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BAR  
ASSOCIATION**



**300 – 287 BROADWAY  
WINNIPEG, MANITOBA  
R3C 0R9**

**TEL: 204.986.8640**

**FAX: 204.985.8644**



**E-MAIL: [centre@pilc.mb.ca](mailto:centre@pilc.mb.ca)**

Writer's direct line: (204) 985-8533  
Email: [bwilliams@pilc.mb.ca](mailto:bwilliams@pilc.mb.ca)

May 14, 2013

The Public Utilities Board of Manitoba  
Attention: Mr. Hollis Singh,  
Executive Director and Board Secretary  
400 – 330 Portage Avenue  
Winnipeg, MB R3C 0C4

Dear Mr. Singh:

**Overview**

Over the past 100 years, the Manitoba Public Utilities Board (PUB) has earned a well deserved reputation for independent and thoughtful judgement. The pillars on which this reputation is built include accessibility, transparency, and the balanced perspective that comes from openness to the concerns of all stakeholders in the public interest.

We are writing on behalf of the Green Action Centre and the Consumers Association of Canada (Manitoba Branch) (GAC/CACM) to express their concern that the ability of the Public Utilities Board to provide informed and meaningful advice to its Minister has been materially impaired by the Terms of Reference for the Need For and Alternatives to Review (NFAT).

In particular, we are concerned that the Terms of Reference as currently framed:

- will deny intervenors the opportunity to make informed and meaningful representations;
- will place counsel for intervenors at risk of violating the Law Society Code of Professional Conduct;
- will put independent experts retained by the PUB in a potential conflict of interest;
- will deny the Public Utilities Board information essential to its final determinations; and,
- will prevent a meaningful review of Manitoba Hydro's preferred option and the alternatives with respect to the Principles of Sustainable Development;

## Findings and Remedy Sought

GAC/CACM seek a determination by the Public Utilities Board that:

- the Terms of Reference for the NFAT Review will impede the ability of the Public Utilities Board to provide informed and meaningful advice to its Minister;
- there are grounds for concern that the undertaking set out in Appendix A, under *Access to In Camera Evidence* may place counsel for intervenors at risk of violating the Law Society Code of Professional Conduct;
- the Terms of Reference are at odds with the PUB Notice of Pre-hearing Conference in making no provision for the intervenor-sponsored consultants contemplated in the Notice<sup>1</sup>. Only PUB appointed consultants are mentioned and provided access to confidential materials;

To remedy this deficiency, GAC/CACM are asking the PUB to:

- recommend that the Lieutenant-Governor-in-Council amend Appendix A, p. 7 of the Draft Terms of Reference in the following manner (proposed amendments are in *italics*):

### Access to In Camera Evidence

...

The documents filed and evidence adduced in camera shall not be made public, other than through the high-level summaries as described above, and shall only be disclosed to or shared with the following persons, on the terms and conditions as noted below:

...

3. *Registered Intervenor*s, any independent consultant(s) appointed by the Panel or by *registered intervenor*s and any non-staff Panel advisors with a need to know, as determined by the Chair, may review Commercially Sensitive Information and participate in the in camera process upon execution of a non-disclosure agreement in a form agreeable to the Panel and Hydro.

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<sup>1</sup> NOTICE OF PRE-HEARING CONFERENCE NEEDS FOR AND ALTERNATIVES TO (NFAT) REVIEW OF MANITOBA HYDRO'S PROPOSED DEVELOPMENT PLAN, p. 2. Interveners must describe their reasons for intervention, their specific issues of concern as well as their detailed work plan and proposed consultants and estimated budgets.

- co-operate with registered intervenors and Manitoba Hydro in seeking a binding determination from the Manitoba Law Society on whether the proposed undertaking set out in Appendix A, under *Access to In Camera Evidence* places counsel for intervenors at risk of violating Rules 2.02 (1), 2.02 (2) and 2.02 (3) of the Law Society Code of Professional Conduct;
- recommend to the Lieutenant Governor in Council that assessment of the NFAT include consideration of all incremental transmission costs necessitated by Hydro's preferred plan including any incremental costs associated with the Bipole III Transmission Line and Converter Station;
- recommend to the Lieutenant Governor in Council that the PUB be enabled to expressly incorporate into its assessment of the NFAT any findings of the CEC relating to the costs and benefits associated with the Keeyask project.

### **Background on the Green Action Centre and CAC MB**

This is the first joint motion to the PUB by GAC/CACM. Both parties are long time intervenors in regulatory proceedings related to Manitoba Hydro including General Rate Applications before the PUB and the NFAT review related to the Wuskwatim Hydro-electric generating station and associated transmission facilities.

GAC and CACM often take differing positions on issues relating to Manitoba Hydro including the appropriate level of rate increases and mechanisms for rate design. However, they are united in their support of the need for a transparent and publicly accessible process to assess the Hydro plan.

The concerns of GAC and CACM with the NFAT Terms of Reference are set out in the sections which follow.

### **Intervenors are denied the opportunity to make informed and meaningful representations**

At the heart of the right to make meaningful representations is the right to understand the essential facts of the case. When it comes to *in camera* or closed door proceedings, the terms of Reference have adopted an unacceptable standard of exclusion.<sup>2</sup>

There is an absolute prohibition on intervenors and their independent experts participating in closed door proceedings. The effect of this standard of exclusion is to effectively neuter the voice of Intervenor on closed door issues.

It is no answer to say that legal counsel for registered intervenors can take part in the closed door proceedings. Should legal counsel wish to participate in these proceedings, they must refrain from discussing any information obtained with their client. In effect, the lawyer is expected to substitute her or his judgment for that of the client. It is not appropriate or feasible for legal counsel to substitute their own opinions for that of their clients.

There can be no doubt that the information canvassed in the closed door proceedings is likely to be relevant and material to the deliberations of the PUB. Based on the extensive discussion in the Terms of Reference, it is reasonable to assume that the closed door discussions will address commercially sensitive information relating to forecasts of export revenues, financial risks, generation sequences, Net Present Value and Internal Rate of Return and forecasts of future market prices.<sup>3</sup>

By closing the door to stakeholders, the Terms of Reference effectively silence the voice of intervenors on many important issues. Just as fundamentally, they deny the Public Utilities Board essential input from stakeholders for its deliberations.

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<sup>2</sup> For examples of other jurisdictions, please see, OREGON PUBLIC UTILITIES COMMISSION, [http://www.oregon.gov/puc/Pages/admin\\_hearings/guidelines\\_tips.aspx](http://www.oregon.gov/puc/Pages/admin_hearings/guidelines_tips.aspx). *Tips on PUC Practice and Procedures, Confidential Material and Protective Orders*. . . . "When a party signs a "consent to be bound" by a standard protective order, the party must submit a list of persons associated with that party whom the party wishes to be considered "qualified persons" to review confidential material." NEW BRUNSWICK ENERGY AND UTILITIES BOARD, POLICY ON ISSUES OF CONFIDENTIALITY, September 18th, 2007, s. 3.6 in which provision is made for an Order identifying the representatives of participants who may view Designated Confidential Information (Designated Recipients); Re: Practice Directive of the British Columbia Utilities Commission "Confidential Filings", September 12, 2007 in which provision may be made for access to confidential information to parties to the proceeding or to their counsel or to consultants and experts. See also ONTARIO ENERGY BOARD, Practice Direction On Confidential Filings, Revised October 13, 2011 which enables the inclusion of independent consultants retained by parties as well as their lawyers.

<sup>3</sup> See the Terms of Reference pages 3 and 4 of 8 under the heading *Independent Expert Consultants*.

## **Counsel for intervenors are placed at risk of violating the Law Society Code of Professional Conduct**

The effect of the existing Terms of Reference will be to prohibit intervenor legal counsel who sign a confidentiality undertaking from sharing relevant and material information with their clients.

To whom is the ultimate duty of legal counsel owed? Is it to the client or to a confidentiality undertaking? As noted in the commentary for Rule 2.02(3):

Lawyers provide legal services based upon the client's instructions. In order to provide appropriate instructions, the client should be **fully and fairly informed**. [emphasis added]

Under Section 2.02(1) of the Law Society Code of Professional Conduct, "a lawyer has a duty to communicate effectively with the client." Underlying this obligation is "the need for the client to make **fully informed decisions and provide instructions**." [emphasis added]<sup>4</sup> Rule 2.02 (2) underscores the obligation of legal counsel to be honest and candid. It states that a lawyer:

must inform the client of **all information** known to the lawyer that may affect the interests of the client in the matter. [emphasis added]

Preliminary discussions with the Law Society of Manitoba suggest that the Terms of Reference are problematic for legal counsel seeking to discharge their duties in accordance with the Code of Professional Conduct. An informal written opinion could be obtained from the Law Society. However, a preferable course of action would be for the Board, Hydro and registered intervenors to seek a binding determination from the Law Society Practice and Ethics Committee on whether a lawyer can properly act in these circumstances. For further information on the Code of Professional Conduct please see Appendix A.

## **A potential conflict for the independent expert**

The concept of independence is shorn of any meaning when the expert expected to provide advice to Intervenor lawyers is subject to cross examination by the very same counsel.

The Terms of Reference put PUB Independent Experts in an untenable position. They are expected to provide expert *in camera* evidence for which they can be cross examined. They also are expected to be available as a resource to counsel for registered intervenors to prepare for the cross-examination of Hydro witnesses.

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<sup>4</sup> Among the key examples of expected practice in this area are the obligations to: (a) keep a client reasonably informed; and, (b) answer reasonable requests from a client for information.

Consider a circumstance where the Independent Expert has been persuaded by Hydro of the validity of its own position or has taken a position even more extreme than the one adopted by the Hydro witness. Could the Independent expert be expected to provide credible advice aimed at testing a position she or he had already endorsed?<sup>5</sup>

### The Exclusion of Bipole 3

The Terms of Reference suggest that Manitoba Hydro's plan includes:

the Keeyask and Conawapa Generating Stations, their associated domestic AC transmission facilities and a new Canada-USA transmission interconnection.

However, the Terms of Reference exclude an essential element of the plan to bring power from new generating stations on the Lower Nelson to the American marketplace. No reference is made to the essential role played by the Bipole lines, particularly the Bipole 3 Transmission Line and Converter Station, in bringing power south. The Terms of Reference expressly exclude the Bipole 3 transmission line and converter station.

The Plan cannot operate without the additional transmission capacity of Bipole 3. In Board Order 5/12, the PUB noted that:

It is MH's position that Keeyask G.S. cannot proceed without Bipole III in place to transmit the full Keeyask plant capacity when water levels are well above dependable flow levels. . . . Recently, MH has also suggested that an additional 208 to 838 MW of transmission capacity would be required once Keeyask is in service to match total generation capacity and provide system reserves.<sup>6</sup>

Whether judged in conventional economic terms or within the framework of the *Sustainable Development Act*, a true picture of the benefits and costs of the Hydro plan versus those of the alternatives cannot be garnered in the absence of a consideration of the incremental impacts on Bipole 3 and other existing major north to south transmission, including both cost and availability for domestic supply purposes.

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<sup>5</sup> Like any expert retained by Manitoba Hydro or intervenors, experts retained by the Board may be fallible. During the 2010/11 and 11/12 General Rate Application, independent experts retained by the PUB formed the opinion that the retained earnings of Manitoba Hydro were too low. However, cross examination of these experts by intervenor counsel demonstrated that the probability distributions selected and the subsequent "best fit" estimates were flawed. The estimates of the PUB Independent Experts were materially revised. These multi-billion dollar revisions would not have taken place without the assistance of experts retained by the intervenors.

<sup>6</sup> Order 5/12, page 45.



### Impeding a meaningful review based on the Principles of Sustainable Development

The Principles of Sustainable Development provide that “Economic decisions should adequately reflect environmental, human health and social effects.”<sup>7</sup> Under the *Sustainable Development Act*, full cost accounting means:

accounting for the economic, environmental, land use, human health, social and heritage costs and benefits of a particular decision or action to ensure no costs associated with the decision or action, including externalized costs, are left unaccounted for;

The Guidelines for Sustainable Development define the efficient use of resources to mean:

- (a) encouraging and facilitating development and application of systems for proper resource pricing, demand management and resource allocation together with incentives to encourage efficient use of resources; and
- (b) employing full-cost accounting to provide better information for decision makers.

The advancement of new generation to “take advantage” of the potential for enhanced inter-tie capacity and firm sale opportunities has both positive and negative environmental implications. In calculating the full costs of the Hydro plan, the potential benefits of displacing CO<sub>2</sub> generation in the MISO marketplace must be balanced against potential negative impacts such as the release of methane gas by flooding peat land or the potential extirpation of lake sturgeon in portions of the Lower Nelson River.

Unfortunately, the terms of reference raise the risk that attempts to calculate the full costs of the project will be skewed by the omission of critical information that becomes available in the course of the Clean Environment Commission's consideration of the Keeyask Environmental Impact Statement.

The Terms of Reference expressly exclude the “environmental reviews of the proposed projects that are part of the Plan, including Environmental Impact Statements”. It is suggested that “where possible the impacts of the matters to be considered by the CEC are included in the costs of the projects that are part of the Plan”. However, this provision appears to prohibit the calculation of environmental costs identified by the Clean Environment Commission (CEC) even if inadvertently excluded by Manitoba Hydro.

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<sup>7</sup> The Sustainable Development Act, C.C.S.M. c. S270, Schedule A, Principles of Sustainable Development, s. 1(1).

For example, Manitoba Hydro appears to be of the view that it can adaptively manage its way out of the potential extirpation of lake sturgeon in the reaches of the lower Nelson River. However, it appears likely that some traditional knowledge and western experts will be more pessimistic than Manitoba Hydro about the potential for extirpation of endangered species such as lake sturgeon and woodland caribou as a consequence of Keeyask and related activities.

In the event, the CEC concludes that there is a reasonable likelihood of endangered species extirpation flowing from Keeyask, these costs must properly be included in any defensible full cost accounting calculation.

### **Conclusion – Avoiding a poisoned procedural chalice**

Over the past 100 years, the PUB has earned a strong reputation for independence and reasoned opinion. The contributions of public interest stakeholders have been an important part of the process.

The PUB has an unenviable task in assessing Manitoba Hydro's controversial plans. The Terms of Reference in their current form threaten to place an intolerable burden upon the PUB. They place a significant portion of the regulatory proceedings behind closed doors; they deny stakeholders an effective voice supported by expert testimony in the closed door proceedings; they put counsel for registered intervenors at risk of violating their Code of Professional Conduct; and, they place Independent Experts in a potential conflict.

The Terms of Reference also have the potential to deny the tribunal the information it needs to provide appropriate advice to the Minister. It is highly possible that important information relating to the full costs of the Keeyask project will be excluded.

The Hydro plan requires the assumption of significant risks to enjoy significant opportunities. In undertaking the difficult assignment of weighing both opportunities and risks, it is critical that the PUB be given adequate tools to do its job.

Thank you for your consideration of these comments.

Yours truly,



BYRON WILLIAMS  
DIRECTOR, PILC

BW/sk

Attachment



BILL GANGE  
GANGE GOODMAN & FRENCH



## **Appendix A**

### **Excerpts from the Law Society Code of Professional Conduct**

#### **Definition**

##### **2.01 (1)**

In this rule,

“Competent lawyer” means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement, including:

...

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;

...

(d) communicating at all relevant stages of a matter in a timely and effective manner;

#### **Quality of Service**

##### **2.02 (1)**

A lawyer has a duty to provide courteous, thorough and prompt service to the client. The quality of service required of a lawyer is service which is competent, timely, conscientious, diligent, efficient and civil.

#### *Commentary*

...

A lawyer has a duty to communicate effectively with the client. What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client, and the need for the client to make fully informed decisions and provide instructions.

...

*Examples of expected practices*

The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides key examples of expected practices in this area:

- (a) keeping a client reasonably informed;
- (b) answering reasonable requests from a client for information;

...

- (l) providing a client with relevant information about a matter and never withholding information from a client or misleading the client about the position of a matter in order to cover up neglect or a mistake;

...

**Honesty and Candour**

**2.02 (2)**

When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

*Commentary*

...

A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

## **Advising Clients**

### **2.02 (3)**

A lawyer must obtain the client's instructions and in doing so, provide informed and independent advice.

#### *Commentary*

Lawyers provide legal services based upon the client's instructions. In order to provide appropriate instructions, the client should be fully and fairly informed. There may not be a need for the lawyer to obtain explicit instructions for every single step on a matter. Before taking steps, a lawyer should consider whether and to what extent the client should be consulted or informed. Fundamental decisions such as how to plead and what witnesses to call almost always require prior consultations. The same may not be so with less fundamental decisions. When in doubt, the lawyer should consult with the client. A lawyer should obtain instructions from the client on all matters not falling within the express or implied authority of the lawyer.

A lawyer should clearly specify the facts, circumstances and assumptions upon which an opinion is based. If it is apparent that the client has misunderstood or misconceived the lawyer's advice, matters concerning the position taken or what is really involved in the matter, the lawyer should explain the matter further to the client to a sufficient degree so that the client does understand.

## **Confidential Information**

### **2.03 (1)**

A lawyer at all times must hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and must not divulge any such information unless:

- (a) expressly or impliedly authorized by the client;
- (b) required by law or a court to do so; or
- (c) required to deliver the information to the Law Society, or

(d) otherwise permitted by this rule.

*Commentary*

A lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

## **2.4 CONFLICTS**

### **Duty to Avoid Conflicts of Interest**

#### **2.04 (1)**

A lawyer must not advise or represent more than one side of a dispute.

#### **2.04 (2)**

A lawyer must not act or continue to act in a matter when there is, or is likely to be, a conflicting interest unless, after disclosure, the client or prospective client consents.

#### *Commentary*

As defined in these rules a conflict of interest or a conflicting interest arises when there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another client, a former client, or a third person. A substantial risk is one that is significant, and while not certain or probable is more than a mere possibility.

The fiduciary relationship between the lawyer and client imposes duties of loyalty and good faith on the lawyer beyond the duty not to disclose confidential information. This engages the duty to avoid conflicting interests, the duty of commitment to the client's cause (zealous representation) and the duty of candour with the client on matters relevant to the retainer.

A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest.

A lawyer should examine whether a conflict of interest exists, not only from the outset, but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.