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February 21, 2014

VIA EMAIL

Public Utilities Board
400 - 330 Portage Avenue
Winnipeg, Manitoba R3C 0C4

Attention: Mr. Hollis Singh

Dear Sir/Madam:

Re: NFAT - Cross-examination by IEC Counsel
Our File: 13235

We write in response to Manitoba Hydro's submission on this issue.

The draft hearing schedules presented by PUB counsel have included some limited time for cross-examination of Manitoba Hydro and the Intervenors by IEC counsel. It is submitted that, taken as a whole, allowing the IECs the right to conduct modest cross-examination is entirely appropriate given the unique nature of these proceedings.

Manitoba Hydro bases its submission upon four grounds. We attempt to address these below.

Manitoba Hydro's 1st Ground: *The IECs are not a party to the proceeding and do not have, or ought not to have, an interest in the outcome of the proceeding.*

Manitoba Hydro states that "*the Board should be guided by principles applicable to its usual proceedings.*" However, no examples are provided which would assist in what is intended by the term "usual proceedings". That being said, we note that Rule 19 of the PUB Rules of Practice and Procedure does provide some guidance with respect to the issue of examination during proceedings:

> 19. The procedure for presenting evidence shall be the same for applicants, Intervenors and independent witnesses and shall be as follows:
>
> [...]
>
> (2) Applicant's oral evidence:

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[...]

b) cross-examination of applicant's witnesses on pre-filed evidence, pre-filed rebuttal evidence and/or direct evidence

In addition, Rule 4(1) of the PUB Rules of Practice and Procedure provides further guidance on the issue of the Board's ability to direct its own procedure on any individual proceeding:

> 4(1) In any proceeding, the Board may issue directions on procedure which will govern the conduct of that proceeding and will prevail over any provision of these Rules that is inconsistent with those directions.

Taken as a whole, in addition to the fact that the Board's own Rules contemplate uniform rights regarding examination of applicants, intervenors and independent witnesses, these same Rules enable the Board to issue directions on procedure in any particular proceeding which will prevail over any other provision of the Rules. Therefore, it is submitted the Board's decision to allow IEC counsel the opportunity to cross-examine is grounded in Rule 19, specifically, or in Rule 4(1), generally.

Finally, it is submitted that contrary to what Manitoba Hydro submits, the NFAT Review process is unlike any other proceeding and cannot be framed within Manitoba Hydro's catch-all category of "usual proceedings". Indeed, this fact is highlighted by Manitoba Hydro's submission on this issue where it quite rightly notes that "*the IECs have been retained by the PUB in accordance with the Terms of Reference*". This point will be addressed under the following heading.

Manitoba Hydro's 2nd Ground: *The Terms of Reference do not contemplate cross-examination of Manitoba Hydro or other witnesses by the IECs.*

Manitoba Hydro's position seems to favour what it states the Terms of Reference do not say, rather than what they do say. It is submitted that when the Terms of Reference are considered in their entirety, the grounds for the right of IEC counsel to be able to cross-examine becomes evident.

Indeed, with respect to the IECs' role, the Terms of Reference state that the IECs "*shall be expected to critically examine*" a list of questions and issues as determined by the Terms of Reference and the Board. This expectation of the IECs obligation of

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critical examination does not and cannot end with the filing of their Reports. Indeed, as part of the process to ensure this critical examination, the IECs were permitted to submit two (2) IRs on the Manitoba Hydro filings. In that regard, keeping in line with the uniform rights as set out in the Rules, the IECs also had to answer IRs provided to them from the PUB, Manitoba Hydro and the Intervenors. Therefore, the right to a modest cross-examination by IEC counsel at the hearing is simply the next logical step in ensuring that the IECs satisfy their obligations of critical examination.

Viewed from another angle, the Terms of Reference state that the report to be prepared by the Panel "*will include recommendations to the Government of Manitoba on the needs for Hydro's preferred development Plan and an overall assessment as to whether or not the Plan is in the best long-term interest of the province of Manitoba when compared to other options and alternatives*". The cornerstone of the NFAT process, therefore, is guided by the public interest (the long-term interest of the province of Manitoba). The IECs should be permitted to ask questions on cross-examination on Manitoba Hydro's and/or the Intervenors' oral testimonies, just as the IECs were allowed to submit questions in writing on Manitoba Hydro's filings and the Intervenor reports. That the IECs are enabled to critically examine all of Manitoba Hydro's evidence, including that which is tendered at the hearing, is consistent with serving the public interest, as per the Terms of Reference.

Manitoba Hydro's 3rd and 4th Grounds:

The IECs are not "adverse in interest" to Manitoba Hydro or any Intervenor and as such do not properly require the opportunity to cross-examine Manitoba Hydro (or any Intervenor, which has been provided for in the most recent draft schedule).

The IECs have been granted significant access to Manitoba Hydro models, documents and staff.

To deny the IECs the right to cross-examine would effectively allow Manitoba Hydro, or the Intervenors, to attack the findings of the IECs without giving those IECs an opportunity to test the evidence put forward attacking the IEC findings. Although the IECs are not starting from a hard and fast adversarial position, built into the Terms of Reference is the expectation that they will critically examine Manitoba Hydro's Preferred Development Plan. The direct result of the IECs' critical examination may include analyses that are interpreted as adversarial by Manitoba Hydro and/or the Intervenors. In light of this fact, IEC counsel must have the right to cross-examine.

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Finally, it is suggested that the simple statement that the IECs are not adverse in interest in any way to Manitoba Hydro runs contrary to the procedural history of this matter. That is, the IECs were required to argue for their right to ask IRs and then were required to again seek recourse from the Board in order to have the IRs answered, if at all.

Natural Justice

In its submission, Manitoba Hydro states that it:

"[...] *defies the principles of natural justice to establish a process whereby Manitoba Hydro opens its drawers and filing cabinets to the full benefit of the independent experts, including providing confidential and proprietary models, hundreds of thousands of pages of data and the full benefit of ongoing meetings and conference calls with its staff only to be advised in the weeks prior to the commencement of the hearing of the expectation that these same independent experts will now take on an adversarial role and seek to challenge Manitoba Hydro's evidence through cross-examination*".

The rules of natural justice must be taken in context. Indeed, the Supreme Court of Canada has held that the rules of natural justice are not fixed; rather, they must be considered in the light of the nature of the particular tribunal at issue.[1] It is submitted that this Board, in light of the Terms of Reference and its own Rules, has the ability to direct how any proceeding will be conducted, such as allowing the IECs the right to ask IRs and to cross-examine.

Moreover, of equal importance is the principle of fairness. In the present matter, fairness requires that the IECs be given an opportunity to test the direct evidence of Manitoba Hydro and the Intervenors where that evidence may seek to discredit or undermine the IECs' findings. In fact, many of the witnesses for Manitoba Hydro are akin to experts, only they are officers of the applicant. Where there are opposing experts in civil actions, those witnesses are normally permitted to hear each other's evidence in order to advise counsel with respect to cross-examination and with respect to evidence to be called in response.[2] Therefore, fairness provides that the IECs offering evidence be offered a chance to hear, and to test, the evidence of an opposing witness who contests that evidence, and *vice versa*.

On a final note, Manitoba Hydro takes the position that, since none of the IECs are resident of Manitoba, the IECs therefore do not have a direct interest in the outcome

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[1] *Bell Canada* v. *C.T.E.A.* 2003 CarswellNat 2427 (SCC), at para. 21, per McLachlin CJC and Bastarache J
[2] Sara Blake, *Administrative Law in Canada*, 4th Ed. (Toronto: LexisNexis Butterworths, 2006), p. 66

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of the proceeding, and this negates their right to cross-examine. It is submitted that on the basis of the fact that the Preferred Development Plan, if approved, would constitute the biggest single expenditure in the history of the Province of Manitoba, allowing the IECs the ability to conduct modest cross-examination will lend itself to ensuring and upholding the public confidence in these proceedings.

In conclusion, for all the reasons set out above, we request the following:

1. That the Board dismiss Manitoba Hydro's motion; and

2. That the Board direct that IEC counsel is entitled to cross-examination, as necessary, in accordance with the hearing schedule.

Yours truly,

HILL SOKALSKI WALSH TRIPPIER LLP

Per:

Christian Monnin*

CM/jm

c.c. *Fillmore Riley LLP, Attn: Bob Peters (via email)*
Fillmore Riley LLP, Attn: Sven Hombach (via email)
Manitoba Hydro, Attn: Marla Boyd (via email)

** services provided by Christian Monnin Law Corporation*