

September 19, 2016

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VIA EMAIL

Public Utilities Board of Manitoba
400 – 330 Portage Avenue
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Attention: Darren Christle

Dear Sir:

**Re: 2016-2017 MPI GRA
Bike Winnipeg Notice of Motion re Round 1 & 2 IRs
Our File: 16137**

Introduction

As noted in our correspondence of Friday, September 16, 2016, the Board granted Bike Winnipeg with Intervener status to assist it with critically evaluating:

1. The optimum size of MPI's Road Safety Budget and whether it is sufficient to enable a significant reduction in the costs to MPI of injuries to vulnerable road users (including but not limited to cyclists) in the short and long term;
2. The adequacy of MPI's Road Safety programs with respect to the fatal and severe injury of vulnerable road users (including but not limited to cyclists); and,
3. The quality and clarity of MPI's data collection, analysis and accessibility, regarding collisions involving vulnerable road users (including but not limited to cyclists) particularly in comparison to transportation safety programs from local, national and international entities and jurisdictions.

As well, it is important to recall that in Board Order No. 135/14 the Board ordered that MPI:

- Provide an independent review of the optimal size of a road safety budget portfolio for the Corporation with a view to minimizing the economic and social costs of collisions; and,
- Provide an independent review of the current road safety portfolio with a view to optimizing it (relative to cost effectiveness and to setting goals for outcomes) and minimizing the economic and social costs of collisions.

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Further, in Board Order 128/15, the Board stated:

The Board expects, however, that MPI demonstrate in a more concrete fashion that it has optimized its road safety budget and is carrying out its responsibilities as a leader on Road Safety by spending on initiatives that can reduce the social and financial costs of collisions. The Board is not satisfied that the report prepared by Jennifer Kroeker-Hall has fully addressed the questions that MPI was asked to answer in PUB Order 135/14.

In light of the Board Orders and in pursuit of its obligations as an Intervener, Bike Winnipeg submitted a series of Information Requests to MPI.

In turn, MPI refused to answers some of these Information Requests. With respect to IR BW MPI 1-11, MPI stated the following regarding the request that it provide the draft reports filed by Ms. Kroeker-Hall:

Specifically, the Corporation submits that **drafts of Ms. Kroeker-Hall's report are neither relevant nor helpful**. The Corporation respectfully declines to produce them.

The Corporation has included Ms. Kroeker-Hall's report in the application. It contains her findings and recommendations. **Drafts would not provide any additional information with respect to her recommendations and findings beyond what is already on the record.**

There is no reasonable basis to challenge Ms. Kroeker-Hall's independence, to the extent that objective underlies Bike Winnipeg's request. The Corporation has provided Ms. Kroeker-Hall's CV and the Corporation's contract with her company, Sirius Strategic Solutions. These documents demonstrate that (1) Ms. Kroeker-Hall is an independent consultant, and (2) she was asked to perform and did perform appropriate work.

Ms. Kroeker-Hall did prepare drafts but the existence of drafts is not a reasonable basis to call Ms. Kroeker-Hall's professional integrity into question. Independent external consultants (regardless of their profession) will often submit draft reports to the client to confirm the accuracy of information

contained in the report and to confirm whether the questions posed have been addressed.¹ [Emphasis Added]

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Regarding BW (MPI) 2-1 and BW (MPI) 2-2 the Corporation takes the following position:

Providing a rerun of the intervenors query from the Enterprise Data Warehouse dataset will not result in significantly different trends or proportionalities from those established through the traffic collisions statics report data set as they relate to fatalities and serious injuries. **Statistical differences that may exist will not assist the Board in assessing the optimum size of the Corporation's road safety budget.**

Preparation of responses as requested is estimated at 20 person hours which represents a considerable allocation of resources which are in high demand during the GRA Rate setting process.

That said, the Corporation recognizes the importance of evaluating data. Should the intervenor wish to pursue this request further, it is recommended that they submit it as a research project to the external stakeholder committee on loss prevention. The Corporation will provide the information requested to this committee as this would be the appropriate forum for such an undertaking.²

As noted in our correspondence dated September 16, 2016, it is respectfully submitted that the refusal by MPI to respond to these relevant and material requests raises some fundamental concerns.

Obligations to Provide Full and Adequate Response

The PUB Rules of Procedure provide that there is an obligation on MPI to provide full and adequate responses to each information request it receives. Further, where it refuses to respond based on allegations of irrelevance, MPI is required to provide specific reasons:

¹ The same logic is relied upon by the Corporation with respect to BW MPI 1-13d regarding a request to provide Ms. Kroeker-Hall's experts file with respect to the preparation of the Sirius report.

² Identical reasoning is provided by the Corporation with respect to BW (MPI) 2-2(e).

15(1) Subject to subsection (2), where any information request has been directed to a party and served on that party in accordance with the Board's directions, the party shall:

- (a) Provide a full and adequate response to each information request on a separate page or pages or, by agreement between the parties by electronic means; and

[...]

16 A party who is unable or unwilling to provide a full and adequate response to interrogatory shall file and serve a response:

- a) Where the party contends that the interrogatory is not relevant, setting out specific reasons in support of that contention;
- b) where the party contends that the information necessary to provide an answer is not available or cannot be provided with reasonable effort, setting out the reasons for the unavailability of such information, as well as any alternative available information in support of the response that the party considers would be of assistance to the party making the information requests;

Therefore in accordance with the Rules, the onus falls on MPI to provide specific reasons outlining why it believes each IR is not relevant or why it unable to respond. It is submitted that MPI has not done so.

The Ability of the Board to Order a Full and Adequate Response

Generally speaking, evidence for a proceeding may be procured through MPI's original filing, the IR process, cross-examination, intervenor evidence, oral testimony or where necessary through an order by the PUB requiring the production of documents relating to the proceeding:

The Board, except as herein otherwise provided, as respects the attendance and examination of witnesses, the amendment of the proceedings, the production and inspection of documents, the enforcement of its orders, the payment of costs, and all other matters necessary are proper for the due exercise of its powers, or otherwise for carrying on any of its powers into effect, has all such powers, rights, and privileges as are vested in the Court of Queen's Bench or a judge thereof.³

³ See *The Public Utilities Board Act*, CCSM c. P280, section 24(4)

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The Board, or any other person authorized by the Board to make inquiry or report, may, where it appears expedient [...]

(c) require the production of all books, plans, specifications, drawings and documents⁴ [...]

(1) where, in an application, intervention, motion or response to information request, a party refers to a document which the party intends to rely on in the proceeding, that party shall attach a copy of that document to its evidence.

(2) The Board, on its own initiative, or upon motion by any party may order any person or party in a proceeding to produce any document relating to the proceeding.

(3) Any party who fails to comply with an order pursuant to subsection (2) shall be deemed to be in breach of the said order.⁵

Further, the Board's power to compel evidence is further supported in *Public Utilities Board v. Manitoba Public Insurance Corp. et al* where the Court of Appeal found the PUB has the authority to order disclosure of specific information:

I note, for example, the authority found in subsection 24(4) and 27(2) (c) of the PUB Act and section 12 of the Rules of Practice and Procedure of the PUB. The PUB could exercise that authority to order the disclosure of specific information and/or documentation and then MPIC would be obligated to respond.⁶

Law and Argument

i. *Relevance*

On the issue of relevance, the Supreme Court of Canada in the decision of *R. v. J-L. J.*, (2000) 2 SCR 600 (at para. 47) has stated that: "The concept of relevance provides a low threshold." Further, in order to meet the threshold, one must

⁴ See *The Public Utilities Board Act*, CCSM c. P280, section 27(2)

⁵ See generally *The Public Utilities Board v. Manitoba Public Insurance Corp. et al*, 2011 MBCA 88 at para 48

⁶ See *The Public Utilities Board v. Manitoba Public Insurance Corp. et al*, 2011 MBCA 88 at para 48

demonstrate that the evidence at issue “has a logical tendency to contribute to a finding about a material fact”.⁷

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Natural Justice

The principles of natural justice are clear. Persons are entitled to have their case, or their defence, heard before an impartial decision-maker. Generally speaking, the Rules of Natural Justice are enshrined in the following two principles⁸:

- “*audi alteram partem*” (let the other side be heard). This is the duty to allow persons affected by a decision to have a reasonable opportunity of presenting their case and to ensure that that decisions made by a tribunal/panel are fair and that those affected are given an opportunity to participate in the decision-making process.
- “*nema iudex in causa sua*” (no one can be the judge in their own cause). This gives rise to a duty to act fairly, to listen to arguments, and to reach a decision in a manner that is untainted by bias. Or essentially, that no one should be a judge in their own case.

Experts’ File and Drafts

In Manitoba, the decision of *Telephoto Technologies Inc. v. Manitoba Jockey Club Inc. et. al.* 2007 MBQB 207 (CANLII) states the following at paragraph 13 with respect to production of an expert’s file:

[13] In *Browne (Litigation Guardian of) v. Lavery*, 2002 CanLII 49411 (ON SC), [2002] O.J. No. 564 (S.C.J), Ferguson J. considered the many reported cases interpreting the scope of “findings, opinions and conclusions” in Ontario’s Rule 31.06(3), which is the same as Manitoba’s rule. This case is quoted by Oliphant A.C.J.Q.B. in *Grenkow v. Marlatt*, 2006 MBQB 108 (CanLII), [2006] M.J. No. 184 (QL), as authority for the proposition that all information provided to and relied upon by an expert are part of the expert’s findings and must be disclosed pursuant to the rule covering disclosure of expert opinions (Queen’s Bench Rule 31.06(3)). Ferguson J. determined that a broad approach to interpretation has been established. He commented:

⁷ See David Paciocco and Lee Stuesser, *The Law of Evidence* (6 Ed) (Toronto: Erwin Law Ink, 2011), page 29 where it is stated that relevance need not establish a material fact on its own. It is enough to pass the relevance threshold to the admissibility of the evidence as a logical tendency to contribute to a finding about that material fact.

⁸ See, Generally, *Kane v. University of British Columbia*, 1980 CanLII (SCC), [1980] 1 SCR 1105.

42 In *Transmetro Properties Ltd. et al. v. Lockyer Brothers Ltd.* (1985), 4 C.P.C. (2d) 273 (Ont. H.C.J.) the court ruled that "findings" included "the documents, the calculations and the engineering data upon which the opinion and the conclusions were drawn" (at p. 279).

¶ 43 Mr. Alan Mark wrote a critical case comment on this decision: op. cit. at p. 274. He argued that the dictionary meaning of "findings" did not justify that interpretation. He also argued that the rule did not contemplate pre-trial discovery of an expert and that this must await trial.

¶ 44 Since *Transmetro* there have been a number of conflicting decisions.

¶ 45 The line of cases giving the term "findings" broad meaning have found the following to be included:

- (a) Technical calculations prepared by the party and sent to the expert: *Athabaska Airways Ltd. v. De Havilland Aircraft of Can. Ltd.* (1988), 34 C.P.C. (2d) 298 (Ont. H.C.J.).
- (b) The raw data and test scores used: *Cacic v. O'Connor* (1990), 1990 CanLII 6701 (ON SC), 71 O.R. (2d) 751 (Ont. H.C.J.); *Beck v. La Haie* (1989), 38 C.P.C. (2d) 67 (Ont. H.C.J.) (Master).
- (c) The disclosure of "findings, opinions and conclusions" of experts should not be restricted to final findings, opinions and conclusions or to written reports. Any finding, opinion or conclusion expressed in sufficiently coherent manner that it can be used by counsel ought to be disclosed on the examination for discovery: *Cheaney et al. v. Peel Memorial Hospital* (1990) 1990 CanLII 7002 (ON SC), 73 O.R. (2d) 794 (Ont. H.C.J.) (Master).
- (d) The field notes, raw data and records made and used by the expert in preparing her/his report: *Award Developments (Ontario) Ltd. v. Novoco Enterprises Ltd.* (1992), 1992 CanLII 7587 (ON SC), 10 O.R. (3d) 186 (Gen.Div.).

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- (e) The research, documents, calculations and factual data relied on by the expert: *Allen v. Oulahen* (1992), 1992 CanLII 7620 (ON SC), 10 O.R. (3d) 613 (Ont. H.C.J.) (Master).
- (f) All documents, video tapes, photographs and any information which were forwarded to expert witnesses as well as full detailed disclosure of all surveillance observations conducted on the plaintiff which were disclosed in surveillance reports, (including all observations which were visible or discernible in photographs, film, or videotape): *Beausoleil v. Canadian General Insurance Co.*, [1993] O.J. No. 2200 (Ont. Gen. Div.)
- (g) A surveillance video tape which was shown to the defence expert and referred to in his report: *Binkle v. Lockhart* (1994), 24 C.P.C. (3d) 11 (Ont. Gen. Div.)
- (h) the information and data obtained by the expert, contained in documents or obtained through interviews, on the basis of which conclusions are drawn and an opinion formed: *Re Ballard Estate* (1994), 1994 CanLII 7305 (ON SC), 20 O.R. (3d) 189 (Ont. Gen. Div.) and unreported additional reasons of December 14, 1995.
- (i) Notes of correspondence between the plaintiff's accountant and the plaintiff's prospective employer, which were used to prepare the accountant's report (including notes and correspondence between the plaintiff and his current employer and between the plaintiff and his prospective employer): *Casey v. Orr* [1996] O.J. No. 425 (Ont. Gen. Div.)

Application to the Present Matter

i. Enterprise Data Warehouse

With respect to the Information Requests BW (MPI) 2-1(a), (b) and (c) and BW (MPI) 2-2 (e), (f) and (g), it is respectfully submitted that these requests necessarily meet the test for relevancy as the information being sought therein has “*a logical tendency to contribute to a finding about a material fact*”.

Indeed, MPI doesn't even attempt to challenge the relevancy of these Information Requests. Rather, it suggests that the request be pursued as a “*research a project to the External Stakeholder Committee on Loss Prevention*”. Further, MPI attempts to

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justify its refusal by saying that the preparation “*as requested is estimated at 20 hours which represents a considerable allocation of resources which are in high demand during the GRA rate setting process.*” With the greatest of respect, this does not satisfy the requirement set out in Rule 16 (b) of the PUB Rules of Procedure. While it is expected that resources are in high demand during a GRA process, that is not a reasonable explanation as to why MPI refuses to provide a full and adequate response.

Further, MPI takes the position that “*providing a rerun [...] from the Enterprise Data Warehouse dataset will not result in significantly different trends from those established through the Traffic Collisions Statistics Report dataset as they relate to fatalities and bodily injuries*”. It is not for MPI to make that determination.

The Board was very clear in its Order when it granted Bike Winnipeg Intervenor status to assist it with the critical evaluation of the quality and clarity of MPI’s data collection, analysis and accessibility, regarding collisions involving vulnerable road users. MPI, without providing such full and adequate answers is nevertheless telling the Board that the information being requested will not help. As well, MPI is taking the position that this information should be provided and reviewed at the External Stakeholders Committee, rather than before the Board. These are determinations that must be made by the Board, with the assistance of Bike Winnipeg, after it has been provided with an opportunity to fully participate in the hearing. Refusing to provide full and adequate answers denies this right of full participation.

ii. *Expert’s File*

With respect to Information Requests BW (MPI) 1-11 and BW (MPI) 1-13, it is respectfully submitted that the law in Manitoba provides for a party to make such a request.

This is a clearly relevant request. However, MPI is refusing to provide the information on the basis that it is “*neither helpful, nor relevant*”. Further, MPI is also stating that the drafts reports and the expert file “*would not provide any additional information with respect to her recommendations and findings beyond what is on the record*”. Once again, it is respectfully submitted that it is not MPI’s place to make that determination. Rather, it the Board that must make that determination, with the assistance of the Interveners, such as Bike Winnipeg.

In short, the refusal to provide the answers:

- Deprives Bike Winnipeg (and consequently the Board) of the necessary information required to critically evaluate, among other things, the quality and clarity of MPI’s data collection, analysis and accessibility regarding collisions involving vulnerable road users (including but not limited to cyclists).

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- Deprives Bike Winnipeg (and ultimately the Board) of the ability to effectively test MPI's evidence; and,
- Deprives Bike Winnipeg as an intervenor, the ability to fully participate in this proceeding and is consequently a breach of natural justice.

For all of the above reasons (and further oral submissions to be made on September 26, 2016), Bike Winnipeg seeks direction from the Board compelling MPI to produce full and adequate responses to the above noted Information Requests.

Yours truly,

HILL SOKALSKI WALSH OLSON LLP

Per:



Christian Monnin*
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