

Order No. 22/22

**APPLICATION FOR AWARD OF COSTS
BY CONSUMERS ASSOCIATION OF CANADA (MANITOBA) INC.
FOR INTERVENTION IN MANITOBA PUBLIC INSURANCE CORPORATION'S
GENERAL RATE APPLICATION FOR THE 2022/23 INSURANCE YEAR (GRA)
AND 2022 SPECIAL REBATE APPLICATION (SRA)**

February 28, 2022

BEFORE: Irene A. Hamilton, Q.C., Panel Chair
Robert Gabor, Q.C., Chair
Michael Watson, Member

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1. INTRODUCTION

By this Order, the Public Utilities Board (Board) hereby awards the Consumers Association of Canada (Manitoba) Inc. (CAC) costs of \$247,850.06, for its intervention in the General Rate Application (GRA) of Manitoba Public Insurance (MPI or the Corporation) with respect to compulsory driver and vehicle insurance premiums for the 2022/23 insurance year, and the 2022 Special Rebate Application (SRA).

The Board provides its reasons for this costs order below.

2. BACKGROUND

By Procedural Order 76/21, dated July 15, 2021, the Board granted an application for Intervener status filed by CAC and approved the Final Issues List for the GRA. Order 76/21 also made reference to the Board's Intervener Cost Policy, and the criteria applied by the Board in determining whether to award costs to an intervener.

On July 19, 2021, MPI filed the 2022 Special Rebate Application and in Order 107/21, dated October 4, 2021, the Board ordered that the GRA and SRA be consolidated and heard together.

In its application for Intervener status, CAC indicated that it intended to address a number of issues in the GRA, including MPI's compliance with the Capital Management Plan approved by the Board in Order 176/19 (CMP), and MPI's transfers of excess retained earnings from its Extension line of business to its Driver and Vehicle Administration (DVA) line of business.

On July 28, 2021, CAC filed a projected budget of \$231,619.30 with the Board. On October 22, 2021, CAC filed an amended projected budget of \$265,055.80 with the Board.

CAC participated in the GRA and SRA in the Information Request process, by calling expert evidence in the public hearings and conducting cross-examination of MPI witnesses, and presenting argument.

3. APPLICATION

On January 10, 2022, CAC filed its final Application for an Award of Costs for its intervention (Cost Application), for a total of \$247,850.06. CAC recognized that this amount exceeded its initial cost estimate, but noted it was below the amended cost estimate amendment of \$265,055.80 of October 22, 2021 and submitted that the costs sought are lower than the total costs it incurred in participating in the GRA and SRA.

4. MANITOBA PUBLIC INSURANCE COMMENTS

MPI provided comments to the Board about the Cost Application by letter dated January 25, 2022. MPI opposes the Cost Application and submits that the Board should deduct the amount of \$22,053.00 from the total requested by CAC, arguing that CAC:

- Argued an issue that was not relevant to the proceedings;
- Engaged in conduct that unnecessarily lengthened the duration of the 2022 GRA and caused unnecessary costs; and
- Advanced serious allegations against MPI, which it ultimately failed to prove.

MPI submits that CAC's participation in the 2022 GRA was, in part, not responsible because CAC made arguments regarding the DVA line of business that were not relevant, unnecessarily lengthened the hearing, did not assist the Board in determining whether the rates sought in the 2022 GRA were just and reasonable, and increased the cost of the hearing.

MPI also states that CAC "intentionally and falsely attacked the character and integrity of MPI and, by implication, a number of its Executive Officers" and spent a considerable

amount of time challenging the relief sought by MPI in the 2022 GRA by raising an issue that the Board found was not within its jurisdiction; in particular, CAC sought relief that would have had the effect of reversing transfers from Extension to DVA, something the Board found it did not have the jurisdiction to do. MPI submits that CAC made unnecessary claims that MPI acted in an unlawful manner, broke its promises, and breached the trust of the Board and ratepayers.

MPI also argues that it was in closing submissions in the GRA and SRA where it learned for the first time that CAC was alleging that it broke promises and breached trust, and asserts that these arguments resembled the “trial by ambush” that courts have consistently admonished for decades, while leaving MPI little or no time to respond. MPI makes this argument, in part, on the basis that CAC relied on section 14(2) of *The Manitoba Public Insurance Corporation Act*, C.C.S.M. c. P215 (MPIC Act) in support of its position that the transfers from Extension to DVA were unlawful, something which MPI suggests it could not have anticipated.

MPI states that the Board found the arguments raised by the CAC regarding the legality of the transfer from Extension to DVA to be “irrelevant.” MPI submits that CAC devoted a significant amount of time in its closing to the DVA transfer issue, which MPI argues was of no assistance and served no purpose other than to lengthen the hearing and increase the legal costs charged to the CAC.

MPI estimates that the CAC incurred \$22,053 in additional legal costs that it would not otherwise have incurred had it participated in the hearing in a responsible manner, and arrived at this figure with reference to the fees charged to the CAC by counsel leading the advocacy of the issue of DVA transfers. Accordingly, MPI asks that the Board reduce the CAC cost award by this amount, and award \$225,797.06 instead.

MPI also submits that CAC should be required to furnish proof of financial need, which should be posted to the public record.

5. CAC RESPONSE

On January 31, 2022, CAC filed a reply to MPI's letter. CAC submits that its participation in the hearing on the issue transfers from Extension to DVA:

- Was squarely within the issues list;
- Was based on evidence, legal arguments and analysis, grounded in the statutory scheme and in case law;
- Was raised and argued in an efficient manner which did not unnecessarily lengthen the process; and
- Contributed to the Board's findings on the issue in Order 134/21.

According to CAC, its arguments on the issue of the DVA transfer were based both on evidence and legal analysis. CAC asked a number of questions in cross-examination of MPI's witnesses about the intent of the CMP when it was first introduced by MPI and ultimately approved by the Board. This evidence was then relied on by CAC in its argument that MPI did not respect the spirit and intent of its CMP by transferring funds from Extension to DVA, and therefore breached the public's trust by breaking its promises contained within the CMP. CAC notes that it asked these general questions of MPI's witnesses regarding their knowledge, at a high level, of the statutory scheme and recent case law and then made legal arguments, based on statutory interpretation and case law in closing submissions, both orally and in a written legal brief.

CAC submits that the argument that MPI breached ratepayers' and the Board's trust was grounded in the evidence that MPI has not complied with its own promises within the CMP and transferred funds from Extension to DVA, which would have otherwise been rebated to captive Basic customers, contrary to the statutory scheme. CAC disagrees that any "trial by ambush" strategy was used; rather, questions regarding the CMP and MPI's respect of the statutory scheme were specifically raised in Information Requests and cross-examination, without asking the witnesses for a legal opinion which would have been beyond their expertise. Further, CAC argues it would

have expected that, prior to transferring funds from Extension to DVA, MPI would have been prepared to justify its actions under all relevant provisions of the MPIC Act, including section 14(2). It was therefore MPI's failure to address section 14(2) in its closing submissions which unnecessarily lengthened the process, as MPI then requested an opportunity to present argument in response to the position CAC advanced in its closing submissions.

In addition, CAC takes issue with MPI's characterization of the Board's comments on its DVA argument. Rather than finding them irrelevant, CAC argues that a close reading of Order 134/21 shows that the Board was speaking of any findings that it would have made on the legality of the transfers when it said that "any finding that the Board might make in that regard will be irrelevant to the outcome of these proceedings, due to the Board's lack of jurisdiction over Extension."

Lastly, CAC states that it does not take issue with filing its most recent audited financial statements and a more recent statement of unaudited revenues and expenses, if requested by the Board.

6. BOARD FINDINGS

Pursuant to section 56 of *The Public Utilities Board Act*, the Board has jurisdiction to award costs of, and incidental to, any proceeding before the Board.

The Board's Intervener Costs Policy (the Policy) applies to the GRA and SRA. The Policy sets out interveners' eligibility for costs awards and the principles applied by the Board in determining whether to grant an award of costs:

3.1 In any proceeding the Board may award costs to be paid to any Intervener who has:

- a) made a significant contribution that is relevant to the proceeding and contributed to a better understanding, by all parties, of the issues before the Board;
- b) participated in the hearing in a responsible manner and cooperated with other Interveners who have common objectives in the outcome of the proceedings in order to avoid a duplication of intervention;
- c) represented interests beyond their sole business interest; and
- d) a substantial interest in the outcome of the proceeding and represents the interests of a substantial number of ratepayers.

3.2 In determining whether the Intervener should receive the amount of costs sought in a costs application, the Board may consider whether the Intervener did one or more of the following:

- a) made reasonable efforts to ensure that the intervener's evidence was not unduly repetitive of evidence presented by another intervener;
- b) made reasonable efforts to cooperate with other interveners to reduce the duplication of evidence and questions to combine the intervener's submission with that of similarly interested interveners; and
- c) needed legal or technical assistance to take part in a proceeding.

3.3 The Board may award an amount of costs that is less than the amount sought in a costs application, including an award of no costs, where the Board determines that the Intervener did one or more of the following:

- a) asked questions on cross-examination that were unduly repetitive of questions previously asked by another intervener;
- b) presented in oral evidence significant new evidence, not previously provided in the proceeding, that was available to the intervener at the time that the intervener pre-filed its written evidence;
- c) failed to comply with a direction of the Board, including a direction on the filing of the evidence;
- d) submitted evidence and argument on issues that were not relevant to the proceeding;
- e) engaged in conduct that unnecessarily lengthened the duration of the proceeding or resulted in unnecessary costs;
- f) incurred costs that did not assist in the Board's consideration and adjudication of the issues in the proceeding and/or did not contribute to an advancement of the Board's understanding of the issues;
- g) the Intervener failed to provide notification of a material difference in the amount of the Intervener's cost estimate or the scope of the Intervener's participation at the time the material difference should reasonably have been anticipated; or
- h) such other factor(s) as the Board considers relevant.

The Board finds that CAC made a significant contribution that was relevant to the GRA and SRA and contributed to a better understanding of the issues before the Board. The

Board also finds that CAC participated in a responsible manner and is not persuaded that CAC made any irrelevant contributions or unnecessarily lengthened the proceedings.

MPI's transfers from Extension to DVA were specifically included in the Final Issues List in Order 76/21. This issue was clearly before the Board as it was highlighted in the opening and closing submissions of MPI and in the testimony of MPI's President and Chief Executive Officer, and the Board devoted a significant portion of its reasons in Order 134/21 to the issue. Further comment in that regard is found in Order 21/22 on MPI's application for a review and variance of Order 134/21.

That being the case, the Board would reasonably expect that all parties would advance any argument or area of inquiry on this issue that, in their judgment, would be a relevant consideration for the Board in its determination of the justness and reasonableness of MPI's rate and rebate requests. Further, the amount of Basic excess capital is affected by transfers from Extension to Basic and therefore the Board finds that the legality of those transfers was a valid area of inquiry.

The Board does not accept MPI's characterization of CAC's arguments as irrelevant. Rather, as noted by CAC, the essence of the Board's comment was that any finding it would make specifically about the legality of the transfers from Extension to DVA would not have an impact on the outcome of the proceedings.

It is not unusual for a party to advance an argument or position that is ultimately not accepted by the Board but that, in and of itself, does not necessarily lead to the conclusion that the party making the argument conducted itself irresponsibly. A party does not know how the Board will decide a particular issue when presenting argument or taking a particular position before the Board. The Board finds there is no reasonable basis to discount CAC's costs award in the manner requested by MPI.

The Board also notes that the Intervener Cost Policy does not require that an Intervener provide proof of financial need and accordingly, the Board declines to direct CAC to do so.

For all of these reasons, the Board will grant CAC the full amount claimed in its Cost Application.

7. IT IS THEREFORE ORDERED THAT:

1. An award of costs to Consumers Association of Canada (Manitoba) Inc. in the total amount of \$247,850.06 BE AND IS HEREBY ORDERED.
2. Manitoba Public Insurance shall pay Consumers Association of Canada (Manitoba) Inc. the costs awarded herein within 15 days of the date of this Order.

Board decisions may be appealed in accordance with the provisions of Section 58 of *The Public Utilities Board Act*, or reviewed in accordance with Section 36 of the Board's Rules of Practice and Procedure. The Board's Rules may be viewed on the Board's website at www.pubmanitoba.ca.

THE PUBLIC UTILITIES BOARD

"Irene Hamilton, Q.C."

Panel Chair

"Darren Christle, PhD, CCLP, P.Log., MCIT"

Secretary

Certified a true copy of Order 22/22
issued by the Public Utilities Board



Secretary