IN THE COURT OF APPEAL OF MANITOBA

IN THE MATTER OF: ***The Public Utilities Board Act, CCSM c P280***

AND IN THE MATTER OF: ***The Manitoba Hydro Act, CCSM c H190***

AND IN THE MATTER OF: ***The Crown Corporations Governance and Accountability Act, CCSM c C336***

AND IN THE MATTER OF: ***An Intended Appeal from Order No. 59/18 dated May 1, 2018, Order No. 68/18 dated May 29, 2018 and Order No. 90/18 dated July 13, 2018 of the Public Utilities Board of Manitoba***

B E T W E E N :

MANITOBA HYDRO-ELECTRIC BOARD	)	***D. A. Bedford***, ***H. D. Van Iderstine*** *and* ***O. V. Fernandes*** *for the Applicant*
(Applicant) Applicant	)	
	)	***R. F. Peters*** *and* ***D. M. Steinfeld*** *for the Respondent*
- and -	)	
PUBLIC UTILITIES BOARD OF MANITOBA	)	***J. B. Williams*** *and* ***K. M. Dilay*** *for the Intervener Consumers' Association of Canada (Manitoba)*
Respondent	)	
	)	***S. Luk*** *and* ***C. B. Shefman*** *for the Intervener Assembly of Manitoba Chiefs*
- and -	)	
CONSUMERS' ASSOCIATION OF CANADA (MANITOBA) and ASSEMBLY OF MANITOBA CHIEFS	)	*Chambers motion heard:* ***January 22, 2019***
	)	*Decision pronounced:* ***May 8, 2019***
Interveners	)	

MICHEL A. MONNIN JA

[1] The applicant (Hydro) seeks leave to appeal two directives contained in Order 59/18 of the respondent (the PUB) released on May 1, 2018.

[2] Firstly, by Directive 6, the PUB ordered that Hydro create a First Nations On-Reserve Residential customer class and that the rate for service to this new class be different than that for those customers remaining in the existing "residential class".

[3] Secondly, by Directive 14, the PUB ordered that Hydro retain an independent consultant to assess Hydro's development of its asset management program and its progress in addressing the recommendations made by UMS Group (an expert consulting group), as well as the progress of the development of the corporate value framework.

[4] With respect to Directive 6, Hydro submits that it violates sections 39(2.1) and 39(2.2) of *The Manitoba Hydro Act*, CCSM c H190 (the *Hydro Act*), which, it argues, stipulates that rates for service to a class of customers must be the same throughout Manitoba and a class of customers cannot be created solely based on where they are located in the province.

[5] With respect to Directive 14, Hydro argues that this directive interferes with its management function and violates existing jurisprudence to the effect that the PUB has no jurisdiction to review, reject or vary its capital projects.

[6] Section 58(1) of *The Public Utilities Board Act*, CCSM c P280 (the *PUB Act*), deals with appeals from an order or a decision of the PUB. The section reads as follows:

> **Grounds of appeal**
> **58(1)** An appeal lies from any final order or decision of the board to The Court of Appeal upon
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> (a) any question involving the jurisdiction of the board; or
>
> (b) any point of law; or
>
> (c) any facts expressly found by the board relating to a matter before the board.

[7] Section 58(2) of the *PUB Act* provides that an appeal can only be taken upon being granted leave by a judge of this Court.

[8] The test to be applied on an application for leave to appeal is set out in *Re The Cash Store Financial Services Inc*, 2009 MBCA 1 (at para 25):

> The criteria to be applied on an application for leave to appeal are well known. In addition to showing that the grounds or questions upon which leave is sought fall within the criteria stipulated under the statute giving the appeal right (here being a question of jurisdiction, point of law, or facts expressly found by and relating to a matter before the PUB), the applicant must also demonstrate that the point raised is arguable, that is, that it has a reasonable prospect of success and that it is a point of sufficient importance to warrant the court's consideration. While it is my view that by reason of s. 58(1)(c) the *PUB Act* provides a broader appeal right than that provided for appeals from most other administrative tribunals, still the appeal right is not unlimited, but is constrained by the factors which I have enunciated.

[9] In performing the analysis required to decide whether to grant leave or not, I must, to a certain degree, remain mindful of the standard of review that will be applied by a panel of this Court if leave is granted. MacInnes JA stated the following in *Cash* (at para 18):

> If leave to appeal is granted, an issue central to the appeal will be the determination of the appropriate standard of review and its application to the Order. The standard of review to be applied on an appeal is a factor to be considered on a leave application, but such standard will be determined ultimately by the court on the hearing of the appeal. See *Nygard International Partnership Associates v. Michalowski*, 2005 MBCA 96, 195 Man. R. (2d) 301 at para. 14.

[10] Hydro, relying on *Cash*, submits that the standard of review on appeal should be one of correctness. It argues that, on a leave application, the court hearing the application may assume that the standard of review most favourable to the applicant, in this case correctness, will likely be applied by a panel on appeal. Hydro further argues that the applicable standard of review to be applied to a case such as this one has yet to be determined and submits that the issues in question are complex ones of pure jurisdiction that not only involve the interpretation of the PUB's home legislation, but also of Hydro's home legislation.

[11] In *Cash*, MacInnes JA stated the following with respect to this issue (at para 23):

> In all of the circumstances, I assume for purposes of my decision that if leave is granted, the court on appeal will likely apply the standard of review most favourable to the applicant, which is, of course, the standard of correctness, and accordingly, I will consider this leave application with regard to that standard.

[12] The PUB and the interveners, Consumers' Association of Canada (Manitoba) (Consumers') and the Assembly of Manitoba Chiefs (AMC), take the position that the standard of review should be one of reasonableness. They cite numerous authorities in support of their position, of which I retain two, both decisions of the Supreme Court of Canada: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61; and *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53.

[13] In *Sattva*, Rothstein J wrote (at para 75):

> Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the applicable standard of review. As I will later explain, reasonableness will almost always apply to commercial arbitrations conducted pursuant to the *AA* [*Commercial Arbitration Act*, RSBC 1996, c 55], except in the rare circumstances where the question is one that would attract a correctness standard, such as a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise. Therefore, the leave inquiry will ordinarily ask whether there is any arguable merit to the position that the arbitrator's decision on the question at issue is unreasonable, keeping in mind that the decision-maker is not required to refer to all the arguments, provisions or jurisprudence or to make specific findings on each constituent element, for the decision to be reasonable (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16). Of course, the leave court's assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal. As such, this should not be taken as an invitation to engage in extensive arguments or analysis about the standard of review at the leave stage.

[14] In *Alberta Teachers'*, Rothstein J wrote (at paras 30, 34, 39, 42):

The narrow question in this case is: Did the inquiry automatically terminate as a result of the Commissioner extending the 90-day period only after the expiry of that period? This question involves the interpretation of s. 50(5) *PIPA* [*Personal Information Protection Act*, SA 2003, c P-6.5], a provision of the Commissioner's home statute. There is authority that "(d)eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir* [*Dunsmuir v New Brunswick*, 2008 SCC 9], at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, *per* Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, . . . '(q)uestions regarding the jurisdictional lines between two or more competing specialized tribunals' (and) true questions of jurisdiction or *vires*" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).

The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

What I propose is, I believe, a natural extension of the approach to

> simplification set out in *Dunsmuir* and follows directly from *Alliance* (para. 26). True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.
>
> As I have explained, I am unable to provide a definition of what might constitute a true question of jurisdiction. The difficulty with maintaining the category of true questions of jurisdiction is that without a clear definition or content to the category, courts will continue, unnecessarily, to be in doubt on this question. However, at this stage, I do not rule out, in our adversarial system, counsel raising an argument that might satisfy a court that a true question of jurisdiction exists and applies in a particular case. The practical approach is to direct the courts and counsel that at this time, true questions of jurisdiction will be exceptional and, should the occasion arise, to address in a future case whether such category is indeed helpful or necessary.

[15] Although all of the parties argue that the applicable standard of review is the same for both directives, in my view, the two directives are far from being similar and could easily attract differing standards of review. Directive 6, establishing the on-reserve class, clearly brings into play the relationship between, and the authority provided by, three *Acts* of the Legislature: the *Hydro Act*, the *PUB Act*; and *The Crown Corporations Governance and Accountability Act*, CCSM c C336 (the *Crown Corporations Act*). This might well be considered as the PUB interpreting more than simply its home statute, and it is therefore not inconceivable that a panel of this Court, hearing this matter, may find, notwithstanding what was said in *Alberta Teachers'*, that the standard of review is one of correctness.

[16] Directive 14, dealing with the retention of a consultant to review Hydro's implementation of its capital asset management program, is, in my view, more in line with the PUB interpreting its own statute and its decision in all probability would attract a review on the basis of reasonableness.

[17] I therefore proceed to consider the substantive arguments of the parties to this application from the perspective that, with respect to Directive 6, the standard of review would be one of correctness, and, with respect to Directive 14, the standard of review would be one of reasonableness.

[18] I deal firstly with the new-class directive, Directive 6.

[19] Hydro argues that this directive is in breach of section 39 of the *Hydro Act*, which stipulates:

> **Price of power sold by corporation**
> **39(1)** The prices payable for power supplied by the corporation shall be such as to return to it in full the cost to the corporation, of supplying the power, including
>
> (a) the necessary operating expenses of the corporation, including the cost of generating, purchasing, distributing, and supplying power and of operating, maintaining, repairing, and insuring the property and works of the corporation, and its costs of administration;
>
> (b) all interest and debt service charges payable by the corporation upon, or in respect of, money advanced to or borrowed by, and all obligations assumed by, or the responsibility for the performance or implementation of which is an obligation of the corporation and used in or for the construction, purchase, acquisition, or operation, of the property and works of the corporation, including its working capital, less however the amount of any interest that it may collect on moneys owing to it;

> (c) the sum that, in the opinion of the board, should be provided in each year for the reserves or funds to be established and maintained pursuant to subsection 40(1).
>
> . . .
>
> **Equalization of rates**
> **39(2.1)** The rates charged for power supplied to a class of grid customers within the province shall be the same throughout the province.
>
> **Interpretation**
> **39(2.2)** For the purpose of subsection (2.1),
>
> (a) grid customers are those who obtain power from the corporation's main interconnected system for transmitting and distributing power in Manitoba; and
>
> (b) customers shall not be classified based solely on the region of the province in which they are located or on the population density of the area in which they are located.

[20] Hydro further argues that the PUB has no jurisdiction over it, save for the authority provided to it under the provisions of Part 4 of the *Crown Corporations Act*, which only provide the PUB with the authority to review and approve "rates for services" meaning the price charged for the provision of power defined under the *Hydro Act.* The reference to Part 4 of the *Crown Corporations Act* derives from section 2(5) of the *PUB Act*, which reads:

> **Application to Manitoba Hydro**
> **2(5)** Subject to Part 4 of *The Crown Corporations Governance and Accountability Act* and except for the purposes of conducting a public hearing in respect of an application made to the board under subsection 38(2) or 50(4) of *The Manitoba Hydro Act*, this Act, other than subsection 83(4) and the regulations under that subsection, does not apply to Manitoba Hydro and the board has no jurisdiction or authority over Manitoba Hydro.

[21] The relevant sections of the *Crown Corporations Act* are:

Hydro and MPIC rates review
25(1) Despite any other Act or law, rates for services provided by Manitoba Hydro and the Manitoba Public Insurance Corporation shall be reviewed by The Public Utilities Board under *The Public Utilities Board Act* and no change in rates for services shall be made and no new rates for services shall be introduced without the approval of The Public Utilities Board.

Definition: "rates for services"
25(2) For the purposes of this Part, **"rates for services"** means

(a) in the case of Manitoba Hydro, prices charged by that corporation with respect to the provision of power as defined in *The Manitoba Hydro Act*; and

(b) in the case of The Manitoba Public Insurance Corporation, rate bases and premiums charged with respect to compulsory driver and vehicle insurance provided by that corporation.

Application of Public Utilities Board Act
25(3) *The Public Utilities Board Act* applies with any necessary changes to a review pursuant to this Part of rates for services.

Factors to be considered, hearings
25(4) In reaching a decision pursuant to this Part, The Public Utilities Board may

(a) take into consideration

(i) the amount required to provide sufficient funds to cover operating, maintenance and administration expenses of the corporation,

(ii) interest and expenses on debt incurred for the purposes of the corporation by the government,

(iii) interest on debt incurred by the corporation,

(iv) reserves for replacement, renewal and obsolescence of works of the corporation,

(v) any other reserves that are necessary for the maintenance, operation, and replacement of works of the corporation,

(vi) liabilities of the corporation for pension benefits and other employee benefit programs,

(vii) any other payments that are required to be made out of the revenue of the corporation,

(viii) any compelling policy considerations that the board considers relevant to the matter, and

(ix) any other factors that the Board considers relevant to the matter; and

(b) hear submissions from any persons or groups or classes of persons or groups who, in the opinion of the Board, have an interest in the matter.

[22] Hydro's central argument is that the "price charged for the provision of power" is a term that does not include such ancillary matters as the creation of customer classes and other terms and conditions of service. It further states that such a power is expressly assigned to it as set out in section 28(1) of the *Hydro Act*, which provides as follows:

Regulations as to supply of power
28(1) The board may, by regulation, prescribe

(a) the terms, and conditions upon and subject to which the corporation will supply power to the users of the power supplied by it;

(b) the standards governing the construction, installation, maintenance, repair, extension, alteration, and use of

> electric wiring and related facilities using or intended to use power supplied by the corporation;
>
> (c) such other conditions relating to the supply of power to users of that power, not inconsistent with this Act, as the corporation deems necessary for the proper carrying out of this Act and for the efficient administration thereof.

[23] Finally, Hydro argues that Directive 6 was included in the PUB's order to effect a social policy remedy, which is to alleviate poverty on First Nations reserves. To do so, it argues, contravenes both the *Hydro Act* and the *PUB Act.* Hydro argues that, by ordering it to create a new class of customers and directing that the new class be charged a rate different from all other residential customers, the PUB has exceeded its jurisdiction.

[24] The PUB's initial position is that Hydro has failed to meet the initial criteria to be granted leave, namely, that the question raised is not of sufficient importance nor does it have an arguable case. It argues that its authority to issue Directive 6 is a matter that has already been determined as being within its jurisdiction. It refers to *Consumers' Association of Canada (Man) Inc et al v Manitoba Hydro, Electric Board,* 2005 MBCA 55, where I wrote (at paras 63-69):

> The intent of the legislation is to approve fair rates, taking into account such considerations as cost and policy or otherwise as the PUB deems appropriate. Rate approval involves balancing the interests of multiple consumer groups with those of the utility. The PUB's decision to build retained earnings more rapidly than proposed in order to better protect the utility and consumers from the financial impact of future drought, clearly meets the intent of the legislation and is within the jurisdiction afforded the PUB in s. 26 of the *Accountability Act* [*The Crown Corporations Public Review and Accountability Act*, CCSM c C336].

> The role of the PUB under the *Accountability Act* is not only to protect consumers from unreasonable charges, but also to ensure the fiscal health of Hydro. It is clear the PUB understood its role in this regard.
>
> The PUB has two concerns when dealing with a rate application; the interests of the utility's ratepayers, and the financial health of the utility. Together, and in the broadest interpretation, these interests represent the general public interest. These issues were addressed in the PUB's decision.
>
> All in all, the PUB addressed the right question, the reasonableness of approved rates. It did not rely on irrelevant evidence or fail to consider relevant evidence. The PUB was alive to the issues and alive to the implications of its decision. It did not apply inappropriate tests or apply appropriate tests or factors incorrectly. It did not make its decision in an arbitrary manner.
>
> The setting of rates, and the elements that are to be considered in doing so, require a specialized knowledge and understanding that ought not to be interfered with by courts unless there is clear error in that decision or the manner in which it was arrived at. This is not such a case.
>
> When all of the arguments of the applicants are considered in light of the evidence the PUB heard and the decision it eventually made, I have not been convinced that what the applicants are complaining about is anything but the methodology the PUB utilized to arrive at that decision. The PUB then went on to justify that decision in the light of the interests of both the public and Hydro.
>
> On whatever standard of review I might consider to be the applicable one, the applicants have not convinced me that leave to appeal should be granted. There are no questions of pure law to be decided. At best, from the applicants' perspective, their applications are grounded on questions of mixed fact and law and those issues are not such that they present a matter of importance that ought to engage the court.

[25] Further, the PUB takes the position that sections 25(4)(a)(viii) and 25(4)(a)(ix) of the *Crown Corporations Act* provide sufficient authority for its

decision to order Directive 6. It argues that it is consistent with its mandate, of fixing just and reasonable rates in the general public interest, and that it can consider affordability as a factor in setting those rates.

[26] Consumers' takes the position that, in orders prescribing rates, the PUB has the authority to exercise the right of classification. It also argues that section 82 of the *PUB Act*, which prohibits the setting of discriminatory rates, justifies the creation of a class such as the PUB did in Directive 6. It refers specifically to section 82(1)(c), which provides:

> **Discriminatory rates**
> **82(1)** No owner of a public utility shall
>
> (c) adopt or impose any unjust or unreasonable classification in the making, or as the basis, of any individual or joint rate, toll, fare, charge, or schedule for any product or service rendered by it within the province;

[27] Consumers' relies on this Court's decision in *Coalition of Manitoba Motorcycle Groups Inc v Manitoba (Public Utilities Board)*, 1995 CarswellMan 433 (CA), where Twaddle JA wrote (at paras 22-23):

> That subsection extends the Board's power of review and approval to the granting of other relief. The term "relief" is troublesome. That, however, is because lawyers identify the word with its usual legal meaning of aid sought by a party to a dispute. Clearly, approval of a higher rate than that sought by the Corporation is not aid sought by that party. But the word also means "alleviation of some burden" and "deliverance from some hardship, burden or grievance; remedy, redress" (*The Oxford Universal Dictionary*, 3rd ed., revised with addenda, 1964) and "anything that offers a pleasing change" (*Webster's New World Dictionary*, 3rd College ed. 1988). In my view, the legislature, in using the word "relief", intended to confer on the Board a power to approve a rate which would alleviate the burden on the Corporation of taking too little

> in premiums to justify taking the risks inherent in a particular class of insurance.
>
> A power of "review" would make little sense if the Board could only approve or reject an application or fix a rate below that sought. The Board's function is not only to protect consumers from unreasonable changes, but also to ensure the fiscal health of the Corporation and fairness between different classes of consumer. Although the Corporation is not a public utility, as that term is defined in *The Public Utilities Board Act* [RSM 1987, c P280], it is a Crown Corporation that is made accountable to the Board by *The Accountability Act* [*The Crown Corporations Public Review and Accountability Act*, SM 1988-89, c 23]. It is the Corporation's accountability which gives the Board its broad power to approve a different rate than that sought by the Corporation.

[28] AMC takes the position that the PUB's authority to order Directive 6 arises from the provisions of section 25 of the *Crown Corporations Act,* and that the section in question incorporates into its interpretation the provisions of section 82 of the *PUB Act.*

[29] Further, AMC argues that the PUB's directive should be considered in light of what the Supreme Court of Canada said in *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board),* 2006 SCC 4 (at paras 4-5, 7):

> As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudency of plant and equipment investment decisions. And more relevant to this case, the utility, outside the ordinary course of business, is limited in its right to sell assets it owns: it must obtain authorization from its regulator before selling an asset previously used to produce regulated services (see MacAvoy and Sidak, at p. 234).
>
> Against this backdrop, the Court is being asked to determine whether the Board has jurisdiction pursuant to its enabling statutes

> to allocate a portion of the net gain on the sale of a now discarded utility asset to the rate-paying customers of the utility when approving the sale. Subsequently, if this first question is answered affirmatively, the Court must consider whether the Board's exercise of its jurisdiction was reasonable and within the limits of its jurisdiction: was it allowed, in the circumstances of this case, to allocate a portion of the net gain on the sale of the utility to the rate-paying customers?
>
> The interpretation of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), the *Public Utilities Board Act*, R.S.A. 2000, c. P-45 ("PUBA"), and the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") (see Appendix for the relevant provisions of these three statutes), can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.

[30] In my view, Directive 6 involves more than simply rate setting, which is clearly within the jurisdiction of the PUB as set out in *Consumers' Association*. The primary issue with respect to this directive is whether the PUB has the authority to create a new class of customers, allegedly done specifically, to address the issue of bill affordability. Notwithstanding a minority view, the PUB believes that it has the authority to do so and its Order 59/18 refers to instances where it has directed Hydro to implement a bill-assistance program. To my knowledge, however, that authority has never been challenged before the courts. The time has come to do so.

[31] I am satisfied that Hydro has demonstrated that it has an arguable case to advance and that it has a reasonable prospect of success, especially if the court hearing the matter accepts its argument with respect to the standard of review. As to the final criterion that must be met for leave to be granted, I am more than satisfied that the matter is of sufficient importance to warrant the attention of this Court.

[32] Accordingly, I grant leave to appeal Directive 6 of Order 59/18.

[33] I now deal with Directive 14.

[34] In seeking leave to appeal from this directive, Hydro takes the position that, in making this directive, the PUB encroaches on its management function. It argues that the PUB has no legislative authority to exercise supervisory authority over it. It relies on *British Columbia Hydro & Power Authority v British Columbia (Utilities Commission)*, 1996 CarswellBC 352 (CA), where Goldie JA wrote (at paras 54-58):

> I earlier referred to the characterization of the issue. Counsel for the Commission contended it merely related to the enforcement of the information gathering power conferred on the Commission.
>
> I am unable to agree with that characterization as in my opinion the IRP process is specific to the planning phase of the utility's response to its statutory obligations and its enforcement by order is an exercise of management as it relates neither to the certification process as such nor to the supervision of the utility's use of its property devoted to the provision of service.
>
> It is only under s. 112 of the *Utilities Act* [*Utilities Commission Act*, SBC 1980, c 60] that the Commission is authorized to assume the management of a public utility. Otherwise the management of a public utility remains the responsibility of those who by statute or the incorporating instruments are charged with that responsibility.

> One of the primary responsibilities and functions of the directors of a corporation is the formulation of plans for its future. In the case of a public utility these plans must of necessity extend many years into the future and be constantly revised to meet changing conditions. In the case at bar the effect of the Commission's directions is to place a group, whose interests are disparate, in a superior position in the sequence of planning and to require the directors to justify a deviation from the product of the IRP process in the exercise of their responsibilities.
>
> Taken as a whole the *Utilities Act*, viewed in the purposive sense required, does not reflect any intention on the part of the legislature to confer upon the Commission a jurisdiction so to determine, punishable on default by sanctions, the manner in which the directors of a public utility manage its affairs.

[35] In reply, the PUB argues that Directive 14 does not mean and is not meant for it to infringe on the management functions of Hydro. It takes the position that, in order for it to fix just and reasonable rates, which is clearly part of its mandate, it has to be in a position to understand Hydro's capital expenditures. The PUB acknowledges that it does not have the authority to approve or disapprove of Hydro's capital projects, but maintains that, as capital project expenditures form part of Hydro's revenue requirements, which it seeks to recover from ratepayers, the revenue requirements have to become a focus of its inquiry.

[36] In addition, the PUB points to the fact that, despite orders dating back to 2008, Hydro has not yet fully complied in providing asset condition information. The PUB argues that, if it is unable to direct an independent study, and if Hydro does not file a comprehensive study, then it is unable to adequately assess the extent to which rates should recover business operations capital expenditures.

[37] Consumers' takes the position that there is no arguable basis on which Hydro can challenge this directive. It argues that, although Hydro advances its challenge on the basis of its authority to make capital expenditure decisions, the effect of that challenge is to question the PUB's ability in the context of its ratemaking role to investigate whether proposed capital asset management expenditures are prudent and reasonable and that is clearly within the PUB's mandate.

[38] AMC takes no position with respect to this directive.

[39] I accept the arguments put forth by the PUB and Consumers'. This directive is not an intrusion into the manner in which Hydro conducts its affairs. It is an information-seeking directive to help the PUB discharge its mandate and, in my view, the PUB is well within its legislative mandate to do so. Considering that the PUB is interpreting its home statute and considered on a standard of reasonableness, I have not been convinced that Hydro has an arguable case with a reasonable prospect of success.

[40] Accordingly, I deny Hydro's motion for leave to appeal from Directive 14 of Order 59/18.

[41] In summary, I therefore grant Hydro leave to appeal on the question of whether the PUB exceeded its jurisdiction in creating a First Nations On-Reserve class whose rate for service would be different from those customers remaining in the existing "residential class".

Monnin JA