line of business constitute "automobile insurance".[25] MPI is authorized to offer both services by section 6(1)(b) of the *MPIC Act*.[26]
31. MPI is also authorized to charge its customers "plan premiums" for universal compulsory automobile insurance and extension insurance.[27] "Premiums" are "any sum of money paid or to be paid by an insured or an applicant for insurance to the corporation for the purchase of or the maintenance of insurance coverage…". "Plan premiums" are premiums "paid or to be paid for an owner's certificate under a plan of universal compulsory automobile insurance or extension insurance…"[28]
32. MPI is required to establish plan premiums for its universal compulsory automobile insurance and Extension insurance.[29] Ratepayers are required to pay plan premiums in order to be insured.[30]
33. Taken together, these provisions confirm that the amounts charged to ratepayers for their universal compulsory automobile insurance (Basic) and Extension insurance are funds received by MPI "in the activity of automobile insurance" within the meaning of section 14(2).
34. Finally, profit, though not defined in the *MPIC Act*, can be understood by the following generally-accepted definition:

> Profit describes the financial benefit realized when revenue generated from a business activity exceeds the expenses, costs, and taxes involved in sustaining the activity in question. Any profits earned funnel back to business owners, who choose to either pocket the cash or reinvest it back

[25] Universal Compulsory Automobile Insurance is defined in the Automobile Insurance Coverage Regulation as consisting of Accident Insurance Benefits, All Perils Insurance (which covers loss and damage to vehicles), Public Liability and Property Damage insurance (flowing from incidents caused by insured vehicles) and Universal Bodily Injury Compensation under Part II of the *Act*. See *Automobile Insurance Coverage Regulation*, Man Reg 290/88R at s 1(1), Parts II, III, IV [Exhibit CAC-12-2 at Tab 6]; See also *MPIC Act, supra* note 4 at Table of Contents (Part II). [Exhibit CAC-12-2 at Tab 1]
[26] *MPIC Act, supra* note 6 at s 6(1)(b). [Exhibit CAC-12-2 at Tab 1]
[27] *Ibid* at ss 6.1(1), 6(1)(b).
[28] *Ibid* at s 1(1). Note that an "owners certificate" is defined as a certificate of insurance issued under the MPIC Act or Regulations to an owner of a motor vehicle or trailer.
[29] *MPIC Act, supra* note 6 at s at s 6.1(1). [Exhibit CAC-12-2 at Tab 1]
[30] *Ibid* at s 6.2

> into the business. Profit is calculated as total revenue less total expenses.[31]

35. It follows that the phrase "profits earned by the corporation in the activity of automobile insurance" used in section 14(2) refers to plan premiums collected by MPI for universal compulsory automobile insurance (Basic) and Extension insurance which exceed the expenses and costs incurred in providing automobile insurance services.
36. The excess capital in MPI's Extension reserve which was transferred to DVA consisted of automobile insurance profits within the meaning of section 14(2).[32]
37. Having established that section 14(2) applies to the funds transferred to DVA, the following paragraphs establish that the driver licensing and vehicle registration services performed by MPI on behalf of government serve a government purpose within the meaning of section 14(2). Based on the statutory scheme, the history of DVA services and the nature of MPI's role as agent of government, it is clear that DVA is ultimately a government undertaking, controlled and intended to be paid for by government, not ratepayers.

The Statutory Scheme Establishes MPI as Mere "Administrator"

38. As explained by MPI in its 2022 General Rate Application,

> MPI administers the [Driver and Vehicle Administration Line of Business] on behalf of the Government of Manitoba and has done so since 2004. Its administration requires MPI to collect various fees and to transfer them to the Government, an agency relationship.[33]

39. These descriptions of MPI as "administrator" and "agent" are consistent with section 2(1) of *The Drivers and Vehicles Act* which establishes MPI's statutory

[31] Investopedia, "Profit" (Definition)(website), available online: <https://www.investopedia.com/terms/p/profit.asp>.[Exhibit CAC-12-2 at Tab 19]
[32] It is also confirmed on the record of this proceeding that the Extension line of business has accumulated "profits" over the course of the Covid-19 pandemic. See October 20, 2021 transcript at 1473 (Meek, Giesbrecht).
[33] MPI 2022 General Rate Application Part I – Overview at 9.

authority to be the administrator of driver and vehicle licensing services on behalf of government:

> Designation of administrator
>
> 2(1) The Manitoba Public Insurance Corporation is the administrator for the purposes of this Act and the regulations under this Act and for the purposes of any other Act or regulation that imposes a duty or confers a power on the administrator. [34]

40. The same terminology is found in the *MPIC Act*:

> Objects and Powers
>
> 6(1) It is the function of the corporation and it has the power and capacity
>
> […]
>
> (c.1) to administer *The Drivers and Vehicle Act*, and to perform the duties and exercise the powers described in subsection 2(2) of that *Act*…[35]

41. MPI's role as administrator is consistent with the characterization of its duties and powers in the *Drivers and Vehicles Act*, which make clear that MPI exercises virtually no control over the services it administers on government's behalf:

> Administrator's duties and powers
>
> 2(2) The administrator must perform the duties that are imposed on it by this or another Act, or a regulation, and any other duties that the minister may require. The administrator may exercise the powers conferred on it by this or another Act, or a regulation.[36]

[34] *The Drivers and Vehicles Act*, CCSM c D104 at s 2(1). [Exhibit CAC-12-2 at Tab 7]
[35] *MPIC Act, supra* note 6 at s 6(1). [Exhibit CAC-12-2 at Tab 1]
[36] *The Drivers and Vehicles Act*, CCSM c D104 at s 2(2). [Exhibit CAC-12-2 at Tab 7]

42. It has also been confirmed on the record of this proceeding that MPI possesses no authority to withhold or retain funds collected on government's behalf through its provision of DVA services.[37]

MPI's role as "agent" leaves government ultimately responsible

43. Similarly, and as noted above, MPI has also described itself as "agent" of government with respect to DVA.[38] In a legal agency relationship, "…an agent acts on behalf of, and subject to the control of, the principal."[39] Particularly where the agent-principal relationship is known to third parties, ultimate responsibility and liability for the actions of the agent lie with the principal. This is often raised in the context of civil or tort liability and contract law, but the principles of a principal's responsibility apply equally here.
44. MPI's role as agent, and government's corresponding responsibilities as principal, confirm that the services provided by MPI on behalf of government serve government's purposes and not MPI's. MPI's role as agent confirms that DVA serves a government purpose within the meaning of section 14(2) of the *MPIC Act*.
45. The Ontario Court of Appeal has identified the "general rule of liability where there is a disclosed principal-agent relationship…The rule is: The contract is the contract of the principal, not the agent, and prima facie at common law the only person who can sue is the principal and the only person who can be sued is the principal." [40]
46. Similarly, the British Columbia Court of Appeal has endorsed the following rule:

> If an agent has made a parol or a written contract with a third party on behalf of a disclosed principal who actually exists and has authorized the

[37] As confirmed during Mr. Herbelin's testimony, MPI does not have the ability to withhold DVA revenues from government. See October 12, 2021 transcript at 286-287 (Scarfone, Herbelin).
[38] MPI's role as "agent", and its responsibility to deliver DVA services "on behalf of" government are confirmed both in MPI's Application in the testimony of Mr. Erik Herbelin on the first day of the hearing. See MPI GRA Part I – OV at 9; October 12, 2021 transcript at 286-287 (Scarfone, Herbelin).
[39] Eileen E. Gillese, *The Law of Trusts* (Toronto: Irwin Law, 2014) at 12. [Exhibit CAC-12-2 at Tab 20]
[40] *Lang Transport Ltd. v. Plus Factor International for the Respondent Trucking Ltd.*, 32 OR (3d) 1 143 DLR (4th) 672 at pdf p 8. [Exhibit CAC-12-2 at Tab 11]

> agent to make such a contract, the principal can sue and be sued by the third party on such contract. A direct contractual relationship is thereby created between a principal and third-party by the acts of the agent, who is not, himself, a party to that relationship, "unless the agent expressly or by implication incurred or intended to incur personal responsibility under the contract." [At 143; emphasis added.][41]

47. Regardless of the specific terms of the contracts between licensed drivers, MPI and the government of Manitoba, MPI's assertion that it acts as agent calls for these established rules to inform the Board's understanding of its relationship with government. MPI's status as agent confirms that driver licensing and vehicle registration is ultimately government's responsibility and under government control.
48. MPI provides driver licensing and vehicle registration services on behalf of government and at government's direction and discretion. Despite being provided through MPI, these services constitute a government purpose within the meaning of section 14(2) and cannot be funded through excess capital collected from MPI's ratepayers.
49. The application of section 14(2) to these circumstances and government's responsibility to fund DVA services is also consistent with the history of DVA and the process by which these services were transferred from government to MPI.

The History of DVA Confirms its Government Purpose

50. It has been acknowledged on the record of this proceeding that the services provided through MPI's DVA line of business were historically provided by a government department, the Department of Driver and Vehicle Licensing (DDVL). In 2004, the government entered into an agreement with MPI to delegate responsibility for delivering these services. Their arrangement was then formalized into law by 2005 amendments to the *MPIC Act* and the introduction of

[41] *Felty v Ernst & Young LLP*, 2015 BCCA 445 at para 25 citing Gerald Fridman, *Canadian Agency Law* (2nd ed., 2012) at 142. [Exhibit CAC-12-2 at Tab 12]

The Drivers and Vehicles Act.[42] This history confirms that DVA has always been a government undertaking, making transfers from Extension to DVA unlawful.

51. The Master Agreement between MPI and the provincial government which formalized the transfer of DDVL to MPI is on the record of this proceeding.[43] This Agreement, dated October 1, 2004, complemented an April 20, 2004 Interim Agreement and confirmed that the services previously provided by government (DDVL) were delegated to MPI. The terms of the Master agreement, which was established to "govern [the parties'] ongoing relationship once the Enabling Legislation [was] in force"[44] illustrate the degree of control and responsibility retained by government.
52. First, prior to the Interim Agreement, DDVL services were solely government's responsibility. This is confirmed in the preamble to the October 1, 2004 Master Agreement which notes that the Registrar of Motor Vehicles and the Minister of Transportation and Government Services first "delegated those statutory authorities, duties and powers which [could] by law be delegated to officers and staff of MPI in a series of delegation letters…"[45] in order to give effect to the Agreement prior to the necessary legislative amendments being made.
53. Second, following this delegation, the Agreement makes clear that MPI was to administer the delivery of services but did not have control or decision-making authority over those services.
54. Specific constraints were imposed on MPI's authority by a list, found at clause 2.03 of the Master Agreement, which set out its responsibilities. Conversely, the agreement made clear that "government retain[ed] responsibility for all other driver licensing and vehicle registration matters…without limitation."[46] MPI further

[42] These legislative changes were implemented by *The Drivers and Vehicles Act and The Highway Traffic Amendment Act*, SM 2005 c 37. See *The Drivers and Vehicles Act,* CCSM c D104 s 2. [Exhibit CAC-12-2 at Tab 7]
[43] Master Agreement between MPI and the Minister of Transportation and Government Services, 1 October 2004 (PUB(MPI) 1-18(d) Appendix 1) [*Master Agreement*].
[44] Master Agreement, *supra* note 43 at Preamble.
[45] Master Agreement, *ibid* at Preamble.
[46] Master Agreement, *supra* note 43 at cl 2.04.

agreed to not "discontinue or substantially change" any services without prior written consent of the government.[47]

55. In 2004, as today, MPI was merely an administrator, delivering government services on behalf of government.

Government's funding commitment confirms that DVA serves a government purpose

56. Importantly, the 2004 agreement and the way in which it was announced to the public demonstrate that neither party intended MPI to be responsible for the costs of administering DVA services. The Master Agreement made clear that MPI was to be paid "in consideration" of its services, and that these payments would continue "in perpetuity."[48] Government's historic and continuing responsibility to fund DVA clearly establish DVA as a government undertaking within the meaning of section 14(2).
57. The record of this proceeding indicates that MPI initially received approximately $21 million annually, which since 2004 has grown to $30 million.[49] It is also on the record of this proceeding that at various times in the past, funds have been transferred from Extension to DVA to cover small shortfalls.[50] The fact that such transfers happened in the past, however, does not make them lawful.[51]
58. To the contrary, the following paragraphs make clear that both parties intended government's annual funding to be sufficient to cover MPI's costs and confirm that DVA was and remains a government purpose.
59. In 2004, it was widely accepted that the transfer of DDVL to MPI would achieve cost savings and operational efficiencies.[52] The Master Agreement between MPI

[47] Master Agreement, *supra* note 43 at cl 2.06
[48] *Ibid* at cl 2.01.
[49] October 20, 2021 transcript at 1425-1427 (Dilay, Giesbrecht).
[50] See Exhibit MPI-81.
[51] Exhibit MPI-81 notes that transfers from Extension to DVA were made annually from 2005/06 through 2013/14. It is important to note that these transfers were made prior to the introduction and approval of MPI's Capital Management Plan, which resulted in additional PUB scrutiny with respect to Extension reserves for the first time in the 2020 General Rate Application.
[52] Government of Manitoba, News Release, "Customer Service and Efficiency to Result from Merger of MPI and Driver and Vehicle Licensing: Ministers" (20 April 2004). [Exhibit CAC-8 at Tab 11]

and Government confirmed that these efficiencies would accrue to the benefit of MPI, not government.[53]

60. Government press releases at the time of the delegation also explained that the agreed-upon amount was equal to the government's annual costs in providing services through DDVL.[54] The Master Agreement also committed both parties to negotiating any increases or changes in costs of delivering DVA services that might arise.[55]

61. Taken together, these factors confirm that government committed to providing MPI with sufficient funds to operate DVA in perpetuity, with increases subject to negotiation as circumstances would require.

62. Further, comments in the legislature made in advance of the 2005 legislative changes confirm that it was broadly understood that DVA services would remain funded by government. Though not speaking for the then-NDP government, Liberal MLA Kevin Lamoureux rose to speak in favour of the Bill and generally of the transfer of DDVL to MPI. Importantly, Mr. Lamoureux emphasized that Manitobans, not MPI ratepayers, would be paying for driver licensing and vehicle registration services:

> Generally speaking, with this particular bill, what we are seeing, in good part, in most part, is something that will effect a positive change for Manitobans where we will see hopefully a more efficient system that will provide better quality service for the people that are actually footing the bill, that being all Manitobans. Thank you, Mr. Speaker.[56]

63. When government transferred DDVL to MPI, it retained control over the services being transferred, engaged MPI only as a service provider, and committed to ongoing responsibility for funding DVA. Further, government also retained the right to all DVA-related revenues.

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[53] Master Agreement, *supra* note 43 at clause 4.04.
[54] Government of Manitoba, News Release, "Customer Service and Efficiency to Result from Merger of MPI and Driver and Vehicle Licensing: Ministers" (20 April 2004). [Exhibit CAC-8 at Tab 11]
[55] Master Agreement, *supra* note 43 at clause 2.07.
[56] Manitoba, Legislative Assembly, *Hansard*, 38th Leg 3rd Sess, Vol LVI No 57B (2 June 2005) at 3251 (Kevin Lamoureux)(Liberal). [Exhibit CAC-12-2 at Tab 22]

64. It is on the record of this proceeding that MPI has no claim on any DVA revenues,[57] which continue to accrue to the government by hundreds of millions of dollars every year.[58] This history further supports a characterization of MPI's DVA line of business as a government purpose within the meaning of section 14(2).
65. The assertion that government's commitment to fund DVA positions government as the party ultimately responsible for DVA services is also consistent with human rights jurisprudence, which confirms that governments can be held responsible for the discriminatory actions of service providers even when their relationship with the services provider only involves the provision of funding.
66. As explained by the Canadian Human Rights Tribunal, "funding can constitute a service if the facts and evidence of the case indicate that the funding is a benefit or assistance offered to the public…"[59]
67. The British Columbia Human Rights Tribunal has also rejected an argument by that province's government which asserted that the lack of a "service relationship" between the government and the claimant precluded any liability. Despite confirming that there was no direct service relationship, the tribunal found that the government's role of merely providing funding did not immunize it from responsibility.[60]
68. Ultimately, driver licensing and vehicle registration services are a government undertaking for which MPI is merely engaged as a service provider. When the services were delegated to MPI, government retained discretionary control, committed to responsibility for MPI's costs, and continues to benefit from MPI's services year after year. Despite being administered by MPI, its history and statutory context make clear that it is a government undertaking with a government purpose within the meaning of section 14(2).

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[57] October 12, 2021 transcript at 286-287 (Scarfone, Herbelin).
[58] Exhibit CAC-8 at Tab 15. See also October 20, 2021 transcript at 1422 (Dilay, Giesbrecht).
[59] *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 40. [Exhibit CAC-12-2 at Tab 13]
[60] *Bitonti et al. v. College of Physicians & Surgeons of British Columbia et al.*, (1999) 36 CHRR D/263 (BCHRT), cited in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 41. [Exhibit CAC-12-2 at Tab 13]

V. The Rebate and the *Reserves Regulation*

69. The record of this proceeding has shown that had the excess retained earnings in the Extension reserve not been transferred to DVA, those funds would have been transferred to the Basic line of business and returned to ratepayers by a rebate.[61]
70. The Board has the authority to ensure that ratepayers are made whole despite the funds in the Extension reserve no longer being available for transfer to Basic. The Board may order that an amount equal to all excess retained earnings from the rebate period be returned to ratepayers irrespective of MPI's unlawful action.
71. Should a rebate of this size cause the Basic Rate Stabilization Reserve to be drawn below the 100% MCT ratio, the Board may proceed by relying again on its finding in Order 176/19 to decline to be bound by the relevant sections of the *Reserves Regulation*.

The Remedial Authority of the Public Utilities Board

72. In Order 176/19, the Board found section 2(a) and 3 of the *Reserves Regulation* to be "*ultra vires* the regulation-making authority of the Lieutenant Governor-in-Council…"[62] for purporting to determine the minimum amount MPI must hold in its Basic Rate Stabilization Reserve. Following that finding, the Board was rightly not bound by those sections of the *Regulation* in issuing its order.
73. As a statutory decision maker, the PUB's remedial powers with respect to the validity of legislation are constrained. The leading case on this issue is the Supreme Court's *Cuddy Chicks* decision from 1991. In that case, the Court found a tribunal's authority to find legislation invalid as a result of its breaching the *Charter* to have effect only in the proceeding in which the finding was made:

> That having been said, the jurisdiction of the Board is limited in at least one crucial respect: it can expect no curial deference with respect to constitutional decisions. Furthermore, a formal declaration of invalidity is not

[61] See, for example, CMMG(MPI) 1-6 (c).
[62] PUB Order 176/19 at 131.

> a remedy which is available to the Board. Instead, the Board simply treats any impugned provision as invalid for the purposes of the matter before it. Given that this is not tantamount to a formal declaration of invalidity, a remedy exercisable only by the superior courts, the ruling of the Board on a *Charter* issue does not constitute a binding legal precedent, but is limited in its applicability to the matter in which it arises.[63]

74. Other appellate decisions confirm that the principle set out in *Cuddy Chicks* is not only applicable in decisions concerning the *Charter* but is a product of the nature of statutory decision-makers. The Ontario Court of Appeal, for example, noted that "[i]t is well-established that an administrative tribunal cannot make a general declaration of invalidity, although it may treat an impugned provision as invalid for the purposes of the matter before it."[64]
75. That Court then went on to quote Professor Hogg on the same point, who wrote that:

> [A] decision by a tribunal that a law is unconstitutional is no more than a decision that the law is inapplicable in the particular case. It is not a binding precedent. According to the [Supreme] Court, only "superior courts" have the power to issue binding declarations of invalidity that will invalidate a law with general effect.[65]

76. The British Columbia Court of Appeal has similarly confirmed that "the power of administrative tribunals does not extend to the making of general declarations of invalidity that are binding on future decision-makers."[66] It explained that "this principle ensures that tribunals do not 'undermine the role of the courts as final arbiters of constitutionality in Canada.'"[67]
77. These decisions make clear that the effect of the PUB's finding that the *Reserves Regulation* was invalid was to permit the Board to decline to be bound by it in Order 176/19. Despite the Board's finding not being binding outside of the 2020

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[63] *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 SCR 5 at 17. [Exhibit CAC-12-2 at Tab 14]
[64] *Starz (Re)*, 2015 ONCA 318 at para 106, citing *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 SCR 5 at 17. [Exhibit CAC-12-2 at Tab 15]
[65] *Starz (Re),* 2015 ONCA 318 at para 107, citing Peter W. Hogg, "Constitutional Law of Canada" (loose-leaf) 5th ed. (Supp.) (Toronto: Carswell, 2007) at pp. 40-52 to 40-53. [Exhibit CAC-12-2 at Tab 15]
[66] *Independent Contractors and Business Association v. British Columbia (Transportation and Infrastructure),* 2020 BCCA 243 at para 59. [Exhibit CAC-12-2 at Tab 16]
[67] *Ibid* at para 59, citing Nova Scotia (Workers' Compensation Board) v. Martin 2003 SCC 54 at para 31. [Exhibit CAC-12-2 at Tab 16]

MPI GRA, the following excerpt from the SCC confirms that the PUB can rely on its own reasons in subsequent decisions including in the present matter and to continue to decline to be bound by the regulation.

> 19] The effect of a finding by a provincial court judge that a law does not conform to the Constitution is to permit the judge to refuse to apply it in the case at bar. The finding does not render the law of no force or effect under s. 52(1) of the Constitution Act, 1982. It is open to provincial court judges in subsequent cases to decline to apply the law, for reasons already given or for their own; however, the law remains in full force or effect, absent a formal declaration of invalidity by a court of inherent jurisdiction.[68]

78. Although this excerpt refers specifically to provincial court judges, the above references confirm that administrative tribunals and statutory courts are subjected to the same constraints in remedying invalid legislation.
79. Despite not constituting binding precedent, the PUB's finding in Order 176/19 remains valid and applicable to the present circumstances. If necessary to enable the adequate return of capital to ratepayers, the Board should rely on its findings in Order 176/19 and again decline to be bound by sections 2(a) and 3 of the *Reserves Regulation*.

MPI's reading of the Order 176/19 is not defensible

80. MPI notes that the PUB "did not strike down the Regulation or find it to be of no force and effect generally."[69] MPI supports its characterization of Order 176/19 by pointing out that the Board found itself, not MPI to be not bound by the regulation. As explained by MPI, "[a]ccordingly, MPI must presume that the Regulation is otherwise valid and applicable and must adhere to its requirements."[70]
81. In reading Order 176/19, MPI focusses solely on the Board's assertion that the *Reserves Regulation* is not binding on the Board. It assumes the corporation,

[68] *R. v Lloyd*, 2016 SCC 13, [2016] 1 SCR 130 at para 19. [Exhibit CAC-12-2 at Tab 17]
[69] CAC(MPI)1-96.
[70] CAC(MPI)1-96.

because it is not named in Directive 13.5, to be unaffected by the Board's finding that the *Reserves Regulation* is "*ultra vires* the regulation-making authority of the Lieutenant Governor-in-Council…"[71]

82. However, a close reading of the PUB's decision on the *Reserves Regulation* characterizes MPI's reading of Order 176/19 as inappropriately narrow and not defensible at law.

83. MPI's characterization of Order 176/19 ignores the PUB's finding that determining the contents of the Basic Rate Stabilization Reserve (RSR) is a fundamental element of the rate-setting process which is squarely within the PUB's mandate and authority. At the core of the PUB's finding in Order 176/19 is confirmation that neither MPI nor government have the authority to determine the contents of the Basic RSR independent of the PUB's rate-approval function.

84. In arriving at this conclusion, the Board explained that "the effect of the Regulation was to set the Basic RSR at a minimum level of the amount determined using a MCT ratio of 100%, rather than having the range for the Basic RSR capital level set by the Board through the GRA process."[72]

85. In introducing its discussion on the *Reserves Regulation*, the Board explained how "the determination of the methodology and setting of capital target levels for the RSR is integral to the determination of just and reasonable rates."[73] In the Board's words,

> The significance of the methodology chosen is that it has a direct bearing on the determination of just and reasonable rates for Basic insurance. The Basic RSR target has been an integral element of the Board's rate approval process since 1989. The Board has been granted broad authority with respect to the factors to be considered in its rate-approval exercise, and historically the Board has taken into account such factors as projected revenues and expenses for the rating year, the Corporation's prudence in managing costs and the overall health of the Corporation, including reserves.[74]

[71] PUB Order 176/19 at 131.
[72] PUB Order 176/19 at 35.
[73] PUB Order 176/19 at 52.
[74] PUB Order 176/19 at 34.

86. Then, the Board turned its attention to the specific role that the amount of capital in the Basic RSR has played in rate-setting, acknowledging the long history of reliance on the RSR in setting just and reasonable rates:

> Setting the levels for the Basic RSR has been integral element of the rate approval function in determining: (1) the appropriate level of the Basic RSR for rate-setting purposes; (2) the appropriate methodology for the Basic RSR level; (3) whether additional premiums should be charged to bring the Basic RSR level within an appropriate range of capital target rate-setting; and (4) whether a rebate should be given to consumers. Over the past three decades, the Board has ordered rebates related to excessive Basic RSR levels, and has also ordered additional premiums related to low Basic RSR levels.[75]

87. The basis for the Board's ultimate finding of *ultra vires* was that sections 2(a) and 3 of the regulation conflicted with central elements of the Board's rate approval mandate set out in the legislative scheme:

> Taking all of the foregoing into consideration, the Board finds that the Regulation is inconsistent and in conflict with the Board's rate approval mandate in section 6.4 of the MPIC Act and the Board's powers under the PUB Act and CCGA Act. As set out above, the determination of the methodology and setting of capital target levels for the RSR is integral to the determination of just and reasonable rates. As such, any regulation which predetermines the methodology or level of the Basic RSR is inconsistent and in conflict with the Board's mandate.[76]

88. Order 176/19 confirms that determining the appropriate level of capital in the Basic RSR is squarely within its statutory rate-setting mandate and that neither MPI nor government possess the authority to make this determination independent of the PUB.

89. For MPI to comply with the *Reserves Regulation* in contravention of a PUB Order would be to view a regulation, being subordinate legislation, as more authoritative than its enabling statute with which it would be in conflict.

90. As explained by CAC Manitoba in its written brief addressing the validity of the regulation, "subordinate legislation, whose existence is authorized by grants of

[75] PUB Order 176/19 at 34.
[76] PUB Order 176/19 at 52.

authority found in statutes of the Legislature, cannot conflict with either the statute that authorized its creation or other statutes of the Legislature."[77]

91. If a situation were to arise in which the PUB ordered MPI to issue a rebate causing the Basic RSR to be reduced below the 100% MCT target, MPI would be required to comply.

VI. **Conclusion**

92. MPI provides driver licensing and vehicle registration services on behalf of the government. These services are ultimately government's responsibility and serve a government purpose.

93. Section 14(2) of the *MPIC Act* is intended to preserve the accountability of MPI by ensuring that the corporation's funds are protected from government interference. By transferring funds from the Extension reserve to DVA, MPI has violated section 14(2) of the *MPIC Act* and broken ratepayers' trust. Manitobans' insurance premiums are not to be used to subsidize government.

94. The Board has the opportunity and authority to make ratepayers whole by returning to them all excess capital accumulated during the rebate period as a result of the Covid-19 pandemic. If necessary, the Board may rely on its findings in Order 176/19 and again decline to be bound by sections 2(a) and 3 of the *Reserves Regulation*, permitting a rebate leaving the Basic RSR below 100% MCT.

95. MPI has disregarded its important position of public trust and unlawfully transferred Extension capital to DVA. Through its rate-setting authority, the Board has a unique opportunity in this proceeding to restore this trust by upholding the protections in the *MPIC Act*.

[77] *Katz Group Canada Inc v Ontario (Health and Long Term Care)*, 2013 SCC 64 at para 24. [Exhibit CAC-12-2 at Tab 18] See also, for general reference, the Legal Brief of CAC Manitoba filed as Exhibit CAC-19 in the 2020 General Rate Application which culminated in Order 176/19.